TRANSITION & THAW: AN EQUAL PROTECTION BASIS FOR GENDER-AFFIRMING HORMONES IN CARCERAL SETTINGS

Benjamyn C. Elliott*

---

*Juris Doctor Candidate, University of Memphis Cecil C. Humphreys School of Law (forthcoming May 2025); University of Mount Olive, B.A., 2022. Firstly, I am always thankful for my parents and family, for their ocean of love and encouragement. The same thanks are due to my loved ones in Memphis. I have the utmost appreciation for my advisor and mentor, Professor Sonya Garza, for contributing her expertise and constant encouragement in this arduous endeavor. Professor Regina Hillman and Professor Daniel Kiel provided nuanced and invaluable guidance also, for which I am grateful. I thank Dr. Keely Byars-Nichols for lighting a new spark in me for analytical writing. These four professors have shown me that the law can reflect the shared humanity present in all people. Many thanks go to Alton Smith, Cooper Harrison, and Phillip Ruston for being anchors during this process with their editing advice, insightful conversations, and comradery. I massively appreciate Emilio Cuebas for his thoughtful suggestions, and attorneys D. Dangaran and A.D. Lewis for providing practical recommendations regarding my arguments and approach to allyship. Lastly, I am eternally grateful to the *Virginia Journal of Social Policy & the Law*, especially Marie Ceske and Charlotte Karlsen, for their incredible insight, effort, and enthusiasm for this Article.

TRANSITION & THAW: AN EQUAL PROTECTION BASIS FOR GENDER-AFFIRMING HORMONES IN CARCERAL SETTINGS

Benjamyn C. Elliott

The legal landscape navigated by gender-diverse people in the United States to acquire gender-affirming care is fraught with obstacles, blockades, difficulty, and death. Currently, prison and jail systems follow a range of approaches regarding gender-affirming hormones, from those that provide incarcerated people such care, to those that deny the care outright. This presents life-changing challenges to transgender incarcerated people who particularly seek or need medical transition. There is a vital need — in both federal courts and on the streets — to fight for decreased barriers to access for gender-affirming care in carceral spaces. One of many avenues to expand this access is through the Fourteenth Amendment's Equal Protection clause. Where informed by critical legal considerations, Equal Protection legal analysis can require prison systems to increase trans peoples' access to gender-affirming hormones by simplifying the procedures for medical transition care. A reimagined approach to prison hormone litigation will bring prison systems in all U.S. jurisdictions within compliance with constitutional guarantees while allowing an alternative pathway for incarcerated claimants to win their rights to care. The time for federal courts to intervene in the face of these constitutional violations is long past due, and review of prison hormone policies under the Equal Protection clause would not only call for strict scrutiny analysis, but also result in vitiation of states' prison hormone laws across the country.

INTRODUCTION

"When the gatekeepers employ dichotomous gender standards, they foreclose . . . norm-resistant possibilities."[1]

Transgender people disproportionately experience forms of violence that few other classes in America understand. This violence is embodied in the experience of a trans woman named Ashley Diamond ("Diamond"). Diamond is a Black transgender woman who underwent over seventeen years of gender-affirming hormone therapy for her gender dysphoria symptoms prior to her incarceration at the Georgia Department of Corrections ("GDOC").[2] Following her entry into a high-security all-male

---

[1] Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 28 (2003).

[2] *Diamond v. Ward et al.*, CTR. FOR CONST. RIGHTS: HISTORIC CASES, https://ccrjustice.org/home/what-we-do/our-cases/diamond-v-ward-et-al (last

prison in 2012, GDOC halted Diamond's hormone treatments.[3] Prison administrators failed to evaluate her for mental health issues like gender dysphoria.[4] In addition, GDOC failed to protect her from gang rape by other incarcerated people.[5] Different actors continued to brutalize and dehumanize Diamond over time.[6]

After being transferred to two separate prisons and fully notifying prison healthcare providers of her gender dysphoria and pre-carceral healthcare, Diamond was denied hormone therapy access by GDOC doctors relying on its department policy multiple times.[7] Official grievances followed, but GDOC administrators' only response was retaliating against Diamond by placing her in solitary confinement.[8] There, she attempted both suicide and autocastration, clearly suffering from her lack of gender-affirming care in the prison environment.[9]

Diamond's abuse at the hands of the prisons continued for years until she filed suit against GDOC in 2015 alleging constitutional rights violations.[10] The state corrections department settled, repealing its freeze-frame policy, which arbitrarily denied certain transgender incarcerated people gender-affirming hormone care.[11] Following this settlement, the GDOC explicitly provided incarcerated people access to initiate hormone therapy by administrative policy.[12] However, the state corrections department violated this policy later between 2019 and 2020, when Diamond was again incarcerated, again denied necessary gender-affirming care, and again attempted suicide.[13] Diamond filed suit for the second time in 2020 but

---

modified Mar. 7, 2023) (hereinafter *Ward*, CTR. FOR CONST. RIGHTS: HISTORIC CASES) Diamond v. Owens, 131 F. Supp. 3d 1346, 1355 (M.D. Ga. 2015).

[3] *Diamond*, 131 F. Supp. 3d at 1355.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.* at 1356. At her third prison, Diamond requested necessary gender-affirming care more than twice to alleviate her gender dysphoria symptoms. She was denied, told to become more resilient, and was merely referred counseling services. *Id.* at 1356-57.

[8] *Id.* at 1356.

[9] *Id.* During the first two years of her incarceration, Diamond was repeatedly sexually assaulted by other incarcerated people and was sexually harassed by prison personnel. *Id.* at 1356-58; *Ashley Diamond v. Timothy Ward et al.*, SOUTHERN POVERTY L. CTR., https://www.splcenter.org/seeking-justice/case-docket/ashley-diamond-v-timothy-ward-et-al (last accessed Jan. 2, 2024) (hereinafter *Ward*, SOUTHERN POVERTY L. CTR.).

[10] *Ward*, Ctr. for Const. Rights: Historic Cases, *supra* note 2.

[11] *Id.*

[12] Diamond, 131 F. Supp. 3d at 1353; Danielle Matricardi, *Binary Imprisonment: Transgender Inmates Ensnared within the System and Confined to Assigned Gender*, 67 MERCER L. REV. 707, 730-31 (2016).

[13] *Ward*, SOUTHERN POVERTY L. CTR., *supra* note 9.

decided in 2023 to forego trial.[14] Although Ashley Diamond's claim ceased, her nightmarish experiences live on through her as a representation of the prison system's pattern of mistreating, abusing, and neglecting trans people.[15]

Every year, thousands of trans incarcerated people are denied access to their necessary care.[16] This presents an urgent legal, social, and political problem that manifests both inside and outside carceral settings. In 2023, individuals and organizations challenged several state laws banning access to gender-affirming healthcare,[17] evincing a tension between those with traditional views on gender and sexuality, and those who seek fundamental human rights for gender-diverse people.[18] As a result, several federal judges have ordered injunctions against state bans on gender-affirming care for minors.[19]

---

[14] Diamond made this decision because the likelihood of success against the corrections department was low, and the litigation's retelling of harmful experiences continued to traumatize her. *Ashley Diamond to Forego Trial to Focus on Healing*, CENTER FOR CONSTITUTIONAL RIGHTS: PRESS CENTER (Jan. 19, 2023), https://ccrjustice.org/home/press-center/press-releases/ashley-diamond-forego-trial-focus-healing.

[15] *See* Jaclyn Diaz, *Trans Inmates Need Access to Gender-Affirming Care. Often they Have to Sue to Get It*, NPR: THE TRANS PRISON EXPERIENCE (Oct. 25, 2022, 5:00 AM), https://www.npr.org/2022/10/25/1130146647/transgender-inmates-gender-affirming-health-care-lawsuits-prison.

[16] *Id.*

[17] Lindsey Dawson et al., *Youth Access to Gender Affirming Care: The Federal and State Policy Landscape*, KFF (June 1, 2022), https://www.kff.org/other/issue-brief/youth-access-to-gender-affirming-care-the-federal-and-state-policy-landscape/.

[18] L.W. v. Skrmetti, 73 F.4th 408, 419-20, 422 (6th Cir. 2023) (describing the ideological tensions that exist between those challenging government bans on hormones for trans people and courts, which have not technically identified transgender discrimination as requiring heightened scrutiny); *Texas Law Forbidding "Gender Transition" Hormone and Surgical Interventions for Minors Takes Effect*, ATTORNEY GENERAL OF TEXAS: TEXAS CONSTITUTION (Sept. 1, 2023), https://www.texasattorneygeneral.gov/news/releases/texas-law-forbidding-gender-transition-hormone-and-surgical-interventions-minors-takes-effect.

[19] Brandt v. Rutledge, 677 F. Supp. 3d 877, 917-18, 925 (E.D. Ark. 2023). This general trend in federal jurisdictions across the country has trickled down to states in the form of political and legal conflict regarding trans rights. For instance, Texas's Governor Abbot issued a directive to the state Department of Family and Protective Services that certain transition actions can constitute child abuse, which functioned as a ban on forms of gender-affirming care for minors. Parents of gender-diverse children challenged the directive in court. The Texas Supreme Court adjusted the temporary injunction on the gender-affirming care ban to only enjoin its enforcement against the case's present plaintiffs. *In re* Abbott, 645 S.W.3d 276, 282-83 (Tex. 2022). Thus, the laws in the state that require reporting of gender-affirming care and impose penalties for its use on children remain active while this litigation continues. *See* Dawson et al., *supra* note 17 (explaining Governor Abbott's executive action limiting gender-affirming care

Unfortunately, state laws banning gender-affirming care represent the general rule regarding transgender people rather than the exception.[20] This Article primarily posits that the current approach to gender-affirming care in prisons and jails violates incarcerated people's Equal Protection rights. The typical solutions to this violation "follow" gender norms, shoehorning transgender incarcerated people into strict labeling processes that deny their humanity and overpathologize them.[21] If the United States is to more fully realize the dream furnished by the Equal Protection Clause, there is a vital need to decrease barriers to access for gender-affirming care in carceral spaces. This Article imagines an America where the legal system acknowledges the historical context of implicit institutional oppression and decreases the reach prisons have over marginalized peoples. The time to bring trans incarcerated peoples' voices to the forefront of the country's legal dialogue is long overdue.[22]

Part I of this Article begins by explaining the terminology underpinning the Article's arguments. It continues by outlining the current standard for prison medical care, carceral approaches to gender-affirming care for transgender people, and the spectrum on which carceral systems' gender-affirming care policies fall. Part I concludes with an explanation of Equal Protection jurisprudence and why antisubjugation (or antisubordination) theory is applicable for all advocacy concerning trans incarcerated people. Part II scrutinizes the history and law from the background to find that most current approaches to transgender peoples' gender-affirming care in prisons violate Equal Protection guarantees. Part III proposes a solution, calling on federal courts to weigh Equal Protection principles in scrutinizing the constitutionality of carceral hormone transition care.

I. HISTORICAL & LEGAL BACKGROUND

"When the prison gates slam behind an inmate, he does not lose his human quality . . . his yearning for self-respect does not end; nor is his quest for self-realization concluded. If

---

and the litigation arising from it, alongside other states with similar recent bans); Koe v. Noggle, 688 F. Supp. 3d 1321 (N.D. Ga. 2023) (granting plaintiffs preliminary injunction against Georgia law banning certain gender-affirming care for minors); Dekker v. Weida, 679 F.Supp.3d 1271 (N.D. Fla. Jun. 21, 2023) (holding that Florida law banning Medicaid coverage for GnRH agonists, cross-sex hormones, and gender-affirming surgery for trans children violates the Equal Protection Clause); Doe v. Ladapo, 676 F. Supp. 3d 1205 (N.D. Fla. Jun. 6, 2023) (granting a preliminary injunction against Florida statute that bans trans children from receiving GnRH agonists and cross-sex hormones).

[20] *See* Dawson et al., *supra* note 17.

[21] *Infra*, Part I.B.2.

[22] *Infra*, Part III.

anything, the needs for identity and self-respect are more compelling in the dehumanizing prison environment."[23]

This Part begins with an explanation of the terminology used in this Article. This language hopefully fosters an understanding of incarcerated peoples' constitutional rights that can deconstruct the carceral institution itself by positioning trans civil rights against a background of structural discrimination.[24] Jurisdictional approaches to carceral gender-affirming care are then defined and placed on a continuum from gender-regressive to pro-gender-diverse.[25] Finally, a brief explanation of marginalized people's Equal Protection challenges is included to provide legal context for this Article's proposal.[26]

A. Terminology Used

This Article includes research about transgender ("trans") people to provide necessary background and context. Trans people, however, are not a monolith and constitute a diverse, intersectional class of individuals.[27] For this Article's purposes, the terms "transgender," and "trans," refer to individuals whose gender identity at any given time is different from the gender and sex the person was assigned at birth.[28] Further, the terms

---

[23] Procunier v. Martinez, 416 U.S. 316, 428 (1974) (Marshall, J., concurring).

[24] *See* D. Dangaran, *Abolition as Lodestar: Rethinking Prison Reform from A Trans Perspective*, 44 HARV. J.L. & GENDER 161, 205 (2021) (positing that gender-affirming medical care in prisons can be non-carceral, but is not de-carceral because it still largely requires psychologists to be medical gatekeepers for trans incarcerated people).

[25] *See* discussion *infra* Part I.B.3 (discussing a range of prison hormone policies throughout the United States).

[26] *See* Fields v. Smith, 712 F. Supp. 2d 830 (E.D. Wis. 2010), *aff'd* 653 F.3d 550 (7th Cir. 2011) (constituting a case wherein a trans incarcerated person brought both Equal Protection and Eighth Amendment challenges).

[27] *See* Avery Martens, *Transgender People Have Always Existed*, ACLU OF OHIO (Jun. 10, 2016, 1:00 PM), https://www.acluohio.org/en/news/transgender-people-have-always-existed. Gender is a social construct, and can be expressed in various ways within the trans community. *Gender and Health*, WORLD HEALTH ORG., https://www.who.int/health-topics/gender#tab=tab_1 (last visited Sept. 25, 2023). The term "gender" refers to "characteristics of women, men, girls and boys that are socially constructed. This includes norms, behaviors, and roles associated with being a woman, man, girl or boy, as well as relationships with each other." *Id.* The effect of the social construction of gender is that it intersects with class and race in harmful ways where it is used as the basis for denying social groups civil rights and liberties.

[28] *Gender Incongruence and Transgender Health in the ICD*, WORLD HEALTH ORG., https://www.who.int/standards/classifications/frequently-asked-questions/gender-incongruence-and-transgender-health-in-the-icd (last visited Sept. 9, 2023). "Sex" refers to the binary label of male or female assigned to a person at birth, most often based on external genital anatomy. However, sex is also a social construct and should never be deemed more important or critical

"prisoner" and "incarcerated person" refer to persons incarcerated in state or federal penal custody.[29] "Gender-diverse" can be understood as an umbrella term referring to trans people, intersex people, nonbinary people,

---

than gender. *See* Christoph M. Zhang, *Biopolitical and Necropolitical Constructions of the Incarcerated Trans Body*, 37 COLUM. J. GENDER & L. 257, 257 n.1 (2019) ("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 . . . ."). Conversely but relatedly, "gender" is a term referring to the spectrum of socially-influenced attitudes and self-perceptions a person has about what constitutes masculinity and femininity, and every gender expression or identity in between or outside those binaristic edges of the continuum. *See* Jennifer Tseng, *Sex, Gender, and Why the Differences Matter*, 10 VIRTUAL MENTOR: AMA J. ETHICS 427, 427 (2008) (noting for instance that "male" is not necessarily interchangeable with "man," because sex and gender are distinct concepts); *Glossary of Terms: Transgender*, GLAAD: GLAAD MEDIA REFERENCE GUIDE-11TH EDITION, https://glaad.org/reference/trans-terms/ (last visited Jan. 28, 2024) ("It is important to note that being transgender is not dependent upon physical appearance or medical procedures. A person can call themself transgender the moment they realize that their gender identity is different than the sex they were assigned at birth."). The word "trans" is an abbreviation of the modern label "transgender" and is used by people in the transgender community. *Id.* The term "transsexual" is an outdated word still sometimes used by judges but was dropped by the wider transgender community alongside gay and lesbian peoples' rejection of the term "homosexual." *Id.; but cf.* Kosilek v. Spencer, 774 F.3d 63, 93 (1st Cir. 2014) (using the outdated word "transsexual" to refer to a trans incarcerated person suffering from symptoms of gender dysphoria). Therefore, where used here, this Article limits the use of the "transsexual" to quotations, and in main text will interchange it with the correct modern label, "transgender." *Glossary of Terms: Transgender*, *supra*. The idea of gender aligning strictly along sex-based lines is not only wrong, but also nonscientific. As Agustín Fuentes states:

> The data-driven bottom line is that 'man/woman' and 'masculine/feminine' are neither biological terms nor rooted exclusively in biology. The lack of an explicit binary is especially evident in humans given the complex neurobiologies, life histories, and morphological dynamics in our species. There are many successful, biologically diverse ways to be human, and millions of people embody this diversity. Growing up human means growing up in a world of varying gender expectations, body types, reproductive options, family structures, and sexual orientations . . . . The simple male/female binary does not effectively express the normal range of being human.

Augustin Fuentes, *Biological Science Rejects the Sex Binary, and That's Good for Humanity*, SAPIENS: ESSAY/HUM. NATURE (May 11, 2022), https://www.sapiens.org/biology/biological-science-rejects-the-sex-binary-and-thats-good-for-humanity/.

[29] 42 U.S.C.A. § 1997e(h) (effective Mar. 7, 2013).

and others whose gender identity or expression exist beyond binary beliefs of who — or what actions — constitute living as "male" or "female."[30]

Trans people often "transition,"[31] which can include a panoply of non-medical and medical actions referred to as "gender-affirming care."[32] Gender-affirming care is "any single [treatment] or [a] combination of . . . [several] social, psychological, behavioral or medical (including hormonal treatment or surgery) interventions designed to support and affirm an individual's gender identity."[33] Gender identity is "[o]ne's innermost concept of self as male, female, [or] a blend of both or neither."[34] Gender-affirming care is widely considered a form of healthcare, as it alleviates gender-dysphoric peoples' gender dysphoria ("GD") symptoms.[35]

---

[30] *The Struggle of Trans and Gender-Diverse Persons*, UN HUMAN RTS. OFF. OF THE HIGH COMMISSIONER, https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity/struggle-trans-and-gender-diverse-persons#:~:text=1,assigned%20to%20them%20at%20birth., (last visited Aug. 2, 2024).

[31] "Gender identity" is "a person's internal, deeply held knowledge of their own gender." *Glossary of Terms: Transgender*, *supra* note 28. Transitioning is a process someone "undertakes to bring their gender expression and/or their body into alignment with their gender identity." *Id.* Transition includes a vast array of changes, but can be grouped into three broad categories: social transition, legal transition, and medical transition. *Id.*

[32] Transition plays an important role in affirming transgender peoples' gender identity. Jennifer Aldrich et al., *Gender-Affirming Care, Incarceration, and the Eighth Amendment*, 25 AMA J. ETHICS 407, 408-09 (2023); Orion Rummler & Kate Sosin, *The 19th Explains: Everything You Need to Know About Gender-Affirming Care*, THE 19TH (June 21, 2023, 6:00 AM), https://19thnews.org/2023/06/everything-to-know-about-gender-affirming-care/; *Medical Association Statements in Support of Health Care for Transgender People and Youth*, GLAAD: TRANSGENDER (June 21, 2023), https://glaad.org/medical-association-statements-supporting-trans-youth-healthcare-and-against-discriminatory/; *LGBTQIA+ Glossary of Terms for Health Care Teams*: *Gender Affirmation* 2-3, NAT'L LGBTQIA+ HEALTH EDUC. CTR. (Feb. 3, 2020), https://www.lgbtqiahealtheducation.org/wp-content/uploads/2020/10/Glossary-2020.08.30.pdf.

[33] *Gender Incongruence and Transgender Health in the ICD*, *supra* note 28; Letter from James L. Madara, MD, CEO, Executive Vice President, American Medical Association, to Bill McBride, Executive Director, National Governors Association at 1 (Apr. 26, 2021) (on file with AMA), https://searchlf.ama-assn.org/letter/documentDownload?uri=%2Funstructured%2Fbinary%2Fletter%2FLETTERS%2F2021-4-26-Bill-McBride-opposing-anti-trans-bills-Final.pdf.

[34] *Sexual Orientation and Gender Identity Definitions*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions (last visited Sept. 10, 2023). *See also Glossary of Terms: Transgender*, *supra* note 28 (defining "gender identity" similarly).

[35] Gender-affirming surgery is one type of gender-affirming care that was held in 2019 in the Ninth Circuit as medically necessary for certain trans incarcerated people. In *Edmo*, Adree Edmo was a trans woman incarcerated in Idaho

"Gender dysphoria" is classified as a mental disorder by the American Psychiatric Association and can describe the mental and emotional distress a trans person experiences resulting from the incongruence between their sex assigned at birth and their gender identity.[36] Hormonal therapy for trans incarcerated people is an important medical intervention that vitally affirms mental and physical welfare and sense of identity.[37] Still, not all trans people engage in hormone transition therapy nor do all trans people experience GD.

Further — and finally — the term "person/people of color" is used throughout this Article to refer to individuals or groups who are not white.[38] This term thus has a broader scope than narrower racial classifications like Black or Indigenous. Thoughtful terminology does not simply end at a humanized understanding of the communities one allies with —

---

who self-mutilated several times before challenging her physician's denying her gender-affirming surgery. Edmo v. Corizon, Inc., 935 F.3d 757,768-74 (9th Cir. 2019) (identifying major depressive disorder, substance abuse, and severe anxiety as the mental health symptoms of a gender-dysphoric incarcerated person). Gender-affirming care exists not in one strict procedure, but instead employs patient-specific treatments ranging from social transitioning, like clothing and name changes, to hormonal therapy, to gender confirmation surgery. *Id.* at 768-74; *see also* Diamond v. Owens, 131 F. Supp. 3d 1346, 1354 (M.D. Ga. 2018) (describing a range of treatments including hormone therapy and surgery that can alleviate GD); Kosilek v. Spencer, 774 F.3d 63, 69-70 (intimating that the incarcerated plaintiff's psychological and hormonal therapy treatment was not sufficient to help her cope with GID and that she needed gender confirmation surgery).

[36] *Edmo*, 935 F.3d at 768-69; *see also* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 512-13 (5th ed. 2022) (explaining gender dysphoria's function as a pathological mental health condition in the medical community).

[37] *See Edmo*, 935 F.3d at 768-73 (describing how providing plaintiff with hormone therapy has helped "clear[] [her] mind" but "has not completely alleviated [her] gender dysphoria"); Phillips v. Michigan Dep't of Corrections, 731 F. Supp. 792, 794 (W.D. Mich. 1990) (reporting that as a result of abruptly severing hormone treatment, a transgender incarcerated person suffered significant discomfort from bruising around her breasts and physical reversal of sex characteristics, which caused periods of vomiting and depression); Supre v. Ricketts, 792 F.2d 958, 960 (10th Cir. 1986) (noting that "after continued attempts at self-mutilation, plaintiff's testicles became severely injured and were removed by a physician"); White v. Farrier, 849 F.2d 322, 323 (8th Cir. 1988) (discussing an incarcerated person who was denied feminizing hormones and attempted to castrate herself on four different occasions, using a razor, a sharpened metal cup, glass from a smashed television set, and glass from a radio).

[38] Juanita Mcleod, *Understanding Racial Terms and Differences*, NATIONAL INSTITUTES OF HEALTH: OFFICE OF EQUITY, DIVERSITY, AND INCLUSION (Mar. 11, 2021), https://www.edi.nih.gov/blog/communities/understanding-racial-terms-and-differences#:~:text=An%20oppressive%20system%20is%20built,reinforce%20or%20disrupt%20one%20another.

it must continue into the legal practices adopted by attorneys who aim to decrease discriminatory harm inflicted by the state.[39]

Indeed, language constructs and maintains the social systems coloring one's worldview. Thus, advocates must scrutinize gender-affirming care through an intersectional lens to keep historical and sociopolitical context in mind.[40] Many scholars, legal or otherwise, have critiqued the treatment of trans incarcerated people as dehumanizing, highlighting the institutional violence arising from prisons.[41]This Article seeks to explain the deficiencies related to hormone transition therapy in carceral settings. These deeply ingrained deficiencies reveal that de-carceral and non-carceral interventions are better solutions than typical prison reforms.[42]

---

[39] For instance, critical race theory ("CRT") places an emphasis on the institutions — carceral and not — that uphold white supremacist patriarchal culture. CRT posits that state discrimination disproportionately impacts people of color who have coexisting minority identities. It critiques the criminal justice system and its discriminatory practices. *See* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1246-50 (1991) (hereinafter Crenshaw, *Women of Color*) ("Where systems of race, gender, and class domination converge, as they do in the experiences of battered women of color, intervention strategies based solely on the experiences of women who do not share the same class or race backgrounds will be of limited help to women who because of race and class face different obstacles."). CRT can be a useful tool for liberating trans incarcerated people from harmful systemic processes that block transition access.

[40] *See* Gabriel Arkles, *Correcting Race and Gender: Prison Regulation of Social Hierarchy Through Dress*, 87 N.Y.U. L. REV. 859, 864 (2012) (hereinafter Arkles, *Prison Regulation*) ("Trans people face different stereotypes and forms of violence through the intersection of race and gender . . . trans people of color are targeted more intensely and pervasively than White trans people."). CRT can inform practitioners', law students', and judges' perspectives on gender-affirming care. It should *especially* inform these playmakers' actions regarding gender-affirming care in carceral settings, where the violence of the state is more absolute than anywhere else. *See* Brittany Friedman, *Toward a Critical Race Theory of Prison Order in the Wake of COVID-19 and Its Afterlives: When Disaster Collides with Institutional Death by Design*, 64 SOCIO. PRSPS. 689, 692 (2021) ("Locating the rise of Black mass incarceration as beginning in the Reconstruction Era exemplifies how extractive structural violence is beneficial to all social institutions and protected at all costs, with institutional actors knowing full well the wage for most is death."). In prisons and jails, every aspect of an incarcerated person's life is under the complete control of the state. Therefore, in these institutions, marginalized communities find themselves — as longtime victims of the intentionally hierarchical, anti-Black, and transphobic practices of the state — most vulnerable to harm.

[41] *E.g.*, Dangaran, *supra* note 24, at 190-91, 206.

[42] *See* Arkles, *Prison Regulation*, *supra* note 40, at 913, 940 ("Prison reform generally has proven to be a double-edged sword: providing vital assistance to imprisoned people in their struggle to survive while often simultaneously expanding and legitimizing the prison system. Prison abolition offers possibilities for

B. The State of Prison Healthcare

Currently, incarcerated people have a constitutional right to "adequate" healthcare, which means their healthcare must be "a serious medical need."[43] Courts have interpreted this right as limited, in that the Eighth Amendment does not empower trans incarcerated people to acquire treatment methods not prescribed by their doctor.[44] Thus, prison physicians have much discretion, which can result in incorrect decisions about hormone treatment access. The procedures these medical providers must follow when making decisions, and treatments they may provide to trans people, are outlined in administrative policies. These policies can vary: some policies adhere to medical standards promulgated by professional medical organizations,[45] while others strictly state that no incarcerated person in the jurisdiction may access hormone therapy.[46] A fundamental problem arises where trans incarcerated people — forced into institutions adhering to binary gender norms — not only seek gender-affirming care in defiance of these norms, but also are denied access to gender-affirming

---

larger scale change that can address fundamental injustices in current systems. Abolition can also operate as a framework for evaluating and advocating for or against particular reforms."). *See also* Dangaran, *supra* note 24, at 200-01. Abolition addresses carceral reform from the perspective that prison institutions are inherently designed to oppress poor people and people of color. Therefore, increasing their resources will increase such oppression. *See* Mike Greene, *Adree Edmo, The Eighth Amendment, and Abolition: Evaluating the Fight For Gender-Affirming Care In Prisons*, 445, 472-73 (2022) ("Popular progressive prison reforms have led to prison expansion and 'gender-responsive, gay-affirmative, and accessible types of incarceration[,]' however, by narrowly focusing on conditions inside the prison, these tactics 'reinforce the system and its logic, so that positive change in the daily lives of those incarcerated actually perpetuates the power structure that keeps [prisons] legitimate . . . .'") (quoting LIAT BEN-MOSHE, DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION 266 (2020)).

[43] Estelle v. Gamble, 429 U.S. 97, 104-07 (1976). The "serious medical need" language is interchangeable today with the phrases "medically necessary" or a "medical necessity."

[44] *See* Farmer v. Brennan, 511 U.S. 825, 833, 835 (1994) ("For a claim (like the one here) based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm . . . The second requirement follows from the principle that "only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.") (internal citations omitted).

[45] *See e.g.,* DEL. DEP'T OF CORR., POLICY NUMBER E-14: TREATMENT OF TRANSGENDER PERSONS (2021) (hereinafter DEL. POL'Y NO. E-14) (Delaware is one in a minority of jurisdictions that adheres to the WPATH Standards of Care in its written policy).

[46] *See* Sadie Cowan, *Georgia Department of Corrections (GDOC) Freeze-Frame Policies: Leaving Inmates Frozen in Time*, 3 JHU MACKSEY J. 1, 1 2022.

care by doctors or by prison policies.[47] Trans incarcerated people can mount legal claims against prisons to try to acquire gender-affirming care when it is not provided. Given the procedures governing complaints and the obstructive laws that trans incarcerated individuals must use to challenge the state to receive gender-affirming care, their claims are often unsuccessful.[48]

1. *Estelle v. Gamble* and the "Medical Adequacy" Standard

Until 1976, there were few legal guarantees for incarcerated people to access even adequate medical care. This changed when J.W. Gamble ("Gamble"), a man incarcerated in Texas, filed suit under 42 U.S.C. § 1983 challenging his facility's refusal to provide treatment and its retaliation arising out of his injury in prison.[49] Gamble alleged his state prison perpetrated cruel and unusual punishment by denying him access to adequate medical care.[50] Gamble was injured by a cotton bale while doing prison labor.[51] After initial treatment, Gamble was denied medical attention while his conditions worsened, including rising blood pressure.[52] Prison authorities then placed Gamble in administrative segregation multiple times and solitary confinement for refusing to work because of his injuries.[53] Gamble sued the prison's agents, and the United States Supreme Court ("Supreme Court") granted certiorari.[54] Adopting a "deliberate indifference" standard, the Supreme Court held that a prison agent's intentional, deliberate indifference to an incarcerated person's medical needs violated the Eighth Amendment's prohibition on cruel and unusual punishment due to the fact that incarcerated people cannot safeguard their

---

[47] Most jails, pretrial detention centers, and prisons are sex-segregated and assigned either male or female detainees. *See* German Lopez, *Inside the Gay and Transgender Wing at the Los Angeles County Jail*, VOX (Nov. 19, 2014, 1:10 PM), https://www.vox.com/xpress/2014/11/19/7246889/LGBT-LA-Central-Jail and Maggie Gordon, *The Tank: These Transgender Inmates Are Trying to Start Over. Jail Might Be Their Best Shot*, HOUS. CHRON., https://www.houstonchronicle.com/tank/ (last visited Sept. 27, 2023) for discussions about local jails that set aside LGBTQ+ wings so that incarcerated people could avoid gender-motivated violence, sexual abuse, and transphobia perpetuated both by fellow incarcerated people and jail employees.

[48] *See infra* Part II.A.

[49] Estelle v. Gamble, 429 U.S. 97, 99-101 (1976).

[50] *Id.* at 101, 101, n.6. *See generally* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); 42 U.S.C.A. § 1983 (outlining via federal statute a claim for people within U.S. jurisdictions to bring claims alleging governmental "deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . .").

[51] *Estelle*, 429 U.S. at 98-99.

[52] *Id.* at 100-01.

[53] *Id.*

[54] *Id.* at 98.

own health.[55] The Court further held that the Eighth Amendment requires that prison punishments, treatment, and conditions serve penological purposes to be legitimate.[56]

Following *Estelle*, incarcerated people have a constitutional right to "medically adequate" healthcare. However, *Estelle's* scope has its limits because it is judicially-created rule affecting a nonlegal practice.[57] "Medical adequacy" is limited by what is necessary for an incarcerated person's health, and therefore incarcerated people are not entitled to merely any treatment or specific treatments they request.[58] In response to *Estelle*, mainstream institutions voiced support for prison medical reform. In 1979, the American Medical Association collaborated with the American Bar Association to publish the first standardized model healthcare guidelines for carceral institutions.[59] When jurisdictions use these guidelines, their prison baselines for what constitutes adequate medical care may simply be a bare minimum that addresses procedural aspects of treatment, despite the state's authority to adopt higher care standards and to provide a wider range of medical treatments.

---

[55] *Id.* at 104-05. Gamble did not necessarily win at the Supreme Court. While his case against the prison's medical director was reversed, and his case against the other prison officials was remanded for the lower court to consider, the justices suggested his case was more fitting for state medical malpractice, and that his claims against the prison officials likely did not rise to the level of cruel and unusual punishment violating the Eighth Amendment. *See id.* at 107-08 (recalling that plaintiff Gamble's health conditions were examined seventeen different times throughout the relevant period, and he had received some diagnoses and treatment).

[56] *Id.* at 102 ("Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society.'").

[57] *Id.* at 116 (Stevens, J., dissenting). Specifically, the fact that judges are not medical experts, but have structured the deliberate indifference standard as prohibitive, results in many legitimate arguments in support of incarcerated people acquiring medical care being dismissed. These dismissals arise because of subjective beliefs: that the treatment was not "medically necessary" or that the treating physician lacked "actual knowledge."

[58] *See* Barrett v. Coplan, 292 F. Supp. 2d 281, 285-86 (D.N.H. 2003).

[59] *NCCHC History: NCCHC Historical Time Line*, NAT'L COMM'N ON CORR. HEALTH CARE, https://www.ncchc.org/historical-time-line/ (last visited Jul. 8, 2024); *cf.* Marcella Alsan et al., *Health Care in U.S. Correctional Facilities — A Limited and Threatened Constitutional Right*, 388 NEW ENG. J. MED. 847, 847-48 (2023) (illustrating the litigious atmosphere underpinning the chronological development of standardized prison healthcare suggesting that regulatory bodies were not solely responsible for progress towards incarcerated people's healthcare rights). In 1983, this AMA project developed into the nonprofit, the National Commission on Correctional Health Care, which provides accreditation to prisons and jails, continuing to standardize prison healthcare and increase incarcerated people's access to healthcare. *NCCHC History: NCCHC Historical Time Line*, *supra*.

Estelle cemented incarcerated people's access to remedies for denial of healthcare through Eighth Amendment violation claims, but its progeny limited the claims' vitality and accessibility.[60] To successfully acquire medical attention that was denied, incarcerated claimants must prove two elements: that they had an objective "sufficiently serious" deprivation of needed care and that the prison administrative actors subjectively knew of the need and were intentionally indifferent to it.[61] The Eighth Amendment approach rarely requires courts to address claimants' gender and is especially unhelpful to incarcerated people with intersecting marginalized identities.[62] Despite these limits, *Estelle* opened the door: where incarcerated people have a medical necessity for a type of healthcare, they can challenge a prison's decision to deny such treatment.[63] Trans incarcerated

---

[60] *See* Gibson v. Collier, 920 F.3d 212, 215, 219-20 (5th Cir. 2019) (holding that a trans incarcerated person's claim failed under the Eighth Amendment deliberate indifference standard because the test requires "malice" and because there is "genuine debate" as to the efficacy of gender-affirming surgeries); Keohane v. Fla. Dep't of Corr. Sec'y, 952 F.3d 1257, 1292 (11th Cir. 2020) (Wilson, J., dissenting) (criticizing the majority opinion for replacing the District court's deliberate indifference analysis with a *de novo* finding that disagreement among testifying medical professionals necessarily precludes an Eighth Amendment claim); Campbell v. Kallas, 936 F.3d 536, 549 (7th Cir. 2019) (applying qualified immunity doctrine to deny an incarcerated plaintiff's claim for damages arising from denial of gender-affirming care); *see also* Minneci v. Pollard, 565 U.S. 118, 129-31 (2012) (declining to accept a person incarcerated in private prison's Eighth Amendment claim against prison agents because his claim belonged to state tort law); Farmer v. Brennan, 511 U.S. 825, 839-40, 845, 847 (1994) (rejecting an incarcerated person's urging for an objective deliberate indifference standard, refining the principle's definition as the criminal "subjective recklessness" state of mind); Kosilek v. Spencer, 774 F.3d 63, 96 (1st Cir. 2014) (holding denial of gender-affirming surgery for a trans incarcerated person constitutional under the Eighth Amendment because she had not alleged that the prison's conduct had been "so unconscionable as to fall below society's minimum standards of decency" and because security concerns outweighed the incarcerated person's healthcare interests).

[61] Farmer v. Brennan, 511 U.S. 825, 834 (1994).

[62] Black trans women are subjugated in varied ways as second-class, and this intensifies the violence they experience in prisons and jails. *See supra*, note 2 and accompanying text; Friedman, *supra* note 40, at 694. Intersectional identity refers to a person or class of people who possess one or more marginalized, minority, or discriminated-against identities, creating a unique multiplicity of disadvantages and experiences. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 149-50. Intersectionality exists in different forms, but generally, it helps one understand that violence inflicted against Black people in America is not constricted within the boundaries of one identity or another, but rather compounds each identity's experiences upon one another. Crenshaw, *Women of Color*, *supra* note 39, at 1244-45.

[63] The most common avenue to challenge a prison's alleged violation of an incarcerated person's constitutional rights is a civil action for deprivation of rights

people, with or without gender dysphoria diagnoses, have used these channels to challenge prison policies for years.[64] Success for trans incarcerated people has been limited by the invidiously high deliberate indifference standard and unwillingness of courts to apply Fourteenth Amendment protections to prison treatment in an appreciably gender-inclusive way.[65]

2. The Medicalization of Gender-Affirming Care in State Custody

Upon carceral sentencing, convicted people are classified by sex assigned at birth, which is often considered to correspond with gender. After entrance into a male or female prison, trans imprisoned people often undergo intake interviews.[66] These intake policies can vary, but this general process is common in American carceral systems.[67] A central focus of Equal Protection prison litigation is the contrast between two groups' treatment by the state, whether during these intake processes or later.[68] Therefore, the constitutional discourse surrounding trans incarcerated peoples' access to hormones is informed by other incarcerated classes' access to similar gender-affirming care. This Article posits that it is unconstitutional to deny trans people access to gender-affirming hormone treatment where analogous treatments are provided to similarly situated

---

under 42 U.S.C. § 1983, as exhibited by the *Morrison* claimant's claim of violation of his Equal Protection rights. Morrison v. Garraghty, 239 F.3d 648, 653, (4th Cir. 2001). The most common defendants in incarcerated peoples' § 1983 suits for denied medical treatment are the state, prison administrators, wardens, and prison doctors. *Id.* at 651.

[64] Beth Schwartzapfel, *What Care Do Prisons Owe Transgender Inmates?*, THE MARSHALL PROJECT (Aug. 10, 2015), https://www.themarshallproject.org/2015/04/21/what-care-do-prisons-owe-transgender-inmates; *see, e.g.*, Elliot Oberholtzer, *The Dismal State of Transgender Incarceration Policies*, PRISON POLICY INITIATIVE (Nov. 8, 2017), https://www.prisonpolicy.org/blog/2017/11/08/transgender/ (referring to the 2013 incarceration of Chelsea Manning and the 2016 revision of Delaware corrections department policy regarding transgender incarcerated people after lawsuits from gender-nonconforming incarcerated people).

[65] Edmo v. Corizon, Inc., 935 F.3d 757, 768-73 (9th Cir. 2019) (representing one of the few successes for trans incarcerated people in acquiring gender-affirming surgery while incarcerated, and a refusal by both a district and appeals court to allow Fourteenth Amendment claim to move forward). Edmo v. Idaho Department of Correction, 358 F. Supp. 3d 1103, 1128-29 (D. Idaho 2018).

[66] Gary Cornelius, *Transgender Inmates: Treating Them Fairly, Keeping Them Safe*, LEXIPOL (July 29, 2022), https://www.lexipol.com/resources/blog/addressing-housing-and-safety-for-transgender-inmates/. Institutions have population, booking, and roommate policies as varied as the many states there are. *Id.*

[67] After intake, certain classes of incarcerated people can access gender-affirming forms of care, and others cannot. *Infra*, Part I.B.2.

[68] *See* Davis v. Coakley, 802 F.3d 128, 132-33 (1st Cir. 2015).

persons.[69] Other classes of people whose healthcare is funded by the state experience easier access to gender-affirming care.[70] The operative class of people for this comparison is incarcerated cisgender women experiencing menopause.[71]

---

[69] Fields v. Smith, 712 F. Supp. 2d 830, 867 (E.D. Wis. 2010) ("Defendants treat the plaintiffs themselves differently than others similarly situated because of their membership in the class of persons who need hormonal therapy to treat GID, and they treat the entire class differently.") *aff'd* 653 F.3d 550 (7th Cir. 2011) (on Eighth Amendment grounds).

[70] *See* Zhang, *supra* note 28, at 265 (noting that in some circumstances, Medicaid is used to provide gender-affirming medications and treatments to cisgender people that are similar to those requested by transgender people, denying trans people treatments merely because of the their trans status); *Healthy Kids: Services to LGBTQI+ Youth in Care*, ILL. DEP'T OF CHILDREN & FAMILY SERVICES, https://dcfs.illinois.gov/brighter-futures/healthy/serviceslgbtqi-yic.html (last visited July 8, 2024) ("In 2003 Illinois DCFS became the first child welfare agency in the nation to develop an LGBTQI+ youth service policy; and in 2017 enhanced procedures were adopted to mandate annual LGBTQI+ training for anyone involved with LGBTQI+ children and youth in care and to clarify protections for transgender/gender expansive youth in care.").

[71] *See* Zhang, *supra* note 28, at 265; *see also* Emily Kaufman, *On Liberty: From Due Process to Equal Protection–Dobbs' Impact on the Transgender Community*, 14 U. MIAMI RACE & SOC. JUST. L. REV. 81, 112-13 (2023). Menopause is a time during women's lives marking the end of menstrual cycles and reproductive viability. *Menopause: Symptoms & Causes*, MAYO CLINIC (May 23, 2023), https://www.mayoclinic.org/diseases-conditions/menopause/symptoms-causes/syc-20353397. It is "a natural biological process" beginning often in between a woman's forties and fifties with perimenopause and including symptoms like "irregular periods, vaginal dryness, hot flashes, chills, night sweats, sleep problems, mood changes, weight gain and slowed metabolism, and thinning hair and dry skin." *Id.* In practice, treatment of incarcerated women's menopause is often disparate and inadequate, but at bottom, *no* jurisdiction categorically denies hormonal menopause treatment or submerges access to it under a sea of administrative obstacles and medical review committees. *Compare* TAMAR KRAFT-STOLAR, REPRODUCTIVE INJUSTICE: THE STATE OF REPRODUCTIVE HEALTH CARE FOR WOMEN IN NEW YORK STATE PRISONS 171-72 (Women in Prison Project of the Corr. Ass'n of N.Y. 2015) (describing that although women were treated for menopausal symptoms in New York prisons, over half of survey participants reported nurses and doctors being insensitive about symptoms and brusque with menopausal incarcerated patients) *with* STATE OF CONN. DEP'T OF CORR., ADMINISTRATIVE DIRECTIVE NO. 8.17 at 2-4 (2023) (hereinafter CONN. DIRECTIVE NO. 8.17) (outlining an overcomplicated treatment plan for gender-diverse incarcerated people that requires (1) the incarcerated person's self-report, (2) the filling out of a referral form by a staff member, (3) forwarding of the form to a "Unit Administrator," (4) forwarding to the prison's psychologist, (5) an in-person interview with the incarcerated person, (6) the creation of a "Gender Diverse Management Plan," (7) forwarding of said plan to the Gender Diverse Review Committee, (8) a second interview with the incarcerated person, and (9) further steps). Therefore, any adequate prison or jail provides hormonal

Following the constitutional framework mandated by *Estelle*, prisons and jails must provide incarcerated women with "medically adequate" care for menopause.[72] Because of its impact on cisgender women's bodies by fluctuating hormones and declining hormone production, menopause can require hormone therapy.[73] In various jurisdictions and local carceral institutions, incarcerated women are provided hormone treatment in response to their experiences with menopause.[74] The need for women's menopause treatment in carceral settings is increasing because women are one of the most rapidly increasing groups of incarcerated persons in the United States.[75] These decisions to provide hormone treatment typically occur without requiring the women to have prior prescriptions for hormones or be suffering from menopause upon carceral entry.[76] The process for obtaining this treatment is therefore relatively straightforward: a

---

menopause treatments where needed; the juxtaposition of this standard with carceral trans gender-affirming hormone standards highlights important Equal Protection concerns.

[72] Kendra Weatherhead, *Cruel But Not Unusual Punishment: The Failure to Provide Adequate Medical Treatment to Female Prisoners in the United States*, 13 HEALTH MATRIX 429, 439-40, 455 (2003). *But see* Cynthia Chandler, *Death and Dying in America: The Prison Industrial Complex's Impact on Women's Health*, 18 BERKELEY WOMEN'S L.J. 40, 53 (2003) (describing grossly inadequate medical care in California in the early 2000s, including prison healthcare providers failing to notify incarcerated women of their illnesses).

[73] *Menopause: Diagnosis & Treatment*, MAYO CLINIC (May 23, 2023), https://www.mayoclinic.org/diseases-conditions/menopause/diagnosis-treatment/drc-20353401.

[74] *See, e.g. Fields*, 712 F. Supp. 2d at 867; De Veloz v. Miami-Dade Cnty., 756 Fed. Appx. 869, 871, 879-80 (11th Cir. 2018) (demonstrating jails' familiarity with incarcerated women undergoing menopause and their need for hormone treatment); Laube v. Campbell, 333 F. Supp. 2d 1234, 1258 (M.D. Ala. 2004) (outlining a settlement agreement covering carceral menopausal care pursuant to the American College of Obstetricians and Gynecologists guidelines, which included hormone therapy as a treatment option); JoAnn V. Pinkerton, *Post Women's Health Initiative — Menopausal Women and Hormone Therapy*, 7 AMA J. ETHICS 751, 753 (2005).

[75] See Lisa C. Barry et al., *Health Care Needs of Older Women Prisoners: Perspectives of the Health Care Workers Who Care for Them*, J. WOMEN AGING 1, 2 (2020); Elana F. Jaffe et al., *Experiences of Menopause During Incarceration*, 28 MENOPAUSE 829, 830 (2021); Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth*, PRISON POLICY INITIATIVE: REPORTS (Jan. 9, 2018), https://www.prisonpolicy.org/reports/women_overtime.html ("Since 1978, the number of women in state prisons nationwide has grown at over twice the pace of men, to over 9 times the size of the 1978 population.").

[76] Sundstrom v. Frank, No. 06-C-112, 2007 WL 3046240, at *8 (E.D. Wis. Oct. 15, 2007) ("Sometimes, DOC prescribes hormone therapy for reasons that do not have to do with GID, such as estrogen replacement therapy in post-menopausal years, or for inmates with a congenital or hormonal disorder that requires the administration of hormone therapy.").

menopausal woman needs hormone therapy and can decide to receive it, or does not need it.

When the lens rotates towards trans incarcerated people, the processes are not so streamlined and differ widely by jurisdiction. For example, some jails focus mainly on housing in their policies by allowing trans people to be housed in accordance with their gender identity or through providing a housing assignment grievance system.[77] Trans incarcerated people in a majority of states must have a medical diagnosis of GD — or stated differently, medical necessity[78] — for any chance to receive gender-affirming care.[79] Thus, trans incarcerated people often have three obstacles when seeking gender-affirming care: first, they must identify as gender-diverse and request medical attention related to this experience; second, their assigned doctors must diagnose them with GD;[80] third, the doctors must propose a treatment plan including "necessary" gender-affirming treatments.[81]

After a trans incarcerated person overcomes the first and second obstacles, a facility-specific or regional committee begins decision-making for the person's hormone treatment "eligibility."[82] Using administrative prison policies as a guideline for what care is allowed, these decisionmakers provide a hormone treatment plan, defer hormone consideration to a

---

[77] Sarasota Cty., Fl., Sheriff's Office Corrections Operations and Services Bureaus Policy # CO 440.04, Subject: Gender Identification Care and Custody 1, 3-4 (May 19, 2022).

[78] Medical necessity occurs when "a prudent physician' selects [health care] 'for the purpose of preventing, diagnosing or treating an illness, injury, disease or its symptoms in a manner that is: (1) in accordance with generally accepted standard of medical practice; (2) clinically appropriate in terms of type, frequency, extent, site, and duration; and (3) not primarily for the convenience of the patient, physician, or other health care provider.'" *FAQ: Equal Access to Health Care*, LAMBDA LEGAL: KNOW YOUR RIGHTS, https://legacy.lambdalegal.org/know-your-rights/article/trans-related-care-faq?_gl=1*1vvpn14*_ga*ODEzNDI1MDc2LjE2OTY0NjAzNzc.*_ga_290ZG8GMP3*MTY5OTE0MzkwOC4xMC4xLjE2OTkxNDM5MzcuMzEuMC4w (last visited Nov. 5, 2023).

[79] Diaz, *supra* note 15; Tara Dunnavant, *Bye-Bye Binary: Transgender Prisoners and the Regulation of Gender in the Law*, 9 FED. CTS. L. REV. 15, 27-28 (2016).

[80] Dunnavant, *supra* note 79, at 27 ("in order to receive any sort of treatment, a prisoner must be diagnosed with a medical condition, "gender dysphoria").

[81] *Id.* at 26.

[82] *E.g.*, Press Release, *Judge Determines NC Department of Adult Correction Violated Transgender Woman's Eighth Amendment Rights*, ACLU (May 1, 2024 1:54 PM), https://www.aclu.org/press-releases/judge-determines-nc-department-of-adult-correction-violated-transgender-womans-eighth-amendment-rights ("The [Department of Adult Correction] empowers a specialized body called the Division Transgender Accommodation Review Committee (DTARC) to evaluate medical requests for incarcerated transgender people.").

specialist, or ultimately deny hormone treatment.[83] Further, the only autonomy trans incarcerated people have in this process in any jurisdiction is that the policies require their informed consent for medical transition care.[84] The discretionary committee process unjustifiably resembles a parenting decision, wherein with a doctor's consensus, parents decide whether to allow medical transition for a trans child — the discretionary committee acts as a parent to the incarcerated person.[85] Textual rules in

---

[83] These review committees are almost always made up of multiple medical professionals, ranging from nurses to primary care providers, to management-level bureaucratic medical officers. The committees often must be referenced a particular incarcerated person's case for consideration of hormone therapy by the person's healthcare provider, further lengthening the process. *E.g.,* STATE OF ALABAMA DEPARTMENT OF CORRECTIONS, ADMINISTRATIVE REGULATION NUMBER 637: GENDER DYSPHORIA at 5 (2018) (hereinafter ALA. REGUL. NO. 637).

[84] *See generally* Dangaran, *supra* note 24.

[85] *Compare* ALA. REGUL. NO. 637, *supra* note 83, at 5 (establishing that during the GDMD review process, the committee will:

> (1) Review the evaluation of each identified inmate.
> (2) Develop an individualized treatment plan for each identified
> inmate that addresses the inmate's medical, mental health, security, and personal adjustment needs.
> (3) The Contracted Psychiatric Clinical Director will meet with the
> Warden of the facility where the inmate with Gender Dysphoria is
> housed to discuss the recommendations for accommodations by
> the GDMC.
> (4) A specialist in the treatment of Gender Dysphoria patients may be
> retained as a consultant on specific cases)

with Stephen B. Levine et al., *Reconsidering Informed Consent for Trans-Identified Children, Adolescents, and Young Adults*, 48 J. SEX & MARITAL THERAPY 706, 719-21 (2022) (describing the best-practices for evaluating minors for hormone transition, which is a process that involves the minors' parents). The decision-making weight parents hold in this process is similar to the influence that other actors have over a trans person's request for gender-affirming care, as detailed above. This procedure for determining a trans incarcerated person's hormone eligibility is infantilizing, in a space where peoples' autonomy is already stripped away. Though the mainstream viewpoint regarding incarceration is that a prison should exert as much control as possible over incarcerated people for safety purposes, no interest is ensured by requiring at least three prison officials to weigh in on a trans person's access to hormones. This much is especially true where the trans person suffers from GD symptoms and intervention is urgent. The minimum requirement for acquiring access to hormones should instead be the person's informed consent, obtained from their primary care physician. *See also* Karl Gerritse et al., *Decision-Making Approaches in Transgender Healthcare:*

state corrections policies and procedures, which are updated periodically, serve as important limitations on these committees' authorities by setting minimums for review periods, allowing primary care providers final decision-making authority, or setting other boundaries.[86]

It is important to remember that "legal" reforms, like lawsuits, are limited in scope and may inadvertently entrench transphobic medical ideas into state institutions. However, describing medical transition hormones in the legal system's terms as a form of healthcare can lead to tangible protection of trans rights. Many LGBTQ+ advocates value the medical attention related to trans peoples' GD because inherent in a GD diagnosis is the opportunity to receive counseling, care, and transition-related resources.[87] Often, incarcerated people need a diagnosis to continue or initiate access to transition care. Thus, while a goal for trans incarcerated people is greater access to medical transition resources, the transmedical framework can obstruct access.[88] Nonetheless, an international movement to secure the right to de-pathologize gender-diverse identity has been underway for sixteen years, and differing viewpoints still

---

Conceptual Analysis and Ethical Implications, 24 MED., HEALTH CARE, AND PHIL. 687, 692-93 (2021) (discussing the informed consent model as an alternative to gatekeeping through the involvement of a mental health professional); Franklin H. Romeo, *Beyond A Medical Model: Advocating for A New Conception of Gender Identity In The Law*, 36 COLUM. HUM. RTS. L. REV. 713, 729-31 (2005).

[86] DEL. POL'Y NO. E-14, *supra* note 45, at § VII(A)(1)(a)-(b) (trans incarcerated people being booked must have behavioral health evaluations and a medical appointment within twenty-four hours of booking). *See also* TENN. CODE ANN. §§ 4-3-603, 606 (2023) (for examples of statutes granting a state corrections commissioner authority to promulgate prison policies and procedures.)

[87] THE CTR. FOR CONST. RTS. & NAT'L LAW. GUILD, THE JAILHOUSE LAWYER'S HANDBOOK: HOW TO BRING A FEDERAL LAWSUIT TO CHALLENGE VIOLATIONS OF YOUR RIGHTS IN PRISON 60 (Rachel Meeropol et al., eds., 6th ed. 2021), https://www.jailhouselaw.org/sites/all/themes/rktp_jailhouselaw/assets/pdf/Jailhouse%20Lawyers%20Handbook%202021.pdf [hereinafter JAILHOUSE LAWYER'S HANDBOOK].

[88] Transmedicalism is the ideology that "experiencing gender dysphoria is necessarily a part of being trans." Zhang, *supra* note 28, at 259. Trans incarcerated people are often expected to either suffer from GD or soldier on without a diagnosis and thus, transition tools. MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS 573 n.7 (Thomson Reuters/West 4th ed. 2009) (presenting an outdated viewpoint that incarcerated people must be "genuinely" transgender by requiring medical diagnoses); Harron Walker, *How Medical Institutions Drive Trans Women Underground*, OUT: HEALTH (Mar. 14, 2019), https://www.out.com/health/2019/3/14/how-medical-institutions-drive-trans-women-underground; Evan Urquhart, *Gatekeepers vs. Informed Consent: Who Decides When a Trans Person can Medically Transition?*, SLATE: OUTWARD (Mar. 11, 2016), https://slate.com/human-interest/2016/03/transgender-patients-and-informed-consent-who-decides-when-transition-treatment-is-appropriate.html.

exist.[89] There are different models for addressing medical aspects of gender-affirming care. Some barricade hormone access for certain patients, while others increase access.[90]

The most recognized of these models is promulgated by the World Professional Association for Transgender Health ("WPATH").[91] Despite their best-practice reputation, WPATH's *Standards of Care for the Health of Transgender and Gender Diverse People* ("Standards") [92] are rarely used expressly in carceral care policies — only ten jurisdictions cite the Standards.[93] While benefits can flow from the Standards' use in prisons

---

[89] Maria Elisa Castro-Peraza et al., *Gender Identity: The Human Right of Depathologization*, 16 INT'L J. ENV. RESCH. AND PUB. HEALTH 1, 2 (2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6466167/pdf/ijerph-16-00978.pdf. *See id.* at 4 for information on the Yogyakarta Principles promulgated in 2006, which help inform the international movement for LGBTQ+ and gender-diverse peoples' rights among UN member states.

[90] *See* Urquhart, *supra* note 88.

[91] *E.g.,* Edmo v. Corizon, Inc., 935 F.3d 757, 769 (9th Cir. 2019) (noting Courts have largely agreed that WPATH is the internationally recognized model for treatment of gender dysphoria); IND. DEP'T OF CORR., POLICY NO. 2.17A: HEALTH SERVICES FOR TRANSGENDER AND GENDER DIVERSE PATIENTS § II (N) (Apr. 1, 2022) (hereinafter IND. POL'Y NO. 2.17A) ("WPATH publishes the Standards of Care and Ethical Guidelines, which articulate a professional consensus"); Aranda Stathers, Comment, *Freeze-Frames and Blanket Bans: The Unconstitutionality of Prisons' Denial of Gender Confirmation Surgery to Transgender Inmates*, 127 DICK. L. REV. 243, 252 (2022).

[92] Eli Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 INT'L J. TRANSGENDER HEALTH S1, S105 (2022); Stathers, *supra* note 91, at 252 ("Founded in 1979, WPATH is an organization designed to offer a unified voice to health care providers who oversee the care of trans patients."). WPATH is composed of "professionals in medicine, psychology, law, social work, counseling, psychotherapy, family studies, sociology, anthropology, sexology, speech and voice therapy, and other related fields" throughout the world. World Pro. Ass'n for Transgender Health, *Mission and Vision*, WPATH: ABOUT, https://www.wpath.org/about/mission-and-vision (last visited Nov. 5, 2023).

[93] California, Delaware, Indiana, Massachusetts, New Hampshire, North Dakota, Oregon, South Dakota, Texas, and Wisconsin require trans prison healthcare specialists to use WPATH guidelines. CAL. CORR. HEALTH CARE SERV., CCHCS/DHCS CARE GUIDE: TRANSGENDER (2024); DEL. POL'Y NO. E-14, *supra* note 45; IND. POL'Y NO. 2.17A, *supra* note 91; MASS. DEP'T OF CORR., POLICY 103 DOC 652: IDENTIFICATION, TREATMENT AND CORRECTIONAL MANAGEMENT OF INMATES DIAGNOSED WITH GENDER DYSPHORIA (2024); N.H. DEP'T OF CORR., POLICY AND PROCEDURE DIRECTIVE 6.85: STANDARDS FOR TREATMENT OF GENDER DYSPHORIA (2014); N.D. CORRS. & REHAB., POLICY NO. 4B-07: GENDER NON-CONFORMING PERSONS (2017) (revised 2022) (hereinafter N.D. POL'Y NO. 4B-07); OR. DEP'T OF CORRS., CLINICAL GUIDELINES FOR GENDER DYSPHORIA (2023); S.D. DEP'T OF CORRS., POLICY NO. 1.4.E.13: MANAGEMENT OF GENDER DYSPHORIA (2021) (hereinafter S.D. POL'Y NO. 1.4.E.13); TEX. CORR., MANAGED HEALTH CARE POLICY MANUAL, NO. G-51.11:

and jails, strict adherence to WPATH as a medical support guideline is untenable with Equal Protection and depathologization, as psychologists can play a "gatekeeper" role and bar hormone access when using their discretion in applying the standards.[94] Prisons rarely permit hormone access without ongoing, documented GD pathology and levels of review by psychologists to determine a person's eligibility for treatment.[95] Alternative approaches like the Informed Consent Model ("ICM") can bring trans incarcerated people within the ambit of Equal Protection while preventing medical gatekeeping.[96] The trans identity still carries stigma because of its proximity to mental health issues and medical transition, and biased physicians may still act as gatekeepers, despite the development of alternative care models.[97]

TREATMENT OF INMATES WITH INTERSEX CONDITIONS, OR GENDER DYSPHORIA, FORMERLY KNOWN AS GENDER IDENTITY DISORDER (2023); WIS. DEP'T OF CORRS. DIV. OF ADULT INSTS., POLICY NO. 500.70.27: TRANSGENDER MANAGEMENT AND CARE (2024) (hereinafter WIS. POL'Y NO. 500.70.27).

[94] *See* JAILHOUSE LAWYER'S HANDBOOK *supra* note 87, at 60; *but cf*. Stathers, *supra* note 91, at 268 ("Some courts and DOCs use the flexibility of the standards to justify denying gender confirmation surgery, while others adhere too strictly to the Standards. This is contrary to the intent the authors had in making the Standards flexible, which is to further access to transition-related care.").

[95] DEL. POL'Y NO. E-14, *supra* note 45; Urquhart, *supra* note 88; Amets Suess Schwend, *Trans Health Care from a Depathologization and Human Rights Perspective*, 42 PUB. HEALTH REV. 1, 9 (2020).

[96] D. Dangaran has accurately suggested the provision of gender-affirming care in prisons is a non-carceral reform that helps abolition efforts by preventing the state from subjugating trans people as second-class, despite being limited because the reform does not aid in deconstructing the institution of prisons. Dangaran, *supra* note 24, at 205-06. The upstream issue in transition hormone contexts is that gender dysphoria is even pathologized at all. *Id.* A viable alternative, the ICM, can expand access to carceral gender-affirming care by removing health evaluations and prior treatment from the equation as specific prerequisites to access, and making the decision to undergo hormone treatment collaborative between the gender-diverse person and their primary physician. Gerritse et al., *supra* note 85, at 694. This does not mean that psychological elements of the transgender person's GD go unaccounted for; rather, the trans patient's mental health aspects bifurcate from the gender-evaluation aspects, and thus, pathologizing requirements like prior psychotherapy are not barriers to the person's access to hormones. *Id.* Therefore, mental health care and psychological treatments take a supplementary rather than predominant role in the ICM approach to trans GD patients. *Id.*

[97] *Cf.* Castro-Peraza et al., *supra* note 89, at 3, (explaining that the International Classification of Diseases (ICD) no longer considers being transgender or gender dysphoria as "mental and behavioral disorders"). However, intersex people are still labeled "disordered." *Id.* Depathologization proponents call for holistic, person-centered care models in all settings. *Id.*

3. Freeze-Frame Policies as Markers of Gender-Regressiveness

Enacted in several jurisdictions, the "freeze-frame" policy requires trans incarcerated people to have medical records of hormonal treatment prior to incarceration in order to receive hormone treatment while incarcerated.[98] It does not effectively implement either WPATH Standards or ICM — which both call for individualized treatment procedures for a GD patient — because it premises carceral hormone access on a requirement of recorded, previous hormone therapy.[99] Under freeze-frame policies, even where a trans person had ongoing transition hormone treatment at entry, the person's dosages and level of care are halted at the same level for their entire sentence.[100] These policies are enacted by state executive branches, enforced by prison authorities, and almost only come under scrutiny where incarcerated people bring forth § 1983 claims alleging violation of their Eighth Amendment right against cruel and unusual punishment.[101]

Freeze-frame policies existed prior to the *Estelle* ruling in 1976.[102] Over time, federal circuits divided over gender-affirming care in prisons, resulting in some U.S. regions providing trans incarcerated people access to gender-affirming medical care that *could* include hormone therapy, while others did not allow for any access.[103] This tension between regional

---

[98] Cowan, *supra* note 46, at 1, 2.

[99] *Id.*

[100] Dunnavant, *supra* note 79, at 27; Stathers, *supra* note 91, at 247 n.11.Thus, the incarcerated person cannot progress further through medical transition, and their hormone dosages may not be increased.

[101] The crux of these Eighth Amendment claims is that freeze-frame policies subject trans incarcerated people to cruel and unusual punishment because trans people suffer severe mental and physical distress as a result of the denial of hormone treatment. These denials arise merely from coincidence and the incarcerated persons' previous opportunities for care. *See* Fields v. Smith, 712 F. Supp. 2d 830 (E.D. Wis. 2010), *aff'd* 653 F.3d 550 (7th Cir. 2011) (on Eighth Amendment grounds). From the 1970s to 1990s, being transgender and experiencing gender dysphoria were often deemed coextensive, and were considered a "serious medical condition" in prisons, but widespread consensus was that freeze-frame policies were constitutional or that hormone therapy for incarcerated people could be denied where the prison administrators decided so. MUSHLIN, *supra* note 88, at 573 ("[A] *genuine* transsexual experiences the 'serious medical condition' of Gender Identity Disorder (GID), one that requires some form of treatment.") (emphasis added). Often, the medical transition resource prisons opted for was psychotherapy. Anita C. Barnes, *The Sexual Continuum: Transsexual Prisoners*, 24 NEW ENG. J. ON CRIM. AND CIV. CONFINEMENT 599, 634 (1998).

[102] Cowan, *supra* note 46, at 3.

[103] Kosilek v. Spencer, 774 F.3d 63, 69 (1st Cir. 2014) (referring to the former practice of the Massachusetts Department of Corrections to prevent newly transitioning incarcerated people from accessing transition hormones at all); Meriwether v. Faulkner, 821 F.2d 408, 413-14 (7th Cir. 1987). The *Kosilek* plaintiff was a trans incarcerated woman who engaged in years of legal challenges against

federal prisons continued into the 2000s, until the Federal Bureau of Prisons ("FBOP") repealed its nationwide freeze-frame policy in response to *Adams v. Federal Bureau of Prisons* in 2010.[104] Following *Adams*, states vitiated freeze-frame policies over time, with some courts expressly overturning statutory bans on prison hormonal therapy.[105] These jurisdictions' prison departments largely made hormone access decisions on an *ad hoc* basis: the incarcerated person initiates by requesting care, a medical care committee medically examines the incarcerated person, interviewing them and conferring among themselves, and the hormone treatment is offered if the committee determines that the person presents a serious medical need for GD.[106]

i. Adams v. Federal Bureau of Prisons

In *Adams v. Federal Bureau of Prisons*, trans plaintiff Vanessa Adams ("Adams") was diagnosed with gender dysphoria six years into her sentence at a federal prison with no history of medical transition, making her ineligible for hormone transition.[107] Prison administrators denied her requests for hormone treatment to aid her transition and alleviate her negative GD symptoms.[108] Soon after, Adams survived an attempted suicide by hanging and was subsequently re-evaluated by the prison's psychologist.[109] The psychologist determined that Adams suffered from severe mental and emotional distress and self-harm resulting from the denial of medical transition resources.[110] The prison provided no further gender-affirming treatment.[111] Two weeks later, Adams attempted self-castration by

---

prison administrators for denying her varying forms of gender-affirming care. *Kosilek*, 774 F.3d at 93.

[104] Adams v. Fed. Bureau of Prisons, 716 F. Supp. 2d 107 (D. Mass. 2010). FBOP began settlement talks and reformed its freeze-frame policy after Adams's case was determined a live controversy and moved forward. The settlement agreement and ensuing policy change arising from *Adams* are binding insofar as federal carceral facilities are concerned. The law may still change in appellate courts in the future.

[105] *E.g.,* Fields v. Smith, 653 F.3d 550, 559 (7th Cir. 2011).

[106] Ala. Regul. No. 637, *supra* note 83, at 5; Ga. Dep't of Corr., Standard Operating Procedures, Policy No. 507.04.68: Management and Treatment of Transgender Offenders (2022) (hereinafter Ga. Pol'y No. 507.04.68); Md. Dep't of Public Safety and Corr. Serv., Exec. Directive No. OPS.131.0001: Identification, Treatment and Correctional Management of an Inmate Diagnosed with Gender Dysphoria at 7-8 (2016) (listing the contemporary individualized process that trans incarcerated people undergo to acquire transition hormones).

[107] *Adams*, 716 F. Supp. 2d at 108-09.

[108] *Id*. at 109.

[109] *Id*.

[110] *Id*.

[111] *Id*.

trying to cut off her penis with a razor blade.[112] Over the next four years, Adams was transferred to three separate federal prisons because of her suicide and self-mutilation risks, each time re-engaging mental health professionals, which was fruitless because the federal freeze-frame policy required that health providers deny Adams hormone therapy.[113] Prison administrators and physicians denied her hormones no less than *ten* times during this period.[114]

After Adams' final denied request for hormones in 2009 under the freeze-frame rule, she autocastrated.[115] Following this horrific incident, she filed an emergency motion to seek outside psychological evaluation, then filed suit against the Federal Bureau of Prisons ("FBOP") alleging deliberate indifference in violation of her Eighth Amendment rights.[116] Faced with the defendant FBOP's motion to dismiss, the federal district court determined that jurisdiction was proper, venue was proper, and that Adams' claim had merit.[117] Therefore, the claim moved forward, and the parties settled the next year in 2011.[118]

ii. The Landscape of Prison Hormone Policies After Adams

As part of the settlement, FBOP promulgated a hormone therapy policy that abolished its nationwide freeze-frame rule, allowing all federally incarcerated people to request and initiate hormone transition without requiring pre-carceral treatment.[119] The impact of *Adams* cannot be overstated; by forcing FBOP into a settlement and policy reform, plaintiff Adams effectively undid decades of anti-trans federal prison administrative policies that harmed countless people in need of gender-affirming care.[120] The memorandum published by the FBOP reversing its freeze-frame policy promised "individualized assessment and evaluation" of trans incarcerated people' needs, access for all trans incarcerated people to initiate treatment, and alignment of federal gender-affirming care procedures with

---

[112] *Id*. Prison doctors stitched the lacerations but refused hormone treatment and punished Adams. *Id*.

[113] *Id*. at 109-10. To be clear, hormone resources are not the only type of care Adams was denied.

[114] *Id*. at 110.

[115] *Id.* Adams fully severed her penis with a razor in the prison.

[116] *Id*.

[117] *Id*. at 112-14.

[118] *Adams v. Bureau of Prisons*, GLAD (Sept. 30, 2011), https://www.glad.org/cases/adams-v-bureau-of-prisons/.

[119] *Id.*

[120] *See* LAMBDA LEGAL, TRANSGENDER RIGHTS TOOLKIT: A LEGAL GUIDE FOR TRANS PEOPLE AND THEIR ADVOCATES 6-7 (2016) (citing *Adams* in its statement that trans incarcerated people have fought for years to acquire medically necessary are recently, finally achieving incremental victories).

WPATH Standards.[121] In the thirteen years since the federal policy change, more states have gradually banned freeze-frame policies, and others have expanded access beyond bare medical necessity.[122]

Currently, publicly available carceral policies from all states fall on a spectrum regarding trans incarcerated peoples' ease of access to gender-affirming care.[123] These jurisdictions' corrections policies for hormone access are in one of five categories: (1) denial or textual omission of hormone access, (2) facially neutral policies either omitting hormone access or peripherally mentioning hormones, (3) freeze-frame policies, (4) policies instituting obstacles or ambiguity that complicate access, and (5) full access to hormone therapy.[124] Four states omit hormone access.[125] Three

---

[121] Fed. Bureau of Prisons, Memorandum for Chief Executive Officers on Gender Identity Disorder Evaluation and Treatment (May 31, 2011) (on file at https://www.glad.org/wp-content/uploads/2011/09/2011-gid-memo-final-bop-policy-1.pdf) (stating that FBOP policy for trans incarcerated healthcare would provide individualized assessments for hormone eligibility and follow "current, accepted standards of care," which at the time were the WPATH Standards' version 7). *See also* FED. BUREAU OF PRISONS, TRANSGENDER OFFENDER MANUAL, 13 (Jan. 13, 2022), https://www.bop.gov/policy/progstat/5200-08-cn-1.pdf (last accessed July 20, 2024) (citing WPATH standards as an additional resource for clinicians).

[122] *See infra* note 125.

[123] The scope of this research was limited to the most recently updated publicly available information from corrections departments in the fifty United States, the District of Columbia, and the FBOP. Because FBOP has clearly expressed its hormone access policy and it is detailed in this Article's main text, it receives less analysis. This Article is not a comprehensive summary of the landscape of gender-affirming throughout the U.S., but I hope it can serve as a guidepost for trans advocates' mobilizing actions and litigation related to one aspect of gender-affirming care.

[124] Corrections policies derive from states' executive branches and their departments of corrections. *See, e.g.*, Tennessee Office of the Governor, *Gov. Lee Names Frank Strada TDOC Commissioner* (Jan. 3, 2023, 3:54 PM), https://www.tn.gov/content/tn/governor/news/2023/1/3/gov--lee-names-frank-strada-tdoc-commissioner.html (providing an example of a southern state whose governor appoints the statewide corrections director). Federal Bureau of Prisons policies are managed the Department of Justice. State v. Lamar, 210 Ariz. 571, 575 (2005). To categorize these policies, several factors were considered, including their textual simplicity, whether they use WPATH standards and how, how many prison actors were involved in decision-making, the length of hormone review procedures, the laboriousness of grievance procedures, and the "prerequisites" for trans incarcerated people to access hormone therapy.

[125] Mississippi, New Mexico, Vermont, and Florida have the most restrictive policies regarding trans gender-affirming care. MISS. DEP'T OF CORR. # 20-16: MANAGEMENT OF TRANSGENDER AND INTERSEX OFFENDERS at 4 (2021) (hereinafter MISS. POL'Y NO. 20-16); N.M. CORR. DEP'T, CD-150800: TRANSGENDER, INTERSEX, AND/OR GENDER NON-CONFORMING (2022) (containing language focused mainly on housing, searches, and property); STATE OF VT. AGENCY OF HUMAN SERVICES DEP'T OF CORR. NO. 432.01: GENDER IDENTIFICATION, CARE,

jurisdictions have facially neutral policies,[126] and seven have freeze-frame policies.[127] Further, seven states maintain problematic hormone policies that barricade access behind administrative barriers or ambiguous language.[128] Finally, thirty-one jurisdictions provide relatively full access,

---

AND CUSTODY (2015); FLA. DEP'T OF CORR., INDEX TO RULES (2023), https://fdc.myflorida.com/legal/ch33/index2.html (Florida used to have a full-access policy, but its hormone policy is no longer published on its government websites: FLA. DEP'T OF CORR., PROCEDURE NUMBER 403.012: IDENTIFICATION AND MANAGEMENT OF INMATES DIAGNOSED WITH GENDER DYSPHORIA (2019)). In movement lawyering, it is critical to not assume that the state will do more than it says it will and thus, that written policy documents mean what they say. Therefore, the first, most restrictive category of carceral policies includes explicit blanket bans, policies that only refer to trans incarcerated people in housing contexts, and those that omit any mention of WPATH, hormone transition, or gender-affirming care from their text.

[126] Colorado, New Jersey, and Wyoming have outwardly neutral policies that may mention care, but are unspecific regarding hormone access. COLO. DEP'T OF CORR., ADMINISTRATIVE REGULATION NO. 700-14, § I-III (2022) (hereinafter COLO. REGUL. 700-14); N.J. DEP'T OF CORR., LEVEL I/III INTERNAL MANAGEMENT PROCEDURES, PROCEDURE PCS.001.TGI.01, § II(D)(1) (2021); WYO. DEP'T OF CORR., POLICY AND PROCEDURE # 3.307: MANAGEMENT OF TRANSGENDER OR INTERSEX INMATES AT 8 (2023).

[127] South Carolina, Alaska, North Carolina, Hawaii, North Dakota, Montana, and the District of Columbia have freeze-frame policies. S.C. DEP'T OF CORR., POLICY GA-06.09: CARE AND CUSTODY OF TRANSGENDER INMATES AND INMATES DIAGNOSED WITH GENDER DYSPHORIA, § 1.1 (2017); STATE OF ALASKA DEP'T OF CORR., POLICIES AND PROCEDURES POLICY NUMBER 807.23: TREATMENT AND MANAGEMENT OF GENDER DYSPHORIA, § IV (C) (2022); STATE OF N.C. DEP'T OF PUB. SAFETY, PRISONS, POLICY AND PROCEDURE SECTION F.4300: EVALUATION & MANAGEMENT OF TRANSGENDER OFFENDERS, § .4303(3)(A) (2021); HAW. DEP'T OF CORRECTIONS AND REHABILITATION, CORRECTIONS ADMINISTRATION POLICY AND PROCEDURES NO. COR.10.1F.10 §§ 4.0.2–.7 (2024); E-mail from Judy Beck, Dir. Commc'n, M.T. Dep't Corr., to Ian Anderson, Legal Services Project Manager, Transgender Law Center (Jul. 13, 2017) (on file at https://tlcenter.app.box.com/s/xyj1adirhxultotmr1uzrjc5c9ydp2x8); D.C. DEP'T OF CORR., POLICY AND PROCEDURE NUMBER 4020.3I (2023); N.D. POL'Y NO. 4B-07, *supra* note 93. For the purposes of this Article, any jurisdiction requiring reporting of pre-incarceration hormone therapy treatment for initiation of treatment in prison functions as a freeze-frame jurisdiction. Further, policies limited in scope to continuing an incarcerated person's prior hormone treatment from life before incarceration are treated as freeze-frames.

[128] Arizona, Connecticut, Kansas, Nevada, Utah, Virginia, and Wisconsin have policies that create administrative obstacles or obfuscate the types of access trans incarcerated people have to hormone care. ARIZ. DEP'T OF CORRS., REHABILITATION AND REENTRY, TECHNICAL MANUAL, at 35-37, 144-45 (2022) (hereinafter ARIZ. POL'Y) (detailing that after medical staff identify a trans incarcerated person as needing accommodations for gender dysphoria, the incarcerated person must then undergo an evaluation with a mental health professional, and if the incarcerated person is actually diagnosed with GD, then the mental health

with the broadest access to medical transition care occurring in Washington: Among other things, its policy allows trans incarcerated people to acquire hormone access without a GD diagnosis.[129] Because there are

professional submits the case to the corrections Medical Director for approval within fifteen days) (listing a drawn-out grievance procedure for trans incarcerated people who were denied gender-affirming care, in which they must submit an informal request for help, followed by filing an informal complaint, filing a formal complaint, and if unsuccessful, then an appeal, all of which can take over fifty days); CONN. DIRECTIVE NO. 8.17, *supra* note 71, at §§ 4(b)(ii), 5(c) (2023) ("If the inmate reports receiving gender affirming care prior to incarceration, including non-prescribed hormones, a referral will be made to a licensed physician or APRN to evaluate the inmate within 10 business days. . . . If the identified inmate does not meet DSM-V criteria for a diagnosis for Gender Dysphoria following the initial interview, a qualified mental health clinician . . . will conduct a secondary interview within ten (10) business days of the diagnostic determination."); KAN. DEP'T OF CORR., POLICY NUMBER P-F-06B: TRANSGENDER, GENDER NON-CONFORMING INDIVIDUALS AND PATIENTS WITH GENDER DYSPHORIA §IV.6 (2021) (stating that hormone therapy initiation follows "community medical standards" but not specifying which standards the department follows); NEV. DEP'T OF CORRS., MEDICAL DIRECTIVE NO. 121: GENDER DYSPHORIA, at 2-4 (2021) (failing to define the standards for continuing hormone therapy prescriptions, listing self-mutilation as a factor that decreases the likelihood of medical transition care, and describing an intrusive evaluation process that requires a psychiatric report and a genital examination); UTAH DEP'T OF CORR., DEPARTMENT MANUAL CHAPTER AG37: DIAGNOSIS & TREATMENT OF OFFENDERS WITH GENDER DYSPHORIA, § 02.04(C)(2018) (hereinafter UTAH POL'Y) ("Treatment with hormones may be ordered by the Director of Clinical Services/designee. The Director of Clinical Services/designee may consult the contract psychologist regarding a recommendation for hormone treatment."); VA. DEP'T OF CORR., GUIDELINES FOR ASSESSMENT AND TREATMENT OF OFFENDERS DIAGNOSED WITH GENDER DYSPHORIA (GD) § 13 (2019) (hereinafter VA. GUIDELINES) (requiring that trans incarcerated people who may need hormone treatment be evaluated by a treatment team, then by the Chief Psychiatrist who outsources a consultation to a community provider for an endocrinology review, with the entire process then ending with the Chief Psychiatrists' discretion regarding initiation of hormone therapy); WIS. POL'Y NO. 500.70.27, *supra* note 93, at § V(c)-(d) (2024) ("Health care staff who receive an initial request from a patient for hormonal therapy or surgical procedures shall forward the request to the PSU Supervisor. The PSU Supervisor shall assign a member of the PSU staff to conduct an initial evaluation to help determine whether a GD diagnosis is appropriate and whether a more specialized evaluation is needed.") The process in Wisconsin follows with a multi-requirement evaluation of the incarcerated person, a review by the PSU Supervisor, and possibly, use of an outside consultant.

[129] As of December 30, 2023, publicly available government records indicate that the jurisdictions in this category include: Alabama, Arkansas, California, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Washington, West Virginia, and FBOP. Washington's policy states:

blurred lines between policies that harm trans people and those that benefit them, these policies with "full access" may sometimes contain provisions that impede medical transition or impose unneeded requirements on trans incarcerated people.

C. Theory, Scrutiny, and Statutes: The Fourteenth Amendment Equal Protection Clause & its Application to Gender-Diverse Incarcerated People

The Equal Protection Clause of the Fourteenth Amendment prohibits the state from denying "any person within its jurisdiction the equal protection of the laws."[130] Part I.C.1 clarifies anticlassification and antisubjugation, which have colored constitutional discourse for decades with regards to state treatment of marginalized peoples. Then, Part I.C.2 defines the tiers of scrutiny, which apply when a trans person alleges the state has violated their equal protection right. Finally, the Background concludes with a discussion about how antidiscrimination laws like the Equal Protection clause apply to gender-diverse people and incarcerated populations.

1. Origins & Theory of Equal Protection

Ideology regarding the Equal Protection clause generally divides along two lines of thought: anticlassification and antisubjugation (originally called antisubordination).[131] Anticlassification is the conceptual

---

> The decision to initiate or change hormone medication treatment while incarcerated is based on an individual assessment. This assessment will determine medical need, risks and benefits, analysis of alternatives, and make sure you have the information you need to make an informed decision with your provider. When you arrive at DOC all your prescriptions will be continued until you can meet with a provider, this includes hormones.

STATE OF WASH. DEP'T OF CORR., 600-HA004: TOOLKIT FOR TRANSGENDER INCARCERATED PERSONS at 8 (2024). *See also* WASH. DEP'T OF CORR., 600-GU013: GUIDELINES FOR HEALTHCARE OF TRANSGENDER INDIVIDUALS at 7-10 (2023) (stating that a gender dysphoria diagnosis is not a prerequisite to gender-affirming care, and identifying informed consent as the minimum requirement for provision of hormones).

[130] U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.") For this Article, the term "law" refers to any state act carrying legal force or state enforcement of a government policy.

[131] Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEORGETOWN L. REV., 1, 5 (2021). "Antisubordination" is the original term for this concept, and scholars identify "antisubjugation" as conceptually distinct and broader, but to avoid entering the semantic weeds, the term antisubjugation

framework underlying much of the post-Civil Rights jurisprudence in the Supreme Court.[132] Anticlassification, when applied in state legislating or policymaking, proscribes all categorization and discrimination of people based on class or group status, adopting a color-blind perspective that the Equal Protection clause functions to end *all* race and status-based separations.[133] Conversely, antisubjugation conceptualizes Equal Protection from the viewpoint of subordinated peoples. This viewpoint focuses less on equal, identical treatment and more on whether the challenged state action props up one class at a suspect class's detriment.[134] Though some jurists maintain that the Fourteenth Amendment is rooted in anticlassification, historical context reveals that the amendment's original intent was to rectify the subjugation of Black people in the U.S.[135]

Antisubjugation is key to an understanding of Equal Protection with regard to trans people because of its interrelatedness with its conceptual successors, critical legal theory and Critical Race Theory ("CRT").[136] CRT

---

is used more in this Article. Both terms refer to a theoretical tradition in Equal Protection discourse that argues for law to protect the humanity and natural rights of socially disadvantaged groups.

[132] *Id.*

[133] *Id.* at 5-6; *see also id*. at 10 n.61 ("[Discriminatory intent] has been assailed as ineffective because most modern discrimination is a function of implicit biases against socially marginalized groups that can operate automatically and without conscious awareness; it has been attacked as conceptually confused because discriminatory intent is not an "essential element of racial harm . . . ").

[134] *Id.* at 48-52.

[135] *Fourteenth Amendment: Report to Congress on New Draft of Fourteenth Amendment: Hearing on Fourteenth Amendment Before the Joint Comm. on Reconstruction*, 39th Cong. (1866) (statement of Thaddeus Stevens, Rep. Penn.) ("Whatever law punishes a *white* man for a crime shall punish the *black* man precisely in the same way and to the same degree. Whatever law protects the *white* man shall afford "equal" protection to the *black* man. . . . Whatever law allows the *white* man to testify in court shall allow the *man of color* to do the same.") (emphasis added); U.S. National Archives and Records Administration, *14th Amendment to the U.S. Constitution: Civil Rights (1868)*, THE NATIONAL ARCHIVES: MILESTONE DOCUMENTS, https://www.archives.gov/milestone-documents/14th-amendment#transcript (last visited Dec. 30, 2023); *see also* THE FEDERALIST NO. 51 (James Madison) ("In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."); Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 292-93 (1997) ("The result was a rule that called into constitutional question all state action that singled out any class of persons of any race for special benefits or burdens.").

[136] Bernick, *supra* note 131, at 7 (referring to the way in which CRT scholar Kimberlé Crenshaw elaborated on the "group-disadvantaging principle" that underlies antisubordination theory).

is an analytical framework pioneered by legal scholar and attorney Kimberlé Crenshaw that critiques American legal and governmental systems as inherently discriminatory, given centuries of legal chattel slavery and a century-long period of *de jure* racial segregation.[137] A pillar of CRT is that legal colorblindness should be acknowledged, analyzed, and opposed, with the ultimate goal to un-systematize state power structures that harm intersectional communities of gender-diverse people of color.[138] Therefore, CRT is directly tied to the antisubjugation approach to Equal Protection — the concept that the Fourteenth Amendment's purpose is not to eradicate *all* state-identified human differentiation, but instead to reverse harmful class separation and subjugation of peoples.[139] Critical race theorists have utilized many aspects of both CRT and antisubjugation to push for greater LGBT rights in recent decades, especially in criminal justice reform.[140]

2. Levels of Review in Constitutional Law

The Supreme Court uses three "scrutiny" levels to analyze state actions under the Fourteenth Amendment.[141] Scrutiny levels attempt to balance the state interests in legislating and enforcement against individuals' interests in civil liberties.[142] The highest burden on the state arises with strict scrutiny, which calls for demanding judicial analysis of a government action where it discriminates, classifies, or separates based on race or national origin.[143] To reach strict scrutiny, the claimant must allege discrimination based on their membership in a suspect class identified by

---

[137] Gabriella Borter, *Explainer: What "Critical Race Theory" Means and Why it's Igniting Debate*, REUTERS (Sept. 22, 2021, 1:45 PM), https://www.reuters.com/legal/government/what-critical-race-theory-means-why-its-igniting-debate-2021-09-21/.

[138] Kimberlé Crenshaw, *Critical Race Theory: A Commemoration: Lead Article: Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1260-61 (2011); Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U.L. REV. 329, 334-35, 347, 364, 369 (2006).

[139] Mutua, *supra* note 138, at 336.

[140] *See generally* Friedman, *supra* note 40.

[141] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 727-28 (6th ed. 2019).

[142] *Id.*

[143] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 290-91 (1978); U.S. v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); CHEMERINSKY, *supra* note 141, at 753. To determine if an individual is a member of a suspect class discriminated against in a manner requiring strict scrutiny, courts may consider whether the class constitutes a "discrete and insular minority" having experienced a history of discrimination and lacking access to the political process. Graham v. Richardson, 403 U.S. 365, 371-73 (1971).

precedent or a suspect class that is new.[144] To fall within a new suspect class, the class often will (1) be a "discrete and insular minority" with immutable traits, (2) have experienced a history of status-based discrimination, and (3) lack access to political processes such that it cannot effectively combat discrimination through electoral politics.[145] In addition, the method of discrimination is relevant; facially discriminatory laws automatically trigger strict scrutiny, whereas facially neutral laws that impact discriminately require additional evidence of the state's discriminatory animus.[146] Meeting these class and method triggers brings an Equal Protection claim under a strict scrutiny analysis. Under strict scrutiny, the state actor carries the burden of showing that its action was "narrowly tailored" in the least discriminatory methods possible to further a "compelling government interest."[147] Because of this high bar, many government actions triggering strict scrutiny are struck down by courts.[148]

Intermediate scrutiny is a lower standard of review, applying to cases where the government discriminates based on sex, gender, or a child's legitimacy.[149] Though the Supreme Court is silent regarding the scrutiny level for trans discrimination, an overwhelming majority of lower courts have ruled that Equal Protection violations against trans people trigger intermediate scrutiny "with bite."[150] In these instances, the challenged law

---

[144] Race, ethnicity, and national origin are the only currently recognized suspect classes. CHEMERINSKY, *supra* note 141.

[145] Frontiero v. Richardson, 411 U.S. 677, 685-87 (1973); *id.* at 692 (Powell, J. concurring); *Carolene Products Co.*, 304 U.S. at 152 n.4.

[146] Village of Arlington Heights v. Metro Housing Dev., 429 U.S. 252 (1977). Facially discriminatory laws explicitly separate classes in their text, whereas facially neutral discriminatory laws have nondiscriminatory text but function to separate peoples. *Id.*

[147] "Narrowly tailored" means that the methods used must are the least restrictive means of enforcing the law on the people. Richmond v. J.A. Croson Co., 488 U.S. 469, 507-08 (1989).

[148] Laws discriminating based on race or ethnicity are presumptively unconstitutional because of several factors but namely, the immutability of race itself. Korematsu v. United States, 323 U.S. 214 (1944) ("Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.") The importance of plaintiffs bringing constitutional claims using strict scrutiny as a movement lawyering tool cannot be overstated. Successes in achieving civil liberties occurred in school racial desegregation, the development of affirmative action, and the inclusion of certain classes of immigrants in the benefits of American residency. Grutter v. Bollinger, 549 U.S. 306, 343 (2003); *Graham*, 403 U.S. at 371-73; Brown v. Bd. of Educ., 349 U.S. 294 (1955).

[149] CHEMERINSKY, *supra* note 141, at 727-28. For purposes of the legal analysis regarding trans incarcerated people, sex discrimination is equated to gender discrimination in this Article, despite the differences between the two. Zhang, *supra* note 28, at 257.

[150] United States v. Virginia, 518 U.S. 515, 555 (1996); Glenn v. Brumby, 663 F.3d 1312, 1316-17 (11th Cir. App. 2011); Koe v. Noggle, 688 F. Supp. 3d 1321, 1348 (N.D. Ga. 2023).

is only constitutional if it is "substantially related to an important government purpose" and the "bite" component calls for an "exceedingly persuasive justification."[151] As Eleventh Circuit Judge Barkett put it, "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. . . . There is thus a congruence between discriminating against transgender . . . individuals and discrimination on the basis of gender-based behavioral norms."[152]

The default scrutiny level where a law has triggered neither strict nor intermediate scrutiny is rational basis; the government action must simply be "rationally related" to some "legitimate" government purpose.[153] This scrutiny level is the least demanding and places the burden of proof on the claimant, so state acts analyzed under rational basis review often survive scrutiny.[154]

3. Equal Protection and Gender-Diverse People

Despite sex discrimination's connection to gender discrimination, the discourse regarding the constitutional standard of review for discriminatory acts against trans people is still in flux.[155] Less than fifteen years ago, courts used rational basis review when analyzing whether a prison policy violated trans peoples' Equal Protection rights.[156] More recently, courts have held that intermediate scrutiny is triggered in cases of discrimination against trans people, but they are divided on the precise reasoning underlying that standard.[157]

The *Bostock* holding could support the idea that heightened scrutiny applies to Equal Protection claims by trans people, as the Supreme Court affirmed that employment discrimination based on a person's trans identity at least partially requires discrimination on the basis of sex.[158] Though it was decided under Title VII of the Civil Rights Act of 1964, *Bostock*

---

[151] United States v. Virginia, 518 U.S. at 531; Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979).

[152] *Glenn*, 663 F.3d 1312 at 1316-17.

[153] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

[154] *Id.* ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest . . . The general rule gives way, however, when a statute classifies by race, alienage, or national origin.")

[155] Regina L. Hillman, *The Battle Over Bostock: Dueling Presidential Administrations & the Need for Consistent and Reliable LGBT Rights*, 32 AM. U. J. GENDER SOC. POL'Y L. 1, 98-99(2023).

[156] Fields v. Smith, 712 F. Supp. 2d 830, 867 (E.D. Wis. 2010).

[157] *See e.g.,* JARED P. COLE, CONG. RSCH. SERV., LSB10902, TRANSGENDER STUDENTS AND SCHOOL BATHROOM POLICIES: EQUAL PROTECTION CHALLENGES DIVIDE APPELLATE COURTS 1 (2023) (describing that appellate courts have applied intermediate scrutiny to challenges regarding bathroom policies applied to gender-diverse people, but are divided on the reasoning behind the application).

[158] *Bostock*, 590 U.S. at 668 ("The employers' policies involved intentional discrimination because of sex, and Title VII liability necessarily followed.")

provides support for the application of intermediate scrutiny to analogous Equal Protection claims because being trans is inexorably related to a claimant's sex assigned at birth.[159] And still, though the Supreme Court has not recently "recognized" another suspect class, several factors lean in favor of trans people constituting a suspect class, which would trigger strict scrutiny.[160]

One of the ways prisons violate the Equal Protection clause is by unreasonably providing discriminatory medical care to trans incarcerated people and premising it on the mere fact that they are gender-diverse.[161] A useful avenue to challenge this differential care is a state or federal constitutional claim that a state actor failed to provide equal protection under the law by denying the claimant gender-affirming hormones.[162] For such claims in federal courts premised on disparate healthcare, the claimant must first show that they are similarly situated to other incarcerated people with similar problems.[163] Then, the claimant must show that they were discriminated against because they should *at least* belong to a quasi-suspect class, though a showing of full suspect class status triggers strict scrutiny and typically, a more successful claim.[164] A state court claimant's strategy may differ depending on the contours of the state's Equal Protection provisions.

---

[159] Susannah Cohen, *Redefining What it Means to Discriminate Because of Sex: Bostock's Equal Protection Implications*, 122 COLUM. L. REV. 407, 442-43, (2022) (suggesting that it is possible for *Bostock* to apply to other claims under equal protection despite the fact it was focused on a Title VII claim). *See also*; H.R. REP No. 92-238, 92d Cong, 1st Sess., 19 (1971) (explaining that the Civil Rights Act of 1964 and its amendments were intended to carry out the "clear intention" of the Thirteenth and Fourteenth Amendments "to prohibit all forms of discrimination," suggesting that the Equal Protection clause can expand to recognize additional protected classes in line with its central goal). *But see* Cheryl I. Harris, *Limiting Equality: The Divergence and Convergence of Title VII and Equal Protection*, 2014 U. CHI. LEGAL F. 95, 103 (describing post-Civil Rights Act doctrine that established a higher bar for constitutional claims than statutory claims by embedding a "purpose" requirement into constitutional cases).

[160] *See infra*, Parts II.C.2, II.D.

[161] Fields v. Smith, 712 F. Supp. 2d 830, 867 (E.D. Wis. 2010).

[162] Dangaran, *supra* note 24, at 184-86 (identifying Equal Protection claims that prisons discriminated on the basis of trans status as an avenue that can bypass the demanding requirements of the Eighth Amendment).

[163] *Flores*, 2010 U.S. Dist. LEXIS 145873, at *48-49. The logic behind such disparate-treatment claims is often that the other class of incarcerated persons acquired more effective treatment more easily, so the claimant's denial of treatment arose from discriminatory practices violative of the Equal Protection clause. *Id.* The Supreme Court has abstracted the Equal Protection clause by adhering to the levels of scrutiny, which use often indistinguishable language and lack quantifiability. This muddying of the waters allows courts to ignore nuances in race and gender contexts that would otherwise appropriately inform judicial review.

[164] *Id.* at 49.

The *Fields v. Smith* holding provides an example of how the Equal Protection clause can be applied in carceral contexts to overturn a statutory hormone therapy ban.[165] In *Fields*, the plaintiff successfully challenged Wisconsin's statutory ban on gender-affirming hormones for incarcerated people by contrasting their treatment to that of other incarcerated classes.[166] The *Fields* court paid much attention to expert testimony, holding for the imprisoned plaintiff on Equal Protection grounds because the denial of hormone access was not rationally related to legitimate penological interests like security.[167] More precisely, the denial of male-to-female transition hormones did not decrease the risk of a trans person suffering sexual assault in the male prison.[168] While the analytical approach put forth by this case is untested among many other district courts, it has viability and the Equal Protection reasoning was not overturned.[169]

II. ANALYSIS

> *"[T]he precedent the majority creates is damaging. It paves the way for unprincipled grants of en banc relief, decimates the deference paid to a trial judge following a bench trial, aggrieves an already marginalized community, and enables correctional systems to further postpone their adjustment to the crumbling gender binary."*[170]

Jurisdictions that allow trans incarcerated people to access hormone therapy help support gender-diverse identity, but their policies must go further to comport with Equal Protection. Eighth Amendment claims do not wholly address trans incarcerated peoples' transition needs. Therefore, this Analysis situates the Equal Protection clause as complimentary to Eighth Amendment claims in the trans advocate's toolkit, as the standard it sets may be less demanding on claimants. Where a trans person could not show a serious medical need, a GD diagnosis, or indifference from the state, Equal Protection may still guarantee a right to gender-affirming care.

---

[165] Fields v. Smith, 712 F. Supp. 2d 830, 867 (E.D. Wis. 2010) *aff'd* 653 F.3d 550 (7th Cir. 2011) (on Eighth Amendment grounds). The *Fields* court used rational basis review. Currently, federal courts are applying intermediate scrutiny to discrimination claims against trans people in bathroom accessibility cases. COLE, *supra* note 157 at 1.

[166] *Fields*, 712 F. Supp. 2d at 868-869.

[167] *Id.*

[168] *Id.* at 868.

[169] Fields v. Smith, 653 F.3d 550, 553, 559 (7th Cir. 2011); Brief for Plaintiffs-Appellees at 36-43, Fields v. Smith, 653 F.3d 550 (7th Cir. Nov. 11, 19) (ECF 20); *accord* Vargas v. California Dep't of Corr. & Rehab., No. 1:20-cv-00083-JLT-CDB, 2023 U.S. Dist. LEXIS 27896, at *16-17 (E.D. Cal. 2023) (permitting a trans incarcerated person's equal protection claim to move forward).

[170] Kosilek v. Spencer, 774 F.3d 63, 113 (1st Cir. 2014) (Thompson, J., dissenting).

Disparate treatment presents an urgent problem for state correctional departments and courts.[171] These injustices occur despite the several legal recourses available and some well-structured policies.[172] The following section outlines the shortcomings of the current legal standards regarding gender-affirming hormones in prisons. Then, it analyzes prison hormone policies as facially discriminatory laws under intermediate scrutiny. Additionally, because trans incarcerated people should constitute a suspect class, this section then analyzes prison hormone policies under strict scrutiny. Under these levels of scrutiny, both restrictive and obstructionist prison hormone policies violate the Fourteenth Amendment Equal Protection Clause.

A. The Eighth Amendment Deliberate Indifference Shortcomings

Trans incarcerated people suing under the Eighth Amendment for access to transition care must prove both objective "sufficiently serious" and subjective "deliberate indifference" elements relating to the prison agent's

---

[171] *See* Edmo v. Corizon, Inc., 935 F.3d 757, 772-73 (stating facts in which trans incarcerated woman underwent severe emotional distress, depression, and self-harm as a result of her physician's decision to not allow her transition to proceed to gender-affirming surgery under an obstructive department policy); Rachael Rezabek, *(D)evolving Standards of Decency: The Unworkability of Current Eighth Amendment Jurisprudence as Illustrated by Kosilek v. Spencer*, 87 S. CAL. L. REV. 389, 406-07 (2014). Additional benefits are inherent in states' opportunity to expand access to hormone therapy for trans incarcerated people: broadened gender-affirming healthcare for incarcerated women undergoing menopause, lowered chances of trans incarcerated juveniles' recidivism, and reduced litigation costs on prison facilities, which are heavily funded by taxpayer dollars.

[172] People incarcerated in state prisons have several recourses available. The first and most immediately available are informal and formal grievance procedures, which are often prison-specific. *See e.g.,* Painter v. Baca, No. 1:04-CV-6435-REC-DLB-P, 2005 U.S. Dist. LEXIS 33300, at *4 (E.D. Cal. 2005); Clark v. LeBlanc, No. 19-00512-BAJ-SDJ, 2023 U.S. Dist. LEXIS 53241, at *6 (M.D. La. 2023); Quillman v. Estate of Obaisi, No. 14-cv-09806, 2020 U.S. Dist. LEXIS 75976, at *5 n.2 (N.D. Ill. 2020). Alternatively, trans incarcerated people can file medical malpractice claims against their primary care providers, but these claims often fail because of qualified immunity doctrines where the provider was state-employed. *See* Gatson v. Quinn, No. 86-3169, 1987 U.S. Dist. LEXIS 4618 at *6-7 (D. Kan. 1987) (dismissing incarcerated plaintiff's § 1983 claim for negligent medical treatment, noting "[h]is dubious remedy, if any, is a suit for malpractice in state court"). Another possible remedy is to claim damages for intentional torts, where denial or hormone therapy prescription could amount to instances of intentional infliction of emotional distress. However, given the already difficult subjective prong of Eighth Amendment deliberate indifference claims, these tort claims would be almost impossible to make absent excessively egregious physician or administrator misconduct. Some trans incarcerated people have attempted compassionate release claims, especially in light of the COVID-19 pandemic and under color of federal statute. *See e.g.,* United States v. Wolaver, No. CR. 1:12-1606 JCH, 2022 U.S. Dist. LEXIS 140898, at *3-6 (D.N.M. 2022).

act.[173] Because of the difficulty in proving the subjective prong of these claims, they often fail.[174] The Supreme Court functionally insulated prison authorities from claims by all classes of incarcerated people by creating the deliberate indifference standard. While this is a method of protecting state action from judicial scrutiny, it was also an avoidance tactic[175] — the Court likely knew that its decision to anchor an actual requirement of subjective indifference into Eighth Amendment claims would preclude future claims.[176] Even in cases where trans incarcerated people win on Eighth Amendment grounds, some courts subtly apply Equal Protection reasoning.[177]

The deliberate indifference standard also insulates prisons from court scrutiny of intersectional aspects, like differential treatment of LGBTQ+ incarcerated people when juxtaposed with treatment of cisgender incarcerated people. This narrow view of trans rights when courts hold on Eighth Amendment claims further strips LGBTQ+ people of color of bodily autonomy in a setting where their wellness must be secured fully and equally under the Constitution.[178] The Equal Protection analysis considers context where the Eighth Amendment cannot, as the latter requires judicial ignorance of factors like the claimant's race, class, gender, or sexuality.[179]

---

[173] Farmer v. Brennan, 511 U.S. 825, 834 (1994).

[174] *See id.* (noting agreement between the parties on applying the deliberate indifference standard, but disagreement between parties on the test underlying the standard).

[175] Joel H. Thompson, *Today's Deliberate Indifference: Providing Attention Without Providing Treatment to Prisoners with Serious Medical Needs*, 45 HARV. CIV. RTS.-CIV. LIBERTIES L. R. 635, 650-52 (2010) (discussing why incarcerated people struggle to successfully bring individual Eighth Amendment claims against medical providers). Why should the state avoid adequate treatment of all people in its care?

[176] Campbell v. Kallas, 936 F.3d 536, 549 (7th. Cir. 2019).

[177] *See* Fields v. Smith, 653 F.3d 550, 556-57 (7th Cir. App. 2011) (referring to the fact that the state cannot deny incarcerated people with cancer the necessary treatment, so it follows that trans incarcerated people must have similarly adequate treatment).

[178] The state's mass incarceration of people of color upholds whiteness by denying non-white people similar opportunities as white people, whether it is stated explicitly or not. BECKY PETTIT & BRYAN SYKES, INCARCERATION, THE STANFORD CENTER ON POVERTY AND INEQUALITY 1-3 (2017), https://inequality.stanford.edu/sites/default/files/Pathways_SOTU_2017_incarceration.pdf; *see also* Mutua, *supra* note 138, at 363-64 (discussing Supreme Court jurisprudence in the 1970s that contributed to the removal of Black Americans' autonomy and backtracking of racial justice reforms through the legitimization of colorblindness as a legal practice).

[179] *See* Jacoby v. Carter, No. 4:16-cv-0728-MHH-TMP, 2017 U.S. Dist. LEXIS 107834, at *52 (N.D. Ala. May 1, 2017) ("However, the plaintiff may not rely solely on his claims that he is a 'feminine, gay, smaller size white male' to establish deliberate indifference."); Friedman, *supra* note 40, at 692-94

B. The Current Legal Environment Requires Trans Advocates to Work Within the "Medical Necessity" Concept of Gender-Affirming Care in Prisons

By medicalizing trans peoples' gender identity-related distress, corrections departments otherize trans incarcerated people, instituting hurdles to hormone therapy.[180] This requirement of a "medical necessity" permeates prisons, upholding the archaic concept that a trans person must experience GD to transition.[181] Thus, medicalization limits the total range of gender-affirming care available, exacerbating mental discord in already discordant environments.[182] Opponents of medicalization emphasize that treating gender transition like a medical condition further stigmatizes trans people.[183] Between the antimedicalization movement and the pathologization of trans people exists a gray area within which advocates can dismantle barriers to gender-affirming care.

Gender-affirming hormone therapies can cause harmful bodily side effects and thus, healthcare providers are instrumental in the provision of such treatments for gender-diverse incarcerated people.[184] It follows then that in current prison contexts, gender-affirming hormone care is medical in nature.[185] However, importing the WPATH model — which is broadly

---

(discussing the methods by which the "social organization of prison life" kills incarcerated people and maintains racist, classist, and sexist subordination to the institution of prisons, despite the state's professed colorblindness).

[180] JAILHOUSE LAWYER'S HANDBOOK, *supra* note 87, at 60 (describing the invidious difficulty of establishing that a trans individual has a "serious medical need"). The mental distress trans people suffer when they lose access to gender-affirming care has detrimental physical impacts. De'Lonta v. Angelone, 330 F.3d 630, 632, 634 (4th Cir. App. 2003) ("In contravention of the directive that hormone treatment be tapered off, De'lonta's hormone treatment was terminated abruptly, causing De'lonta to suffer nausea, uncontrollable itching, and depression. The most harmful effect of the cessation of the hormone treatment, however, was that De'lonta developed an uncontrollable urge to mutilate her genitals."); Coleman et al., *supra* note 92, at S7. However, unfortunately the medicalization of trans incarcerated needs also provides legitimacy to their claims in a carceral system otherwise apathetic to the trans experience.

[181] MUSHLIN, *supra* note 88, at 572-75 (discussing that courts will only interpret the law in favor of trans incarcerated peoples' gender-affirming care if that gender-affirming care stems from some right to medical treatment). *See, e.g.*, IND. POL'Y NO. 2.17A, *supra* note 91, at § III(F); S.D. POL'Y NO. 1.4.E.13, *supra* note 93, at 8 (stating that "inmates diagnosed with gender dysphoria" can acquire access to "treatment," which really means transition care).

[182] Diaz, *supra* note 15.

[183] Castro-Peraza et al., *supra* note 89, at 3.

[184] Rafael B. Santos et al., Gender-Affirming Hormone Therapy: Physical and Sociopsychological Effects, Impact and Satisfaction, 15 CUREUS 1, 2, 9 (2023); *see supra* Part I.B.2.

[185] Despite the desires and efforts of some contemporary trans advocates, viewing gender-affirming care in prisons as "medical care" is unavoidable

accepted but rarely acknowledged — into prisons to make psychologists hormone gatekeepers is problematic, as it increases prison power over trans incarcerated peoples' decision-making, reinforcing one of many layers of mass incarceration.[186] Where WPATH Standards are applied, they require increased funding or reallocation of funds, proliferating unequal treatment.[187]

It may be even more necessary for advocates to work within the medical framework for gender-affirming care because of the difficulty in even getting grievances heard before judges. Namely, the Prison Litigation Reform Act ("PLRA") passed federally in 1996 institutes several steps incarcerated people must take to remedy wrongs experienced while incarcerated, all in the spirit of increasing "judicial efficiency."[188] Nonetheless, this goal for efficiency decreases incarcerated people's access to the legal system.[189] While opponents of carceral gender-affirming hormones may

---

because of risk factors to those medically transitioning and the fact that medicalization legitimizes trans incarcerated peoples' needs in otherwise hostile environments. JAILHOUSE LAWYER'S HANDBOOK, *supra* note 87, at 60 (describing a GD diagnosis as a pathway to medical transition in carceral settings); Austin H. Johnson, *Rejecting, Reframing, and Reintroducing: Trans People's Strategic Engagement with the Medicalisation of Gender Dysphoria*, 41 SOCIO. HEALTH & ILLNESS 517, 520 (2019) (regarding the trans experience generally: "the medical model restricts trans people in legal, social and medical settings while simultaneously providing avenues to gender affirming care . . .").

[186] Greene, *supra* note 42, at 474-75; Dangaran, *supra* note 24, at 205-06.

[187] Channeling funding into the maintenance of treatment review committees and psychologists as hormone gatekeepers in carceral settings bolsters the state to the inevitable detriment of trans people and racial minorities. Greene, *supra* note 42, at 475 (describing how prison medical and legal budgets will expand in the wake of WPATH litigation). The increase of state resources entrenches its ability to perpetrate violence and discriminate against gender-diverse people. *Id.* ("Under even the most generous interpretation of [WPATH] reform, the criminal punishment system retains its power and its purpose — to violently enforce a racial caste system and cissexist gender norms"); JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY, 163-64, https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf (last visited Oct. 29, 2023) (establishing that 16% of transgender respondents of a nationwide transgender discrimination survey were incarcerated at some point, which contrasts starkly with the 2.7% of general population having been incarcerated at some point) ("Sixteen percent (16%) of respondents reported being sent to jail or prison "for any reason," with Black (47%) and American Indian (30%) respondents at highest risk for going to jail/ prison.").

[188] 42 U.S.C. § 1997e (a–g); *see generally* Langford v. Norris, 614 F.3d 445, 457 (8th Cir. 2010) (explaining the mechanics of the PLRA, particularly its exhaustion requirement).

[189] With the PLRA, Congress created an obstacle course of administrative hurdles preventing both state and federal incarcerated people's access to legal recourse when they are mistreated, denied constitutional rights, or sexually

raise this point to highlight that policy change is unimportant because imprisoned people can barely have their grievances heard anyway, the PLRA demonstrates that carceral reform must *also* occur outside the courts, in legislatures and communities.[190]

Using the Equal Protection clause to scrutinize current approaches to trans peoples' gender-affirming hormone access — which overemphasize levels of medical review — would result in findings of unconstitutionality.[191] Despite this, tension exists because effectively reducing state violence against trans incarcerated people requires calling incrementally for reforms that are *unlike* the currently accepted transition care models.[192]

---

assaulted while incarcerated. *The Prison Litigation Reform Act in the United States*, HUMAN RIGHTS WATCH: NO EQUAL JUSTICE (Jun. 16, 2009), https://www.hrw.org/report/2009/06/16/no-equal-justice/prison-litigation-reform-act-united-states.

[190] Chinyere Ezie & Richard Saenz, *Abuse and Neglect of Transgender People in Prisons and Jails: A Lawyer's Perspective*, LAMBDA LEGAL, (Nov. 25, 2020) https://legacy.lambdalegal.org/blog/20201125_transgender-people-prisons-jails. Even in circumstances where an incarcerated person overcomes the PLRA to access the Court, a state's statute may prohibit the use of state funds for hormone transition. WIS. STAT. § 302.386.5m (banning the use of state resources to "facilitate" hormonal therapy or gender-affirming surgery for people in state custody) (rendered unconstitutional by Fields v. Smith, 653 F.3d 550 (7th Cir. App. 2011)); Cano v. S.C. Dep't of Corr., No. 9:22-cv-04247-DCC-MHC, 2023 U.S. Dist. LEXIS 160250, at *22 (D.S.C. May 31, 2023) (citing a South Carolina state budget bill that would prohibit use of government funds for funding gender-affirming care); H. 4100, 124th § 65(N040)(A) Gen. Assemb., Reg. Sess. (S.C. 2021) ("The Department of Corrections is prohibited from using state funds or state resources to provide a prisoner in the state prison system sexual reassignment surgery"). These laws demonstrate that pro-trans advocacy cannot occur solely in the legal arena, as layered legal barriers to trans rights already exist and will continue to arise. Only by continuing to combine community organizing, mobilizing, and legal advocacy can the movement continue.

[191] *See e.g.,* Daniel Trotta & Brendan Pierson, *U.S. Judges Halt Healthcare Bans for Transgender Youth*, REUTERS: HUMAN RIGHTS (Jul. 3, 2023), https://www.reuters.com/legal/us-judges-halt-healthcare-bans-transgender-youth-2023-07-03/ ("U.S. district court judges have halted such laws in six states - Alabama, Arkansas, Florida, Indiana, Kentucky and Tennessee - finding that they infringe on the constitutional guarantee to equal protection under the 14th Amendment"). I acknowledge that seeking to legitimize the needs of trans incarcerated people through the legal system is limited because the legal system itself created and upholds white supremacist, capitalist, heteronormative patriarchy. Therefore, the system cannot be trusted to fully reverse the social problems it causes and benefits from. Gabriel Arkles et al., *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. FOR SOC. JUST. 579, 595-7 (2010).

[192] *See* Dangaran, *supra* note 24, at 206 ("Why must gender dysphoria remain pathologized? Why must the diagnosis be a requirement before hormone replacement therapy? Trans people should be able to demand access to hormones and

C. Restrictive Hormone Policies for Gender-Diverse People in Prisons Violates the Equal Protection Clause

This subsection posits that all carceral gender-affirming care policies that restrict hormone therapy access are facially discriminatory; they identify trans and gender-diverse incarcerated people as a specific class in attempts to justify disparate-treatment.[193] All restrictive hormone policies fall short of Fourteenth Amendment Equal Protection paradigms because, like cisgender incarcerated people, trans incarcerated people are detained in state-funded institutions and thus, their healthcare is controlled and provided by the state.[194] Further, the most restrictive hormone policies violate the Fourteenth Amendment by limiting trans people's access to necessary hormone treatments based on their classification as gender-diverse.[195] Moreover, hormone policies offering freer access do not ensure trans incarcerated people are treated equally to cisgender incarcerated people.[196]

---

surgeries without a medical gatekeeper. Finally, trans medical care should include access to holistic therapy, not just therapy to screen for gender dysphoria and offer diagnoses."); *supra*, Part I.A and accompanying text.

[193] These policies subject transgender people to different standards than cisgender incarcerated people. *See, e.g.* MISS. POL'Y NO. 20-16, *supra* note 125, at 4 (omitting hormone access from policy text); N.D. POL'Y NO. 4B-07, *supra* note 93, at § 5.D.2 (constituting a freeze-frame policy); COLO. REGUL. 700-14, *supra* note 126, at 6 (Apr. 1, 2022) (using vague language in a document more facially focused on housing than gender-affirming care).

[194] Weatherhead, *supra* note 72, at 452-55. *See* Fields v. Smith, 712 F. Supp. 2d 830, 836, 866-69 (E.D. Wis. 2010), *aff'd* 653 F.3d 550 (7th Cir. 2011) (on Eighth Amendment grounds) for an equal protection analysis concluding that the denial of hormone therapy to trans incarcerated people where non-trans incarcerated people had such access violates the Fourteenth Amendment. *See generally* Davis v. Coakley, 802 F.3d 128, 133 (1st Cir. 2015) (detailing that the meaning of "similarly situated" in First Circuit civil rights contexts require the plaintiff's circumstances to be fairly alike to the other class, but need not be identical). *But see* Norsworthy v. Beard, No. 14-cv-00695-JST, 2014 U.S. Dist. LEXIS 41519, at *8-9 (N.D. Ca. Mar. 26, 2014) (deeming an incarcerated plaintiff's Equal Protection claim deficient because she contrasted her treatments with non-incarcerated people, who were not similarly situated).

[195] *See* Sarah Ortlip-Sommers, *Living Freely Behind Bars: Reframing the Due Process Rights of Transgender Prisoners*, 40 COLUM. J. GENDER & L. 355, 378 (2021) (describing that some federal courts have equated discrimination claims based on trans status with claims based on sex). *E.g.*, Griffith v. El Paso Cnty., No. 21-cv-00387-CMA-NRN, 2023 U.S. Dist. LEXIS 32186, at *20-26 (D. Colo. February 27, 2023) (acknowledging that separate categorization of trans people leading to disparate treatment would violate the Equal Protection clause); Bradley v. Weber, No. 20-cv-48-jdp, 2020 U.S. Dist. LEXIS 128518, at *17-18 (W.D. Wis. July 20, 2020) (stating that disparate treatment based on the claimant's "membership in a definable class" creates a valid Equal Protection claim).

[196] *See* Allison Eddy, *Life is What You Make It . . . Unless You are Transgender and Incarcerated: Revising the Test for Judging an Incarcerated Transgender Individual's Readiness for Gender Confirmation Surgery*, 28 SUFFOLK J. TRIAL & APP. ADV. 1, 7-8 (2022) (discussing how the Federal Bureau of Prison's adherence to WPATH is problematic because it does not adapt the

1. How Trans Incarcerated People Are Similarly Situated to Other Incarcerated Classes

Trans incarcerated people are similarly situated to cisgender incarcerated people, as both classes are detained in state-funded institutions with state-controlled healthcare.[197] Those who argue trans incarcerated people are not similarly situated to other classes must rely on their differentiations from those groups: their higher risk of mental health pathologies, potential for gender dysphoria, and visible physical changes that can accompany gender affirming care.[198] Because of these differences, the state would allege that trans incarcerated people have different needs in carceral settings than cis people, which they may. However different trans women's health needs are from cis women's, such differences arising largely from gender identity and sex assigned at birth do not justify state action that treats the two groups substantially unequally.[199] From a critical legal viewpoint, demarcating trans incarcerated peoples' healthcare as different and instituting barriers to certain types of transition care is a form of subjugation.[200]

WPATH requirements for care to restrictive, dangerous carceral settings); Dangaran, *supra* note 24, at 177 ("The formal legal LGBTQ equality movement can be held up as a model even though many on the inside continue to offer critiques of how it has let down its own community — often its trans subcommunity."); Spade, *supra* note 1, at 18 (noting that advocates for trans peoples' access to gender-affirming care must be cautious in their reliance on medical evidence because broadened access to gender-affirming care in settings controlled by the state inevitably involves gender oppression and violence).

[197] Weatherhead, *supra* note 72. *See Davis*, 802 F.3d, at 133. *But see Norsworthy*, 2014 U.S. Dist. LEXIS 41519, at *8-9 (demonstrating an example of an incarcerated plaintiff's Equal Protection claim deemed to lack similar situation status).

[198] *See, e.g.,* Baker v. Toney, No. 5:20-cv-672-MHH-GMB, 2022 U.S. Dist. LEXIS 236161, at *7-8 (N.D. Ala. Dec. 8, 2022); Green v. Director Brian Sterling, No. 0:22-1634-SAL, 2023 U.S. Dist. LEXIS 175442, at *6-7 (D.S.C. Sept. 29, 2023). *But see* Williams v. Lane, 548 F. Supp. 927, 932 (N.D. Ill. 1982) (holding that incarcerated people in solitary confinement are similarly situated to people incarcerated in general population).

[199] Numerous courts have held that the Equal Protection clause covers treatment and conditions in prisons and requires parity of treatment that is substantially equal between genders. *See, e.g.,* Victory v. Berks Cty., No. 18-5170, 2019 U.S. Dist. LEXIS 112721, at *27 (E.D. Pa. Jul. 8, 2019); Glover v. Johnson, 478 F. Supp. 1075, 1079 (E.D. Mich. 1979). *But see* Barefield v. Leach, No. 10282, 1974 U.S. Dist. LEXIS 11539, at *52 (D.N.M. Dec. 18, 1974) ("The state can justify a lack of parity in treatment or opportunities where its actions have a fair and substantial relationship to the purpose of the inmate's incarceration.").

[200] *See* Friedman, *supra* note 40, at 694 (describing how incarcerated people can suffer "social death . . . which justifies their continual dispossession, subjugation, and removal from social society"); *cf.* Gabriel Arkles, *Correcting Race and Gender: Prison Regulation of Social Hierarchy Through Dress*, 87 N.Y.U. L. Rev. 859, 940 (2012) ("While in some cases prison officials may offer these justifications for their policies as an *ex post* justification during litigation, sometimes

If lawyers view this subjugation through two related lenses, antisubjugation theory and CRT, they can understand that current prison hormone policies are untenable with Equal Protection.[201] Further, the current approach in these policies is hypocritical because it constitutes labelling and separation of healthcare resources — therefore, it is unconstitutional even under the anticlassification theory promulgated by the Supreme Court in recent decades and urgently requires reconsideration under heightened scrutiny.[202] Even originalist judges must acknowledge that trans incarcerated people require care that is at least equal to other incarcerated classes in that their needs as gender-diverse people must be adequately met just like cis peoples' needs.

The most explicit exhibition of the disparate-treatment between cis and trans incarcerated people is the freeze-frame policy. It would be absurd to require a cisgender woman who has not begun menopause, to have an existing hormone-based menopausal prescription at her entry into prison, simply so she could receive hormone-based menopausal care a year later.[203] Crucially, gender-diverse children encounter similar obstacles in state custody, which is not limited to prison or jail settings.[204] They are entitled to the same Fourteenth Amendment guarantees to care as

---

prison officials articulate protective purposes when they make their policies. These measures resonate with mandatory arrest laws and hate crime laws, as exercises of the criminal legal system's power to ostensibly help "protect" a marginalized group in a way that ultimately involves disproportionately punishing the members of that group."); Crenshaw, *Women of Color*, *supra* note 39 at 1250-51 ("The fact that minority women suffer from the effects of multiple subordination, coupled with institutional expectations based on inappropriate nonintersectional contexts, shapes and ultimately limits the opportunities for meaningful intervention on their behalf.")

[201] Mutua, *supra* note 138, at 336; Bernick, *supra* note 131, at 7.

[202] *Cf.* Bernick, *supra* note 131, at 72 ("Without abandoning its apparent commitment to a limited judicial role in evaluating state protection, the Court could qualify its more sweeping pronouncements about the Constitution's indifference to private violence and state inaction.").

[203] *See* Fields v. Smith, 712 F. Supp. 2d 830, 867-68 (E.D. Wis. 2010), *aff'd* 653 F.3d 550 (7th Cir. 2011) (affirmed on Eighth Amendment grounds) ("It is undisputed that the DOC sometimes prescribes hormone therapy for reasons that do not have to do with GID, such as estrogen replacement therapy in post-menopausal years.").

[204] *E.g., In re* Brian L. v. Administration for Children's Servs., 859 N.Y.S.2d 8 (2008) (N.Y. App. Div. 2008) (reversing an order for a healthcare provider for a foster child to provide them gender-affirming surgery). *See also* J. Lauren Turner, *From the Inside Out: Calling on States to Provide Medically Necessary Care to Transgender Youth in Foster Care*, 47 FAM. CT. REV. 552, 557 (citing *in re* Tameka M., 580 A.2d 750 (Pa. 1990) and *in re* N.E., 787 A.2d 1040 (Pa. 2001) to illustrate that the state has a "constitutional duty imposed" upon it "to provide all medically necessary care to children in the child welfare system" including necessary gender affirming care).

cisgender children and women in state custody.[205] Therefore, trans incarcerated people are sufficiently similarly situated to other classes of incarcerated people to mount Equal Protection claims.

2. Restrictive Policies Under Scrutiny[206]

When applying intermediate scrutiny, carceral policies governing trans incarcerated people in states like Mississippi, North Dakota, and Colorado are restrictive policies targeting a quasi-suspect class, and each of these policy types violates the U.S. Constitution's Equal Protection clause because they are not substantially related to important state purposes.[207]

First, categorical bans on hormone therapy violate Equal Protection because they broadly preclude an entire target class of incarcerated people from a range of healthcare interventions provided more easily to cisgender people.[208] Second, freeze-frame policies violate Equal Protection because they "freeze" trans incarcerated peoples' hormone dosage — if any — at its level on the date of incarceration.[209] This arbitrarily precludes *any* gender-diverse incarcerated people without documentation of prior hormone treatment from initiating treatment, which is invidious differential treatment unsupported by security interests.[210] Freeze-frames thus violate both the Eighth and Fourteenth Amendments.[211] Third, policies that omit

---

[205] For general discussion about bans of gender-affirming care for minors violating equal protection guarantees, see Koe v. Noggle, 688 F. Supp. 3d 1321, 1356-57 (N.D. Ga. 2023).

[206] For this Analysis and Proposal, the first three categories of prison hormone policies — categorical bans, freeze-frame policies, and policies omitting hormone access — are called "restrictive policies."

[207] MISSISSIPPI DEPARTMENT OF CORRECTIONS, INMATE HANDBOOK, 2023 (omitting any mention of hormone therapy access); N.D. POL'Y NO. 4B-07, *supra* note 93 (functioning as a freeze-frame policy); COLO. REGUL. 700-14, *supra* note 126, at 6 (Apr. 1, 2022) (containing vague language that does not specify when and how a trans incarcerated person's care is to be handled).

[208] *See also* Stathers, *supra* note 91, at 247 n.11 (explaining the consequences of blanket bans on gender-affirming care); *cf.* Complaint at 42-43, Brandt v. Rutledge, 551 F. Supp. 3d 882 (E.D. Ark. 2021) (arguing in the complaint that the trans children who would be affected by a gender-affirming care ban for minors would be disparately treated by healthcare providers as contrasted with cisgender children in similar circumstances).

[209] *See also* Kaufman*, supra* note 71, at 112-13.

[210] *See, e.g.,* Fields v. Smith, 712 F. Supp. 2d 830, 868-69 (E.D. Wis. 2010), *aff'd* 653 F.3d 550 (7th Cir. 2011) (affirmed on Eighth Amendment grounds) (holding differential treatment of trans incarcerated plaintiffs did not support the state's alleged interest in their safety).

[211] By intentionally precluding a broad group of incarcerated people from hormone therapy access, freeze-frame policies have the deliberateness that is violative of the Eighth Amendment standard articulated in *Farmer* — state actors passing and enforcing these laws are aware that some trans incarcerated people

hormone therapy access from their text violate Equal Protection because, in application, they can preclude important care for gender-diverse people that is otherwise provided for other classes.[212] For these reasons and those outlined below, restrictive prison hormone policies are untenable with the Fourteenth Amendment's mandate.

Trans incarcerated people are at least a quasi-suspect class if the possibilities furnished by *Bostock* are imported into an equal protection context.[213] Under intermediate scrutiny, these restrictive policies are likely to fail.[214] *Bostock* is useful outside the sphere of employment discrimination

---

may need hormone access but deny hormones anyway. *Farmer*, 511 U.S. at 835-36; *Adams*, 716 F. Supp. 2d at 112-14. Further, by exacerbating unequal access to medical care when some trans people need medical transition care, freeze-frame policies violate the Equal Protection clause. Fields v. Smith, 712 F. Supp. 2d 830, 869 (E.D. Wis. 2010), *aff'd* 653 F.3d 550 (7th Cir. 2011) (affirmed on Eighth Amendment grounds).

[212] The practice of denying certain gender-affirming care to trans people but providing similar care to cis people is common in government-controlled spaces. All such instances constitute disparate treatment of marginalized groups like trans people, and should be reconsidered. *Cf.* DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 82 (Duke University Press, Revised and Expanded Edition 2015) ("Non-transgender 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 addition, reconstruction of breasts, testicles, penises, or other tissues lost to illness or accident is routinely performed or covered.").

[213] The *Bostock* court held employment discrimination against transgender people on the basis of their gender-diverse status, as violative of Title VII of the Civil Rights Act. Bostock v. Clayton Cnty., 590 U.S. 644, 680 (2020). It also hinted that transgender people could constitute a quasi-suspect class in instances of discrimination. *Id.* at 660-62 (2020) ("For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex"); *id.* at 733-34 (Alito, J., dissenting) ("By equating discrimination because of sexual orientation or gender identity with discrimination because of sex, the Court's decision will be cited as a ground for subjecting all three forms of discrimination to the same exacting standard of review.").

[214] One of this Article's goals is to engage in pro-LGBTQ+ discourse to generate solutions to a developing area of law. The Equal Protection litigation asserting trans rights has viability, but is not perfect. *See* Gonzales v. Cal. Dep't of Corr. & Rehab, No. 1:19-cv-01467-BAM, 2020 U.S. Dist. LEXIS 64505 at *18-19 (E.D. Ca. Apr. 13, 2020) (identifying intermediate scrutiny as the proper level of review in the Ninth Circuit for constitutional discrimination cases involving trans claimants and allowing an Equal Protection claim to move forward); Silpa Maruri, *Hormone Therapy for Inmates: A Metonym for Transgender Rights*, 20 CORNELL J.L. & PUB. POL'Y 807, 827, 832 (2011) ("[T]he most likely home that transgender individuals might find in the Equal Protection regime is as a quasi-suspect class . . . . The overall expressive effect of such an approach, based not in language of deformity or disability but in the language of protection from

because its holding can be applied in other circumstances in which the state has an interest in ensuring trans people do not experience oppression.[215] Further, Supreme Court precedent is unclear on the exact scrutiny level for trans people's classification, and current jurisprudence has done little to clarify ambiguities from prior holdings, like the use of factors to delineate what is quasi-suspect and what is not.[216] The standards for determining suspect class status may be antiquated in 2024.[217] Therefore,

---

prejudice and access to rights, comports with the mission of the transgender rights movement."). Other Equal Protection challenges to discrimination against transgender people in non-hormone or non-carceral contexts provide hope for the application to trans incarcerated plaintiffs. Tay v. Dennison, No. 19-cv-00501-NJR, 2020 U.S. Dist. LEXIS 76921 at *3-6 (S.D. Ill. May 1, 2020) (holding there were sufficient facts alleged by a trans incarcerated person to state a disparate-treatment claim); New Hampshire v. Anoka-Hennepin Sch. Dist., 950 N.W.2d 553, 570-71 (Minn. Ct. App. 2020) (holding that an Equal Protection claim brought by a trans boy was entitled to at least intermediate scrutiny review).

[215] The logic underlying the *Bostock* holding — that gender is a subdivision of sex, and thus, gender discrimination is a type of sex discrimination — is not airtight, but it has been reasonably extended by some judges to other contexts because of the anti-discrimination nature shared by federal statutes and the Constitution. Also, the recency of *Bostock* has prevented it from widespread and thorough application by lower courts in prison cases. *See Skrmetti*, 83 F.4th at 499 ("Further, just three years ago, the Supreme Court confirmed that if the government treats differently 'a person identified as male at birth for traits or actions that it tolerates in a[] [person] identified as female at birth,' or vice versa, the person's 'sex plays an unmistakable . . . role.'") (White, J., dissenting); Williams v. Kincaid, 45 F.4th 759, 772 (4th Cir. 2022) ("In part because of the long history of discrimination against transgender people, we have held that intermediate scrutiny applies to laws that discriminate against them."); Smith v. City of Salem, 378 F.3d 566, 577 (6th Cir. 2004) ("As this Court has noted several times, "the showing a plaintiff must make to recover on a disparate treatment claim under Title VII mirrors that which must be made to recover on an equal protection claim."). *But see* Naumovski v. Norris, 934 F.3d 200, 221 (2d Cir. 2019) (declining to adopt a district court's assertion that the standards for showing workplace discrimination under Title VII, § 1983, and the Equal Protection clause are "essentially the same".).

[216] The Supreme Court itself has combined factors, omitted factors, and admitted that some groups should be a suspect classification despite holding otherwise. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442-46 (1985) (describing the "real and undeniable differences" between the mentally disabled and non-mentally disabled, but refusing to apply a heightened standard of review). *But see* J.E.B. v. Ala. ex rel. T.B., 511 U.S. 127, 152 (1994) ("And though the intermediate scrutiny test we have applied may not provide a very clear standard in all instances . . . our case law does reveal a strong presumption that gender classifications are invalid.") (Kennedy, J., concurring).

[217] Not only were the *Carolene Products* "suspect classification" factors promulgated over eighty years ago, but American scholars continue to recognize that strict adherence to the gender binary serves patriarchy at the detriment of women and gender-diverse people. Jeremiah A. Ho, *Find Out What it Means to*

there is fertile legal ground for arguing that trans identity constitutes a suspect class.

As the accepted scrutiny level for Equal Protection claims by trans people in lower courts and intermediate courts of appeals, intermediate scrutiny would strike down restrictive hormone policies because they are not substantially related to an important government purpose and lack an exceedingly persuasive justification.[218] Recognized state justifications for carceral policies include deterrence of crime, rehabilitation, and internal security.[219] None of these purposes justify any of the three restrictive approaches.[220] Refusing gender-affirming hormones does not prevent trans people from committing crimes in prisons, does not rehabilitate them quicker, and does not make them categorically safer around other incarcerated people. Instead, the restrictive policies result in categorical denials of hormone care for swathes of trans people whose only shortcoming is

---

Me: The Politics of Respect and Dignity in Sexual Orientation and Antidiscrimination, 2017 UTAH L. REV. 463, 523 (2017). *See generally* Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. Rev. 507, 551 (2016). Furthermore, the judge-made requirement that discrimination be "intentional" ignores the context that discrimination is systemic and often belies notions of intent.

[218] *See* Cano v. S.C. Dep't of Corr., No. 9:22-cv-04247-DCC-MHC, 2023 U.S. Dist. LEXIS 160250, at *30-31, *38-39 (D.S.C. May 31, 2023); Kadel v. Folwell, 620 F. Supp. 3d 339, 379 (M.D.N.C. 2022) (holding that the denial of transgender plaintiff's insurance claims were not substantially related to an important governmental interest); Dekker v. Weida, 679 F. Supp. 3d 1271, 1290, 1298 (N.D. Fla. Jun. 21, 2023) (stating that "drawing a line based on gender nonconformity" triggers intermediate scrutiny and holding that a Florida ban on Medicaid payment for gender-affirming care violated the Fourteenth Amendment). These cases hold comparative value to prison context, as they involve trans peoples' attempts to gain state-funded gender-affirming care.

[219] Pell v. Procunier, 417 U.S. 817, 822–823 (1974) (holding that the deterrence of crime, rehabilitation, and internal security are "legitimate penological interests" in prisons and jails).

[220] Cano, 2023 U.S. Dist. LEXIS 160250, at *11; Cairin M. Fay, *Equal – But Not for Everyone – Protection? Disparate Transgender Rights in Prisons across the U.S. and the Subsequent Effect on Mental Health*, 25 SUFF. J. TR. & APP. AD. 257, 260, 268 (2020) (discussing the lack of connection between prisons' purported justifications and their denial of gender-affirming care); *cf.* Poe v. Labrador, No. 1:23-cv-00269-BLW, 2023 U.S. Dist. LEXIS 229332 at *44-45 (D. Idaho Dec. 26, 2023) (noting that a categorical ban on gender-affirming care as applied to trans minors failed under heightened scrutiny because the Idaho state defendants' purported justification of protecting minors from "the dangers of unproven medical . . . treatments" was pretextual); Federica Coppola, *Gender Identity in The Era of Mass Incarceration: The Cruel and Unusual Segregation of Trans People in The United States*, 21 INT'L J. CON. L. 649, 657 (2023) (noting that prison justifications for mistreating trans people are often "specious" and lead to other perils like denial of gender-affirming care).

circumstance.[221] Moreover, these policies are not supported by an "exceedingly persuasive justification."[222] States most often cite "prison security" for the justification behind demarcating trans care as different, but prison security has no "substantial relation" to limiting trans peoples' care.[223] Faced with challenges on a quasi-suspect class theory, federal courts will likely strike down restrictive policies under intermediate scrutiny.

While intermediate scrutiny analysis is likely to render such policies unconstitutional, the application of strict scrutiny provides a stronger response to unconstitutional hormone policies. Under strict scrutiny, restrictive policies constitute facially disparate treatment of a suspect class and are not narrowly tailored to serve compelling state interests.[224] Trans incarcerated people constitute a suspect class because their experiences in carceral settings align with the suspect class factors identified in *Frontiero*; they are a discrete and insular minority in the nationwide carceral system,[225] they have long experienced intentional discrimination,[226] and they lack sociopolitical agency as they are typically denied voting rights upon incarceration.[227] The life-threatening nature of GD complications in

---

[221] Stathers, *supra* note 91, at 259, 263 (describing how restrictive policies prevent prison actors from individualizing medical gender-affirming care for trans incarcerated people).

[222] U.S. v. Virginia, 518 U.S. 515, 531 (1996) (articulating the standard for intermediate scrutiny).

[223] *See* Fields v. Smith, 712 F. Supp. 2d 830, 868 (E.D. Wis. 2010), *aff'd* 653 F.3d 550 (7th Cir. 2011) (affirmed on Eighth Amendment grounds).

[224] See Richmond v. J.A. Croson Co., 488 U.S. 469, 507-08 (1989) and Graham v. Richardson, 403 U.S. 365, 371-73 (1971) for explanations of the justifiably demanding standard that state policies must meet to survive strict scrutiny review.

[225] *See* Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) (describing the factors used by the Supreme Court to determine whether to apply heightened standard to "new" classifications); GRANT ET AL., *supra* note 187, at 163 (reporting that trans survey respondents recalled being incarcerated in jails or prisons "for any reason" almost six times more often than the general population of the U.S.).

[226] Maruri, *supra* note 214, at 826.

[227] CHRISTOPHER UGGEN ET AL., LOCKED OUT 2022: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION 2 (2024), https://www.sentencingproject.org/app/uploads/2024/03/Locked-Out-2022-Estimates-of-People-Denied-Voting.pdf ("Laws in 48 states ban people with felony convictions from voting. In 2022, an estimated 4.6 million Americans, representing 2 percent of the voting-age population, will be ineligible to vote due to these laws or policies, many of which date back to the post-Reconstruction era.") *See also* Matthew Peljovich, *Can People Vote in Jail? Yes, But It's Very Challenging*, CLC: ISSUES: VOTING AND ELECTIONS (Aug. 1, 2022), https://campaignlegal.org/update/can-people-vote-jail-yes-its-very-challenging (describing the barriers to voting as an incarcerated person).

the oft-unstable prison setting exacerbates the need to identify trans people as a suspect class.[228]

Notably, strict scrutiny is also applicable because of intersectional considerations; trans people of color are harmed disproportionately by restrictive hormone policies.[229] This presents a constitutional problem

---

[228] Norsworthy v. Beard, 87 F. Supp. 3d 1104, 1110, 1119 (N.D. Ca. 2015) (referring to trans woman claimant's severe distress and anxiety as a result of denied gender-affirming care, and applying intermediate scrutiny to her disparate-treatment case to hold the Equal Protection claim sufficient). *Contra* White v. Farrier, 849 F.2d 323, 323 (8th Cir. 1988) (denying viability of incarcerated person's constitutional claim after they tried autocastration several times). Though the *Norsworthy* reasoning did not directly tie Michelle Norsworthy's suffering to her right to equal protection, the court cited the indicia of suspect classifications. This Article asserts that one of those important indicia should be the historical denial of adequate healthcare to gender-diverse people, which is rooted in systemic transphobia.

[229] This racial disparity in COVID-19 mortality is especially analogous here when viewing GD in the context of its medical implications. These medical implications are salient, even though trans status should not be medicalized as a precondition to receiving care. *See* Friedman, *supra* note 40, at 690-91 ("Early evidence already suggests incarcerated Black people are dying of COVID-19 at higher rates than others, with some dying just before their release date after serving decades in prison"). The lack of direct research on the issue of gender-affirming care for transgender people in prisons does not itself indicate that conditions are equitable or a lack of disproportionality. Instead, considered with the totality of circumstances for trans people in America, it highlights a severe need for improvement of social safety nets. *See generally* Akua O. Gyamerah et al., *Experiences and Factors Associated with Transphobic Hate Crimes Among Transgender Women in the San Francisco Bay Area: Comparisons Across Race*, 21 BMC PUB. HEALTH 1, 12 (2021) ("Additionally, the low level of police reporting of transphobic hate crimes suggests that trans women might be disillusioned with law enforcement's ability to bring justice to trans survivors of violence due to experiences of police disbelief and prejudice."); HUM. RTS. WATCH, "I JUST TRY TO MAKE IT HOME SAFE" 46 (2021) (quoting Thee Santos et al., *The Trump Administration's Latest Attack on Transgender People Facing Homelessness*, CTR. FOR AM. PROGRESS, (Sep. 3, 2020), https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/09/03/490004/trump-administrations-latest-attack-transgender-people-facing-homelessness (accessed Nov. 9, 2021)) ("According to survey data from the Center for American Progress, 87 percent of transgender respondents said 'it would be somewhat difficult . . . very difficult . . . or impossible . . . for them to find an alternative homeless shelter if they were refused.'"); Sel Julian Hwahng & Larry Nuttbrock, *Sex Workers, Fem Queens, and Cross-Dressers: Differential Marginalizations and HIV Vulnerabilities Among Three Ethnocultural Male-to-Female Transgender Communities in New York City*, 4 SEXUALITY RSCH. AND SOC. POL'Y 36, 7, 54 (2007) ("What was noticeably apparent was that White, middle-class cross-dressers were usually employed in legal occupations. If they engaged in sex work, it was always as a recreational pursuit. On the other hand, many of the House Ball community members

because though these policies do not explicitly target recognized suspect classes, their application discriminatorily impacts Black, trans incarcerated people, among other nonwhite trans people.[230] Therefore, this issue may present the intersection of suspect classes with a quasi-suspect class.[231] Restrictive hormone rules plainly violate Equal Protection guarantees, as the Equal Protection clause was drafted to contend with negative impacts of anti-Black discrimination.[232] Discrimination against intersectional classes is not limited to the sphere of prisons and jails, and executive decisionmakers can learn from the treatment of other classes in state custody, like minors in foster systems.[233]

[whom were mostly Black and Latino] also did sex work, but they, like the Asian sex workers . . . engaged in survival sex work, even if just temporarily.").

[230] Village of Arlington Heights v. Metro Housing Dev. Corp., 429 U.S. 252, 266 (1977) ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.").

[231] Maruri, *supra* note 214, at 825, 828 (positing that in the context of hormone therapy in prisons, transgender incarcerated people represent the intersection of a quasi-fundamental right (the right to gender self-determination) and a quasi-suspect class (a class that meets not all, but at least some of the suspect classification factors)). This Article disagrees with Maruri's assertion that trans people can reasonably only constitute a quasi-suspect class, as that intermediate status between unprotected and protected would continue courts' trend of imprecisely defining and obfuscating trans legal rights. Full suspect class status would attain more concrete protections for trans people, faster.

[232] *Fourteenth Amendment: Report to Congress on New Draft of Fourteenth Amendment: Hearing on Fourteenth Amendment Before the Joint Comm. on Reconstruction*, CONG. GLOBE, 39th Cong., 1st Sess. 2459-60 (1866) (referencing a proposed, but unadopted article of the Fourteenth Amendment that would have pressured the former Confederate states to immediately enfranchise free Black men — "In my judgment, we shall not approach the measure of justice until we have given every adult freedman a homestead on the land where he was born and toiled and suffered . . . That article referred to provided that if one of the [Black] injured race was excluded [from voting] the State should forfeit the right to have any of them represented. That would have hastened their full enfranchisement.") (statement of Thaddeus Stevens, Rep. Penn.).

[233] In Illinois, gender-affirming healthcare for children in state custody provides the right to hormone therapy, comporting with equal protection and affirming gender-diverse children's humanity. Its policies state:

> LGBTQIA+ Youths' protected legal rights while in care include, but are not limited to: . . . (2) the right to be treated equally, to express their gender identity, and (3) the right to choose to be open or private about their sexual orientation, gender expression and gender identity. Adults involved in the care of LGBTQIA+ Youth have a legal and ethical obligation to ensure these youth are supported, safe, and their rights are protected . . . For initiation of [hormone] therapy, approval of care for minor Youth shall be based on either: (i) *one letter* from a member of the Youth's culturally competent multidisciplinary

Institutionalists and originalists alike may disagree with a strict scrutiny approach, positing that a lower scrutiny level like rational basis should apply to trans incarcerated peoples' claims. Similar discourse regarding unequal treatment occurred in the American military when feminist advocates fought for women's right to participate in front-line military combat; this dialogue suggested there are reasons for discrimination in strictly gendered contexts that may be impermissible in racial contexts.[234] These reasons may limit the viability of trans incarcerated people gaining suspect class status. Yet, even if courts determine that trans incarcerated people are only a quasi-suspect class, restrictive hormone policies —

> team (involving both medical and mental health professionals) reflecting the assessment and opinion of the team that the Youth is appropriate for initiation of puberty blocking / hormone therapy; or (ii) if the Youth does not have access to a multidisciplinary team, one letter of assessment from the Youth's *culturally competent health care professional* stating that the Youth is appropriate for initiation of puberty blocking therapy.

ILL. DEP'T OF CHILD. AND FAM. SERV.'S, APPENDIX K: SUPPORT AND WELL-BEING OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUESTIONING/QUEER, INTERSEX, AND ASEXUAL (LGBTQIA+) CHILDREN AND YOUTH, *in* PROCEDURES 302, at 1, 11 (2023) (emphasis added) (hereinafter ILL. DEP'T OF CHILD. POLICY). While Illinois has robust social safety nets in place for children in its custody and institutes few barriers to these children to access gender-affirming care, Texas wages war on minors' access to gender-affirming hormone therapy. *Compare id. with* Eleanor Klibanoff & Reese Oxner, *Texas' Child Welfare Agency Ordered To Investigate Trans Kids' Families Has Been In Crisis For Years*, TEX. TRIB. (Mar. 11, 2022), https://www.texastribune.org/2022/03/11/texas-dfps-trans-teens/#:~:text=Texas'%20child%20welfare%20agency%20ordered,of%20kids%20in%20foster%20care (detailing parents' negative responses throughout Texas after Governor Greg Abbott ordered the state Department of Family and Protective Services to investigate both natural and foster parents of transgender minors who provided those children various forms of gender-affirming care). Notably, in Texas, Black and Hispanic/Latino children together constitute a majority of the children in foster care and lack guaranteed gender-affirming care when they happen to be gender-diverse, creating layered disadvantages for young individuals with intersectional backgrounds. Hope Osborn, *Breaking Down the Numbers for Kids in Foster and Kinship Care: Strategic Framework*, TEX. 2036 (2022), https://texas2036.org/posts/breaking-down-the-numbers-for-kids-in-foster-and-kinship-care-strategic-framework/#:~:text=In%202020%2C%20three%20out%20of,%2C%207%25%20live%20in%20Texas; HEALTH CARE FOR TEXAS CHILDREN IN FOSTER CARE: STAR HEALTH, *in* TEX. CHILD WELFARE L. BENCH BOOK, at 229-44, http://benchbook.texaschildrenscommission.gov/pdf/Bench%20Book%202022%20STAR%20Health.pdf. (omitting gender-affirming care from healthcare policies for children in state custody).

[234] Tim Bakken, *A Woman Soldier's Right to Combat: Equal Protection in the Military*, 20 WM. & MARY J. WOMEN & L. 271, 285-88 (2014).

namely, freeze-frame policies — fail constitutional muster under intermediate scrutiny review.[235]

D. Obstructionist[236] Hormone Policies for Gender-Diverse People in Prisons Fail Under Both Intermediate and Strict Scrutiny

With regards to trans incarcerated peoples' gender-affirming care, obstructionist policies are also unconstitutional. Policies with excessive obstacles to hormones contravene the Equal Protection clause because treatments for other classes like menopausal incarcerated women do not have similar barricades.[237] Trans incarcerated people who are denied hormone access by complicated hormone policies are similarly situated to cis incarcerated people but treated disparately.[238]

These policies fail under intermediate scrutiny because they are not substantially related to important state interests and are not supported by

---

[235] *See* Fields v. Smith, 712 F. Supp. 2d 830, 868 (E.D. Wis. 2010), *aff'd* 653 F.3d 550 (7th Cir. 2011) (affirmed on Eighth Amendment grounds).

[236] For this Article's purposes, "obstructionist" policies barricade hormone access behind procedural obstacles, administrative barriers, or ambiguous language. Ambiguous language can make it practically unclear whether incarcerated people can safely acquire gender-affirming care or not. Even "full-access" prison jurisdictions sometimes have provisions that obstruct gender-affirming care. *See e.g.,* GA. POL'Y NO. 507.04.68, *supra* note 106.

[237] *See* WIS. POL'Y NO. 500.70.27, *supra* note 93, at § V(d)(1)-(9) (2024) (detailing the four, sometimes five-step process after a trans person requests care, that can take extended amounts of time and result in denial of care). For perspective on how a state treats trans and cis incarcerated people disparately, compare GA. POL'Y NO. 507.04.68, *supra* note 106, at 3, 5-7 (requiring as preconditions for hormone therapy initiation: (1) informed consent; (2) age of majority; (3) "reasonably well controlled" medical risk factors, if any; and (4) the approval of *four* Georgia Department of Corrections officials) (emphasis added) with GA. DEP'T OF CORRS., STANDARD OPERATING PROCEDURES, POLICY NO. 507.04.69: WOMEN'S HEALTH SERVICES, at 1-7 (2022) (stating broadly that all incarcerated women, *without exclusion*, will receive standard care including health history screenings, reproductive healthcare, and STI testing throughout the incarceration period). Although the Georgia trans hormone policy is not categorized as "obstructionist," it still has the glaring issue of expanded administrative barriers because of the power given to four prison actors, and as shown Ashley Diamond's experiences with its implementation.

[238] *See* Williams v. Lane, 548 F. Supp. 927, 932 (N.D. Ill. 1982) (holding that incarcerated people in solitary confinement are similarly situated to people incarcerated in general population). *Compare* Laube v. Campbell, 333 F. Supp. 2d 1234, 1258 (M.D. Ala. 2004) (outlining a settlement agreement following women's healthcare organization's standards, which included hormone therapy as a care option for menopause) *with* CONN. DIRECTIVE NO. 8.17, *supra* note 71, at 2-4 (2023) (outlining overcomplicated gender-diverse treatment plans for incarcerated people).

exceedingly persuasive justifications.[239]Some courts may disagree. As one district judge stated, "[t]he biological female already has a vagina; the biological male doesn't. The government has an interest in ensuring that inmates receive appropriate, effective medical treatment. Employing different decision-making policies for different types of medical procedures does not violate the Equal Protection Clause."[240]

However, the Court's response misses the point. It is the separate categorization of trans incarcerated people and consequential introduction of barriers to hormone access, *not* merely different decision-making, that causes insufficient care for many trans imprisoned people.[241] The minimum requirement for access to hormone therapy should be informed consent. Obstructionist hormone policies disadvantage trans incarcerated people arbitrarily by instituting excessive levels of review before even initiating discussions about hormone options. [242]

Similarly, if trans incarcerated people are deemed a suspect class, obstructionist hormone policies fail strict scrutiny review because they are not narrowly tailored to serve compelling government interests. These policies entail lengthy review procedures,[243] arbitrary, veto-like powers exercised by review committees,[244] or unclear language resulting in outcomes similar to those of freeze-frame policies.[245] Obstructionist policies do not serve legitimate government interests for prison management.[246]

---

[239] *Cf. Fields*, 712 F. Supp. 2d at 868 ("Furthermore, nothing [is] in the record to support a finding that withdrawing hormone therapy from the plaintiffs will decrease the risk that they will become victims of sexual assault. Thus, a connection between the hormone therapy barred by Act 105 and sexual assaults is not reasonable — instead, defendants' own expert said connecting them was 'an incredible stretch.'").

[240] Williams v. Kelly, No. CV 17-12993, 2018 U.S. Dist. LEXIS 158119, at *30 (D. La. Aug. 27, 2018), *aff'd*, 818 F. App'x 353 (5th Cir. 2020).

[241] *Fields*, 712 F. Supp. at 867.

[242] It is clear that state prison and jail departments have the institutional infrastructure to open incarcerated peoples' access to gender-affirming hormones similarly to Illinois' approach to foster children's gender-affirming care. ILL. DEP'T OF CHILD. POL'Y, *supra* note 233, at Procedures 302 p. 11. *See generally* Romeo, *supra* note 85, at 729-31 ("Because the experiences of many gender nonconforming people do not match the diagnostic criteria of GID, and because, for all except the most privileged few, accessing trans-friendly health care is extraordinarily difficult, the medical model of gender does not serve the vast majority of gender non-conforming people.").

[243] *E.g.,* CONN. DIRECTIVE NO. 8.17, *supra* note 71, at 4 (2023); ARIZ. POL'Y, *supra* note 128, at 35-37, 144-45.

[244] *E.g.,* UTAH POL'Y, *supra* note 128, at § 02.04(C).

[245] *See, e.g.,* VA. GUIDELINES, *supra* note 128, at § 13(a)-(e).

[246] Few American courts have ruled on this particular constitutional question. Nonetheless, if strict scrutiny applies to cases of trans discrimination under obstructionist policies, prison officials would have to prove that these policies are narrowly tailored to serve the recognized compelling interests of carceral "security and discipline." Johnson v. California, 543 U.S., 499, 512 (2005).

Maintaining a complicated *status quo* as an implicit form of blocking trans peoples' *access* is the constitutional problem with these policies.

III. PROPOSAL: A CALL FOR FEDERAL COURTS TO FIND CURRENT PRISON HORMONE APPROACHES UNCONSTITUTIONAL

"The arc of the moral universe bends towards justice, but it does not bend of its own volition."[247]

Faced with pressure from trans incarcerated litigants, non-governmental organizations, and the courts, it is well past time executives in every jurisdiction streamline their hormone access policies by adopting person-centered alternative care frameworks like the ICM.[248] Although federal prisons have abolished freeze-frame policies,[249] overly medicalized psychologist-gatekeeper policies remain an obstacle for trans people seeking gender-affirming hormone care in state prisons.[250] Policies denying hormone therapy for trans incarcerated people are vulnerable to both Equal Protection and Eighth Amendment challenges; even where such challenges do not succeed, they push the discourse forward.[251] As arbiters between the government branches, courts upholding transition care rights can pressure legislatures and agencies to comport with modern standards

---

[247] Bernice Donald, J., retired, Address at "Implicit Bias & Decision-Making: A Fireside Chat with Judge Bernice Donald and Attorney Terrence Reed" at the University of Memphis Cecil C. Humphreys School of Law (Jan. 31, 2024).

[248] Gerritse et al., *supra* note 85, at 693-94 (referencing Fenway Health in Boston, which adopted an alternative care framework, only requiring (1) the patient's informed consent and (2) a persistent gender-diverse identity that falls under the DSM definition of GD, to receive hormone therapy).

[249] FED. BUREAU OF PRISONS, MEMORANDUM FOR CHIEF EXECUTIVE OFFICERS ON GENDER IDENTITY DISORDER EVALUATION AND TREATMENT (2011), https://www.glad.org/wp-content/uploads/2011/09/2011-gid-memo-final-bop-policy-1.pdf.

[250] Currently, there are twenty-one U.S. jurisdictions with problematic hormone-access policies for trans incarcerated people, and those in the majority are not perfect. *See supra*, Part I.B.3.ii.; GA. POL'Y NO. 507.04.68, *supra* note 106; Dangaran, *supra* note 24, at 169, 178 (suggesting that the removal of the requirement of a GD diagnosis would remove obstacles to trans incarcerated care).

[251] *See* JAILHOUSE LAWYER'S HANDBOOK, *supra* note 87 at 26-29, 60-64.

of care.[252] Also, benefits of reformed access will hopefully flow outward to other incarcerated classes.[253]

The current landscape regarding gender-affirming care indicates some courts' and many litigators' willingness to uphold trans peoples' rights.[254] Where trans incarcerated people seek to continue or initiate medical transition through hormone therapy, are denied access to such therapy by a carceral policy, and file suit, federal courts should enforce their rights through the Fourteenth Amendment. Current challenges requesting care are often premised on the Eighth Amendment, but the expansion of avenues can broaden gender-affirming care for trans incarcerated people.[255]

Certain prison hormone policies are vulnerable to Equal Protection challenges. Four categories of hormone access policies should be held unconstitutional under Equal Protection by reviewing courts: (1) categorical bans, (2) freeze-frame policies, (3) those failing to expressly permit access to gender-affirming hormones in their text, and (4) obstructionist policies.[256] There are scarce recent Equal Protection challenges in hormone therapy cases against prisons, but past holdings demonstrate some of the litigation strategies available.[257]

Several approaches to gender-affirming care for trans incarcerated people harmfully distinguish them from other incarcerated classes and ultimately result in disparate-treatment.[258] Bare medicalization fails to consider the totality of trans incarcerated peoples' circumstances.[259] If the purpose of the Fourteenth Amendment is to provide all people equal

---

[252]. Graham v. Florida, 560 U.S. 48, 58 (2010) ("[T]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.") (quoting Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (quoting Furman v. Georgia, 408 U.S. 238, 382 (1972) (Burger, C. J., dissenting)).

[253] *See* Kaufman, *supra* note 71, at 91-92 ("Laws targeting the autonomy of women and their right to choose an abortion and laws targeting transgender peoples' access to gender-affirming care are tied together in a profound way.").

[254] Gonzales v. Cal. Dep't of Corr. & Rehab, No. 1:19-cv-01467-BAM, 2020 WL 1847491, at *6-7, 2020 U.S. Dist. LEXIS 64505 at *18-19 (E.D. Ca. Apr. 13, 2020); *see also* Quinn Yeargain, *Litigating Trans Rights in the States*, 85 OHIO ST. L.J. 355, 400-01 n. 313 (2024) (compiling state-level challenges to gender-affirming care bans).

[255] Cano v. S.C. Dep't of Corr., No. 9:22-cv-04247-DCC-MHC, 2023 U.S. Dist. LEXIS 160250, at *29-31 (D.S.C. May 31, 2023); Vargas v. California Dep't of Corr. & Rehab., No. 1:20-cv-00083-JLT-CDB, 2023 U.S. Dist. LEXIS 27896, at *16–17 (D. Ca. Feb. 17, 2023) (permitting a trans incarcerated person's disparate-treatment claim to move forward).).

[256] *Supra*, Parts II.C.2, II.D.

[257] *Supra*, Part I.C.3*; see generally* Fields v. Smith, 712 F. Supp. 2d 830 (E.D. Wis. 2010), *aff'd* 653 F.3d 550 (7th Cir. 2011).

[258] Cano v. S.C. Dep't of Corr., No. 9:22-cv-04247-DCC-MHC, 2023 U.S. Dist. LEXIS 160250, at *30 (D.S.C. May 31, 2023).

[259] Johnson, *supra* note 185, at 517.

protection under the law, then state corrections departments and courts must proscribe carceral policies that disparately limit access to hormones[260] and adopt holistic, person-oriented hormone policies.[261] Reformed policies should affirmatively promise access to gender-affirming hormone therapies for all gender-diverse people who seek to medically transition.[262]

CONCLUSION

"They literally did everything they could to make sure that . . . my demise would be inevitable."263

Freeze-frame policies still exist as testaments to mainstream society's discomfort with gender-diversity. Recent legal challenges undertaken by trans incarcerated people demonstrate both claimants' courage and the possibilities for prison reform in the courts. Incremental non-carceral reforms provide immediacy, saving trans lives, while organizers work in the streets and legislatures to deconstruct peoples' ideological and political investments in the institution of prisons. As demonstrated here, the legal system must progress regarding gender, or continue to sow chaos in the lives of Black LGBTQ+ people already at risk of incarceration.

Repealing restrictive policies and amending obstructionist hormone policies will bring carceral institutions in line with federal constitutional guarantees to Equal Protection. These reforms should and can be undertaken through non-carceral and de-carceral care frameworks like the ICM, as the United States already incarcerates people at higher rates than any other nation.[264] History has shown that instituting teams of psychologists to gatekeep life-altering decisions for trans incarcerated people is not an effective approach to gender-affirming care.[265] It was ineffective for Adree

---

[260] Both state and federal courts can follow the lead provided by *Fields*, 712 F. Supp. 2d at 866-69.

[261] *See* Matthew Murphy et al., *Implementing Gender-Affirming Care in Correctional Settings: A Review of Key Barriers and Action Steps for Change*, J. CORR. HEALTH CARE (2023) for a notable example of the Rhode Island correctional system implementing a clinical care model that allows trans incarcerated people to access transition hormones through an informed consent procedure.

[262] *See* Flack v. Wis. Dep't of Health Servs., 395 F. Supp. 3d 1001, 1020-22 (W.D. Wis. 2019) (striking down an administrative regulation preventing use of Medicaid funds for gender-affirming care under the Equal Protection clause); *see generally* Gerritse et al., *supra* note 85, at 693.

[263] Closer Look with Rose Scott, *Trans Activist Ashley Diamond Discusses Healing After Dropping Second Lawsuit Against Georgia DOC*, WABE, at 11:42 (Feb. 10, 2023), https://www.wabe.org/transgender-civil-rights-activist-ashely-diamond-discusses-her-journey-to-healing-in-the-aftermath-of-dropping-her-second-lawsuit-against-the-georgia-department-of-corrections/.

[264] Emily Widra, *States of Incarceration: The Global Context 2024*, PRISON POLICY INITIATIVE (June 2024), https://www.prisonpolicy.org/global/2024.html.

[265] Dangaran, *supra* note 24, at 206.

Edmo, Michelle Kosilek, Ashley Diamond, and countless other trans people in prisons.[266] A better path exists in the provision of hormone resources without requiring GD diagnoses. A better path exists in the adoption of the ICM. Policymakers' carceral decisions must reflect the reality that disparate treatment restricts rather than heals. All incarcerated people in America, from South Carolina to California, can have their gender identity protected if this path is taken. It is incumbent upon lawyers to walk that path now and continue along it, against systems that induce them to forget about their trans neighbors locked in cells. Humanity demands that the law remember.

***

[266] Aldrich, *supra* note 32, at 409.