Trans Medical Care in Prisons, COVID-19, and the Eighth Amendment's Uncertain Future

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In 2019 and 2020, the Supreme Court denied two petitions for certiorari concerning the provision of gender confirmation surgery to incarcerated individuals.[1] These denials solidified a circuit split over whether a prison must provide gender confirmation surgery to incarcerated people with gender dysphoria[2] under the Eighth Amendment's prohibition on cruel and unusual punishment. During that same period, another disagreement in the federal courts over prison health care was brewing: what standards (if any) the Eighth Amendment imposes on prisons with regard to protecting incarcerated people

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1. *Compare* Edmo v. Corizon, Inc., 935 F.3d 757, 803 (9th Cir. 2019), *cert. denied sub nom.* Idaho Dep't of Corr. v. Edmo, 141 S. Ct. 610 (2020) *with* Gibson v. Collier, 920 F.3d 212, 216 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 653 (2019).

2. The term gender dysphoria has been criticized as equating trans identity with a mental disorder. *See generally* Roy Richard Grinker, *Being Trans is Not a Mental Disorder*, N.Y. TIMES (Dec. 6, 2018), https://www.nytimes.com/2018/12/06/opinion/trans-gender-dysphoria-mental-disorder.html. However, prison doctors and federal courts still use a gender dysphoria diagnosis as a prerequisite to finding that a prison has violated a trans person's rights by denying hormone therapy or other gender confirming treatment. Accordingly, I use it where appropriate in this article.

from COVID-19.[3] The Supreme Court also declined to decide this issue.[4] But the petitions, growing disagreement between the federal courts, and an increasingly bold conservative majority on the Supreme Court have made the future of Eighth Amendment-based healthcare in prisons uncertain.

This article provides a brief overview of the history of Supreme Court doctrine and political contention surrounding prison conditions litigation and advocates for prophylactic legislative action to codify and build upon Eighth Amendment conditions of confinement jurisprudence, particularly in the realm of healthcare. Prison healthcare has long been a constitutional issue. But as we have seen this past court term, protections that were once won under the Constitution may still be lost.

I.
A BRIEF HISTORY OF THE ADVENT OF CONDITIONS OF CONFINEMENT JURISPRUDENCE UNDER THE EIGHTH AMENDMENT

Prior to the 1960s, the law viewed incarcerated people as de facto slaves of the state without any constitutional rights, much less a positive right to healthcare.[5] However, in the 1950s and '60s, incarcerated members of the Nation of Islam and civil rights leaders including Malcolm X began to challenge the accepted notion that those who were convicted of crimes had forfeited their rights.[6] In 1964, the Warren Court, in a one-paragraph per curiam opinion, held that an incarcerated Muslim had stated a claim for religious discrimination.[7] This decision opened the door to prison litigation in the federal courts, and over the next decade the Court would establish a wide-ranging constellation of constitutional prison law.[8]

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3. *Compare* Martinez-Brooks v. Easter, 459 F. Supp. 3d 411, 439 (D. Conn. 2020) (granting temporary restraining order to plaintiff-inmates because "prison officials have an Eighth Amendment duty to protect inmates from exposure to communicable disease"); Maney v. Brown, No. 6:20-CV-00570-SB, 2021 WL 354384 (D. Or. Feb. 2, 2021) (granting a preliminary injunction against a prison for its failure to provide inmates with adequate protections against COVID-19, despite the prison taking *some* steps against transmission), *with* Wilson v. Williams, 961 F.3d 829, 841 (6th Cir. 2020) (finding that essentially any precautionary measures taken by prison officials against COVID-19 would preclude a finding of an Eighth Amendment violation, regardless of the efficacy of those measures).

4. Valentine v. Collier, 140 S. Ct. 1598, 1601 (2020).

5. *See* Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790 (1871) (describing prisoners as "slaves of the state").

6. See *In re* Ferguson, 361 P.2d 417, 418 (Cal. 1961) (en banc); MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X 199 (1964) (discussing the problem of "Muslim teachings" in prisons).

7. Cooper v. Pate, 324 F.2d 165, 166 (7th Cir. 1963), rev'd, 378 U.S. 546 (1964) (per curiam). For a more in-depth description of the role that Black Muslim incarcerated people played in early prison litigation, see Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 527-30 (2021).

8. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 555 (1974) (finding that incarcerated people have due process rights in disciplinary hearings). *See generally* Driver & Kaufman, *supra* note 7, at 531-32.

In 1974 the Supreme Court for the first time applied the Eighth Amendment's prohibition on cruel and unusual punishment to conditions of prison confinement. In *Estelle v. Gamble*, the Court held that a prison's deliberate indifference to an inmate's serious medical need was violative of the Eighth Amendment.[9] The importance of this decision to prison healthcare is difficult to overstate: it was the first time the Court applied the Eighth Amendment to internal prison operations. Previously, the amendment had been applied to, for instance, permissible forms of the death penalty[10] or the constitutional limits on proportionality of crime and punishment[11]—but the Court had never examined the lived experience of prisoners as a constitutional issue. While Gamble, the plaintiff in that case, still lost his claim, the importance of the decision extended well beyond his case: *Estelle* explicitly held that conditions of confinement imposed by prison officials, rather than by statute, could be considered "punishment" under the Eighth Amendment—an idea that is now so entrenched it may be difficult to appreciate how novel it was at the time. Further, the Court definitively established "the government's obligation to provide medical care for those whom it is punishing by incarceration."[12] Today, incarcerated people are the only group in America that hold a positive constitutional right to medical care.

This decision led to a striking project of lower federal court involvement in prison healthcare systems. In 1964, no American court had ever ordered a prison to change its conditions of confinement; by 1984, 24 percent of the nation's 903 state prisons (including at least one in each of forty-three states and the District of Columbia) operated under a court order requiring reform.[13] Prisons under court order housed 42 percent of the nation's state prisoners.[14] On average, health care claims were the most frequent subject of inmate litigation,[15] and deficient

9. 429 U.S. 97 (1976).

10. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 158 (1976) (finding the imposition of the death penalty for the crime of murder is not cruel and unusual); State of La. ex rel. Francis v. Resweber, 329 U.S. 459, 462 (1947) (holding it is not cruel and unusual to electrocute a prisoner convicted to die a second time after the first electrocution failed).

11. *See, e.g.*, Robinson v. California, 370 U.S. 660, 660 (1962) (finding a statute that criminalized the status of being addicted to narcotics was violative of the Eighth Amendment).

12. Estelle, 429 U.S. at 103.

13. MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 13 (1998).

14. Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2004 (1999).

15. The figures used to calculate the average estimate for each litigation topic were taken from Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1571 n. 48 (2003). The average was calculated by adding the estimates for each subject (taking the highest number when a range was given) and then dividing by the number of estimates. For assaults, the average estimate was 14.95 percent; for health care the average estimate was 16.3 percent; for discipline the average estimate was 15.46 percent; and for conditions the average estimate was 10.41 percent. Considering that many "conditions" cases were in fact related to healthcare (consider, for instance, the provision of hand sanitizer and soap), the estimates for healthcare-related litigation are probably still lower than the reality.

medical services and overcrowding were tied for the highest incidence of court orders.[16]

Finney v. Hutto provides an illustrative example of federal court involvement in prisons. In that case, which was litigated for over ten years, a class of prisoners in Arkansas alleged thirteen violations of their constitutional rights, including overcrowding, lack of medical care, brutality, and inhumane solitary confinement conditions.[17] The district court issued a highly detailed opinion (that has since been called "the most comprehensive and thorough examination of a prison system ever undertaken by a court")[18] and affirmed that the "state owes to its convicts a constitutional duty to provide them reasonable and necessary medical and surgical care and this duty extends to the field of mental health and also to other fields of health care."[19] Similarly involved orders were entered around the country.[20]

This prison litigation renaissance was short lived, however. In the late 1980s and early 1990s, both the legislative branch and the Supreme Court began to scale back the extent to which the Eighth Amendment could be used to protect incarcerated people.

II.
RETRENCHMENT AND APATHY

Just two decades after *Estelle* was decided, the vast judicial involvement in prisons began to receive backlash: Prison administrators complained about being micromanaged, local officials began to talk about the enormous financial and political costs of complying with court-ordered relief, and legislators blamed judicial activism for the state of prison litigation. The National Association of Attorneys General distributed a list of the "top ten" frivolous prisoner lawsuits to the press[21] and a *New York Times* opinion piece complained that "[t]axpayers have grown justifiably tired of footing the bill for the special privileges provided to prisoners when they file their suits."[22] The media hysteria culminated in a now-infamous article that detailed the case of a prisoner who sued over receiving a jar of creamy peanut-butter instead of crunchy.[23] Conservative politicians

16. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE 1984 CENSUS OF STATE ADULT CORRECTIONAL FACILITIES, *available at* https://www.bjs.gov/content/pub/pdf/csacf84.pdf.

17. 410 F.Supp 257 (E.D. Ark. 1976).

18. FEELEY & RUBIN, *supra* note 13, at 71.

19. Finney v. Hutto, 410 F.Supp 257, 259 (E.D. Ark. 1976).

20. For a few examples, see Hamilton v. Schiro, 338 F. Supp. 1016, 1019 (E.D. La. 1970) (entering one of the longest federal court ordered prison consent decrees in American history); Plyler v. Leeke, No. CIV. A. 3:82-0876-2, 1986 WL 84459, at *15 (D.S.C. Mar. 26, 1986) (approving a sixty-eight-page consent decree that prescribed prison standards for health care, hygiene, and cell size).

21. Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L. J. 1771, 1777 (2003).

22. *Free the Courts From Frivolous Prisoner Suits*, N.Y. TIMES, Mar. 3, 1995, at A26.

23. Ashley Dunn, *Flood of Prisoner Rights Suits Brings Effort to Limit Filings*, N.Y. TIMES, Mar. 21, 1994, at A1.

argued that "judicial orders entered under Federal law have effectively turned control of the prison system away from elected officials accountable to the tax-payers and over to the courts."[24]

In response, both the Supreme Court and the legislature stepped in. "It is the role of courts to provide relief to claimants," the Court wrote in one case, "It is not the role of courts, but that of the political branches, to shape the institutions of government . . . it is for the political branches of the State and Federal Governments to manage prisons."[25] The Court tightened its *Estelle* holding (albeit with four justices concurring only in the judgment), clarifying that incarcerated people alleging inadequate provision of medical care must show that the prison staff had a culpable state of mind, that they acted with "deliberate indifference."[26] This requirement is still in place today and has played a critical role in gender confirmation surgery and COVID-19 cases.

The legislature took a different tact: rather than addressing the substance of Eighth Amendment conditions of confinement protections, the political branches enacted the Prison Litigation Reform Act (PLRA), which made it drastically more difficult for incarcerated people to ever reach the courts.[27] The Act imposed enormous process on prisoner lawsuits and drastically decreased judicial discretion with regard to relief.[28] But as Linda Greenhouse in a *New York Times* article from 1996 put it, the PLRA differed from the "titanic constitutional battles of the early 1980s, when the Republicans newly in control of the Senate pushed a series of bills to strip the Supreme Court and the lower Federal courts of jurisdiction to decide cases involving school prayer, busing and abortion" in its "precision and indirection."[29] Because the Act targeted process rather than substantive rights, it did not give rise to the same left versus right political fervor that other contemporary constitutional battles of the time did.

The PLRA satisfied public appetite for reforming conditions of confinement litigation, and once it was passed, the subject largely disappeared from the public conscience. Likewise, Eighth Amendment conditions of confinement cases—even when they concern politically contentious topics such as trans healthcare and COVID-19 vaccination—have taken a backseat to cases involving other 1960s-era constitutional rights, such as abortion. The state of prison litigation may be, as Justin Driver and Emma Kaufman recently described

24. 142 Cong. Rec. S3703-01 (1996).

25. Lewis v. Casey, 518 U.S. 343, 349 (1996).

26. Wilson v. Seiter, 501 U.S. 294, 299 (1991).

27. 42 U.S.C. § 1997(e).

28. 18 U.S.C. § 3626(a)(3) (implementing procedural barriers to obtaining a "prisoner release order").

29. Linda Greenhouse, *How Congress Curtailed the Courts' Jurisdiction*, N.Y. TIMES (Oct. 27, 1996), https://www.nytimes.com/1996/10/27/weekinreview/how-congress-curtailed-the-courts-jurisdiction.html?searchResultPosition=6.

it, "bleak," but it is not nonexistent.[30] Rather, it is nonpublic, no longer the subject of multiple Supreme Court decisions per term, as it once was. [31]

As the next section discusses, those who are invested in the health of incarcerated people should not take the current period of public and judicial indifference for granted. Growing circuit splits and the intersection of hot-button issues and prison healthcare standards may lead to a Supreme Court decision on conditions of confinement doctrine soon—and it is unlikely that such a decision would result in improvement of prison conditions in America.

III.
THE URGENT NEED FOR LEGISLATION TO PROPHYLACTICALLY CODIFY CONDITIONS OF CONFINEMENT JURISPRUDENCE IN THE FACE OF AN ACTIVIST CONSERVATIVE COURT

In some ways, the lack of political attention on Eighth Amendment conditions of confinement jurisprudence over the past 20 years has been a blessing for prisoners' rights activists and incarcerated people. While the PLRA drastically diminished incarcerated people's access to the courts, courts' ability to oversee implementation of constitutionally mandated conditions, and the scope of structural relief courts can grant to incarcerated people, the basic tenets of Eighth Amendment protections have held. Neither political party has seemed particularly interested in attacking the constitutional basis on which the provision of health care to prisoners rests.

This has been apparent through the development of trans healthcare in prisons. While trans rights have created a firestorm of political controversy outside prison walls, the public has paid little attention to a developing doctrinal body of constitutional law in the lower federal courts on trans healthcare in prisons. It is now well established in the courts that Gender Identity Disorder (GID) is a "serious medical need" that triggers Eighth Amendment protections.[32] Accordingly, courts have found that blanket prison policies that prohibit treatments for GID such as hormone therapy are facially unconstitutional.[33] Recently, as mentioned in the opening paragraphs to this article, some courts have found that the Eighth Amendment may also mandate that a prison provide

30. Driver & Kaufman, *supra* note 7, at 539.

31. *See id.* at 534 ("Today, it is difficult to imagine a major constitutional prison case reaching the Supreme Court every few years, not to mention two banner cases in a single Term.").

32. *See, e.g.*, Fields v. Smith, 653 F.3d 550, 555 (7th Cir. 2011); Keohane v. Fla. Dep't of Corr. Sec'y, 952 F.3d 1257, 1266 (11th Cir. 2020) (acknowledging the parties' agreement that gender dysphoria constitutes a "serious medical need"); De'lonta v. Johnson, 708 F.3d 520, 522 (4th Cir. 2013); White v. Farrier, 849 F.2d 322, 325 (8th Cir. 1988); *Maggert v. Hanks*, 131 F.3d 670, 671 (7th Cir. 1997) (describing gender dysphoria as a "serious psychiatric disorder").

33. Fields, 653 F.3d 550.

gender confirmation surgery to incarcerated individuals who demonstrate a strong need for it.[34]

A circuit split on this issue arose when the Ninth Circuit became the first circuit court to find that a prison's denial of gender confirmation surgery violated the Eighth Amendment.[35] This decision was directly opposed to a decision made earlier that year by the Fifth Circuit.[36] The court in that case found that since there was no medical consensus on gender confirmation surgery as a treatment method for GID, a prison's policy that denied the surgery under all circumstances did not violate the Eighth Amendment. Both cases were petitioned to the Supreme Court, and the Court denied them both. These denials had the effect of making gender confirmation surgery for incarcerated people constitutionally mandated in some circuits, and a constitutional non-issue in others.

A similar federal court disagreement recently arose over what protections the Eighth Amendment affords to incarcerated people during a pandemic. While essentially all federal courts, and indeed most prison officials, agreed early in the pandemic that the Eighth Amendment mandates that prisons take *some* steps to protect incarcerated individuals, courts have disagreed over which steps prisons must take, and to what effect.[37] For example, the Ninth Circuit twice denied a jail's request to stay a preliminary injunction requiring the prison to meet relevant CDC guidelines, finding that its failure to do so "resulted in an explosion of COVID-19 cases."[38] By contrast, the Fifth Circuit found that despite a geriatric prison's failure to enforce social distancing, increase janitorial staff's access to cleaning supplies, enforce mask wearing, provide hand sanitizer, establish a contact tracing plan, or regularly clean surfaces where incarcerated individuals interacted face to face without masks, "[t]he Eighth Amendment does not enact the CDC guidelines."[39]

Both cases were appealed to the Supreme Court, but the Court in both issued an order (denying the application to vacate the stay in *Valentine v. Collier* and granting the application for a stay in *Barnes v. Ahlman*) without any accompanying opinion.[40] Both decisions had the effect of staying preliminary

34. *See* Edmo, 935 F.3d 757 at 803 ("Where, as here, the record shows that the medically necessary treatment for a prisoner's gender dysphoria is gender confirmation surgery, and responsible prison officials deny such treatment with full awareness of the prisoner's suffering, those officials violate the Eighth Amendment's prohibition on cruel and unusual punishment."); De'lonta, 708 F.3d at 527 (finding that incarcerated individual seeking sex reassignment surgery had stated a claim under the Eighth Amendment); Fisher v. Fed. Bureau of Prisons, 484 F. Supp. 3d 521, 544 (N.D. Ohio 2020) (finding that a de facto ban on sex reassignment surgery in a prison was sufficient to state an Eighth Amendment claim).

35. Edmo, 935 F.3d 757.

36. Gibson v. Collier, 920 F.3d 212, 216 (5th Cir. 2019).

37. *See, e.g.*, Plata v. Newson, 445 F. Supp. 3d 557, 562 (N.D. Cal. 2020); Valentine v. Collier, 455 F. Supp. 3d 308, 321-22 (S.D. Tex. 2020).

38. Ahlman v. Barnes, No. 20-55568, 2020 WL 3547960, at *4 (9th Cir. June 17, 2020).

39. Valentine v. Collier, 978 F.3d 154, 164 (5th Cir. 2020).

40. Barnes v. Ahlman, 140 S. Ct. 2620 (2020) (mem.). Valentine v. Collier, 140 S. Ct. 1598 (2020) (mem.).

injunctions ordering prisons to alter their responses to the COVID-19 pandemic. However, since neither decision contained an opinion on the merits—that is, the extent to which the Eighth Amendment requires prisons to protect incarcerated people from COVID-19—the issue remains unsettled.

This might not have been the case had these cases been decided by the current Court, however. In both *Valentine* and *Barnes*, the late Justice Ginsburg joined Justice Sotomayor in lengthy and vehement dissent.[41] While she was, of course, not the deciding vote in either case, since Justice Coney Barrett joined the Court, many commentators have noted an activist shift in the Court's willingness to decide politically contentious issues and overturn precedent in the process.[42]

Today, the Eighth Amendment is still a powerful tool for incarcerated litigants seeking health care. Dozens of incarcerated trans individuals have used it to gain access to hormone therapy, and many are now also using it to gain access to gender confirmation surgery. Hundreds of incarcerated litigants used the Eighth Amendment to force prisons to comply with basic CDC guidelines regarding the COVID-19 pandemic. And these are just two politically contentious examples of the Eighth Amendment's power inside prison walls.

But these protections only exist because of a 1974 Supreme Court decision. And as this past term has demonstrated, rights that were won fifty years ago in court may still be lost today. Just as *Roe v. Wade* was challenged again and again until it was finally overturned this year,[43] just as the *Lemon* test for the separation of church and state was employed for decades before being "abandoned" by the Court this year,[44] and just as *Miranda* warnings were deemed an essential component of criminal procedure doctrine for decades, but were found to be an insufficient basis for suing a police officer this term,[45] so too may the protections afforded by the Eighth Amendment in prisons be overturned.

If history is to serve as a lesson, Congress should act now to codify, and even strengthen and expand upon the protections afforded by the Eighth Amendment for health care in prisons. In doing so, Congress should look to the key commonalities across consent decrees and injunctive orders over the past fifty years (e.g., doctor-inmate ratio) in order to ascertain the concrete conditions of confinement changes that the Eighth Amendment has mandated. Additionally,

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41. Valentine, 140 S. Ct. at 1598 (Sotomayor, J., dissenting); Barnes, 140 S. Ct. at 2620 (2020) (Sotomayor, J., dissenting).

42. *See, e.g.*, Adam Liptak, *As New Term Starts, Supreme Court is Poised to Resume Rightward Push*, N.Y. Times, (Oct. 2, 2022), https://www.nytimes.com/2022/10/02/us/conservative-supreme-court-legitimacy.html (asserting that the Court's "race to the right" shows no signs of slowing); Margaret Talbot, *Amy Coney Barrett's Long Game*, THE NEW YORKER (Feb. 7, 2022), https://www.newyorker.com/magazine/2022/02/14/amy-coney-barretts-long-game (analyzing Amy Coney Barrett's willingness to shift the Court rightward).

43. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

44. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022).

45. *See* Vega v. Tekoh, 142 S. Ct. 2095, 2099 (2022).

codification of conditions of confinement doctrine would need to establish a *mens rea* standard for violations of the statute such as negligence, gross negligence, or criminal recklessness. (Currently, the standard is "deliberate indifference to a serious risk of harm.")[46] Finally, codification would need to have a jurisdictional element granting federal courts the ability to provide injunctive relief when prisons violate the standards laid out in the statute.

This is not meant to be a policy paper; rather, it is meant to identify a potential change in constitutional law. Accordingly, the suggestions above are merely jumping off points for how we should think about codification of conditions of confinement doctrine. But regardless of how it is done, the point stands that prison conditions advocates should not take Eighth Amendment conditions of confinement doctrine for granted. The time to codify constitutional rights is not once the Court grants certiorari or once prison litigation once again becomes a political issue. The time is now. As Justice Sotomayor said in her dissent in *Valentine*, "It has long been said that a society's worth can be judged by taking stock of its prisons . . . May we hope that our country's facilities serve as models rather than cautionary tales."[47]

46. Farmer v. Brennan, 511 U.S. 825, 828 (1994).
47. Valentine, 140 S. Ct. 1598, 1601.