

Supporting Incarcerated Transgender Individuals' Access to Gender Confirmation Surgery: A Wholistic Approach to Change.

Sally Langan

Angelina Resto is a fifty-nine-year-old transgender woman who spent twenty-eight years of her life in the U.S. prison system.¹ After being released from prison in April of 2019, she now devotes her time to speaking about her experience and advocating for the LGBTQIA+ community within prisons.² On November 19, 2021, I had the pleasure of meeting with Ms. Resto, and our conversation has informed this Blog, as I believe the voices of those affected by legal issues are too often lost in legal writing. In the words of Ms. Resto, referring to her experience as a transgender woman in prison: “It’s bullshit . . . and I lived it.”³

A transgender individual is one who possesses a gender identity that does not align with the sex assigned to them at birth.⁴ While it is estimated that transgender folks make up only less than one percent of the general population in the U.S., they are disproportionately represented in prisons.⁵ This can be attributed to transphobia, the over-policing of queer communities,

¹ See Telephone Interview with Angelina Resto (Mar. 21, 2022).

² See *Doe v. Massachusetts Department of Correction*, GLAD LEGAL ADVOCS. & DEFS., <https://www.glad.org/cases/doe-v-massachusetts-department-correction/> [<https://perma.cc/JY2A-KDGH>].

³ See Interview with Angelina Resto in Boston, Mass. (Nov. 19, 2021).

⁴ See *What is Gender Dysphoria?*, AM. PSYCHIATRIC ASSOC., <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> [<https://perma.cc/3LA6-V26B>] (stating gender identity equates to “gender sense”).

⁵ See Melissa Ingle, *How Many Transgender Adults Are in America?*, AN INJUSTICE MAGAZINE (Dec. 8, 2020), <https://aninjusticemag.com/how-many-transgender-adults-are-in-america-9b3bd6d0f64f> [<https://perma.cc/S44T-27WD>] (estimating 0.54% or 1.36 million transgender adults in U.S. in 2020); *LGBTQ People Behind Bars: A Guide to Understanding the Issues Facing Transgender Prisoners and Their Legal Rights*, NAT’L CTR. FOR TRANSGENDER EQUAL., at 5, <https://transequality.org/sites/default/files/docs/resources/TransgenderPeopleBehindBars.pdf> [<https://perma.cc/XZV7-XFT6>] [hereinafter *LGBTQ People Behind Bars*] (stating queer folks three times more likely to end up in prison).

profiling, and systemic discrimination in the realms of education, employment, and housing. Transgender individuals are particularly vulnerable while in prison, as they face high rates of discrimination, abuse, and harassment from others, including both prison guards and fellow inmates.⁶ Additionally, many transgender individuals suffer from gender dysphoria, which occurs when one experiences distress and discomfort because their biological sex does not match their gender identity.⁷ This can cause various mental health issues, including depression, anxiety, and suicidal ideation. When transgender individuals in prison seek medical care to treat their gender dysphoria—including gender confirmation surgery (GCS), which is surgery done to alter one’s physical characteristics to align with one’s gender identity—they often face challenges. Further, even when prisoners move forward with lawsuits against individuals acting on behalf of prisons, they are rarely granted access to GCS by courts.

In these lawsuits, an inmate typically files suit against prison personnel or doctors for acting with deliberate indifference, arguing that the inmate received inadequate medical care and therefore experienced cruel and unusual punishment as defined by the Eighth Amendment.⁸ In 2014, the First Circuit addressed the question of whether denying an inmate access to GCS constitutes a violation of their Eighth Amendment rights.⁹ The case developed after a transgender woman, Michelle Kosilek, filed suit after being denied GCS despite suffering from gender dysphoria.¹⁰ The court used a fact-specific approach to analyze the case, ultimately holding that Kosilek was adequately provided with other treatment in lieu of GCS, and there

⁶ See *LGBTQ People Behind Bars*, *supra* note 5, at 6 (explaining transgender individuals face higher rates of abuse in prison).

⁷ See *What is Gender Dysphoria?*, *supra* note 4 (defining gender dysphoria).

⁸ See *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976) (explaining prisoners can sue both prison doctors and prison guards).

⁹ See *Kosilek v. Spencer*, 774 F.3d 63, 69 (1st Cir. 2014).

¹⁰ See *id.* at 68-69 (providing background of case).

were legitimate security concerns associated with granting GCS and transferring her to a female prison.¹¹

Five years later, in 2019, the Fifth Circuit visited this same issue in *Gibson v. Collier*,¹² where Vanessa Lynn, a transgender woman housed in a Texas prison, filed suit after she was denied GCS in prison.¹³ The Fifth Circuit held that generally, a state does not inflict cruel and unusual punishment on an individual for declining to provide them GCS.¹⁴ A few months later, the Ninth Circuit created a “circuit split” in deciding that GCS *was* medically necessary for Adree Edmo, and therefore, denying her access to GCS was a violation of her rights.¹⁵ In its analysis, the court used a fact-specific approach and reasoned that GCS was necessary because multiple experts testified that it was.¹⁶ The court granted injunctive relief to Edmo, and she became the first transgender individual to receive GCS surgery while incarcerated based on a court order.¹⁷ Since *Edmo v. Corizon*, SCOTUS has declined to make a ruling on the issue.

While scholars have written extensively on changes that should be made in the legal system to support prisoner’s rights, there is a gap in literature that incorporates both (1) reform to the legal system itself, including ways courts should approach claims by inmates; and (2) changes that can be made within the prison system itself regarding how inmates are classified, treated, and given access to care. Transgender individuals should be supported both during their time in prison and throughout lawsuits, in part because lawsuits are expensive, time-consuming, and not accessible to all inmates, and folks should not have to wait until the lawsuit stage to

¹¹ See *id.* at 68-94.

¹² 920 F.3d 212 (5th Cir. 2019).

¹³ See *Gibson*, 920 F.3d at 216.

¹⁴ See *id.* at 215.

¹⁵ See *Edmo v. Corizon, Inc.*, 935 F.3d 757, 767 (9th Cir. 2019).

¹⁶ See *id.* at 787-88.

¹⁷ See *id.* at 767.

access care that they need and deserve. Moreover, as I came to realize during the interview with Ms. Resto, all these issues faced by incarcerated transgender individuals are connected. It is impossible to analyze the legal standards for accessing GCS in prison without also considering the sentencing, classification and housing processes, and an inmate's treatment and overall experience.

Ideally, transgender individuals would be kept out of prisons, or the prison system would be completely overhauled or even abolished altogether. As some people have a significantly more tolerable experience in prison than others, it makes sense to consider one's subjective experience when determining one's sentence. This kind of prison reform, however, will not happen overnight, and we must support transgender individuals as they are incarcerated today.

Although Massachusetts has recently enacted state laws that will hopefully give greater protection to transgender individuals in the housing classification process, not all states have done the same.¹⁸ To best support transgender individuals, all states should amend their laws similarly. The interview with Ms. Resto shed light on the importance of this type of change, as she spent her time incarcerated fighting to be transferred from men's prison to women's prison. While housed in men's prison, she was bullied, harassed, and abused by other inmates and guards because she is a woman. She felt safe and significantly more welcome in women's prison. While this may not be the experience for all transgender inmates, it is the best practice to support individuals by allowing them to choose where they want to be housed.

Additionally, prisons should abolish formal or informal rules that prohibit individuals from dressing like, looking like, or acting like the gender with which they identify. In other

¹⁸ See MASS. GEN. LAWS. Ch. 127 § 32A (2018) (citing legislation expanding flexibility of transgender individual to choose prison housed in).

words, prisons should move away from policing gender. Giving inmates this flexibility is not only fair and humane, but has shown to increase overall mental health, decrease suicidal ideation, and help treat symptoms of gender dysphoria. Additionally, prison officials should be trained—and required—to use the correct pronouns for every inmate they address. While Ms. Resto was incarcerated, correctional officers repeatedly refused to refer to her using the correct pronouns. They went out of their way to use the pronouns “he” and “him”, despite her requesting they use “she” and “her,” and even went as far as to call her a “bitch” and a “chick with a dick.”¹⁹ She believes that if she had been treated with dignity and respect, it would have made her prison experience more manageable.

Further, when an inmate brings a deliberate indifference claim against a prison or prison officials, courts should use a fact-specific approach to analyze their case, as highlighted in both *Kosilek* and *Edmo*. This approach is favorable because it provides support for transgender folks and upholds their constitutional rights, gives flexibility to courts to allow for everchanging advancements in the medical community, and has supporting precedent.²⁰

Although *Edmo* is portrayed as the model case on the issue of accessing GCS in prison, mainly because it uses the fact-specific approach and the holding was favorable to the plaintiff, it put too much emphasis on the fragility of Adree Edmo’s mental health, as evidenced by her multiple self-castration attempts and intense suicidal ideation. In future cases, it is therefore important for courts—and doctors, when diagnosing inmates—to refrain from putting too much value on how extreme one’s suicidal ideation is or how many times they have attempted self-castration or self-harm. Although this is one factor that can be considered, it should not hold too

¹⁹ See Interview with Angelina Resto in Boston, Mass. (Nov. 19, 2021).

²⁰ See *supra* notes 11, 16-17 and accompanying text (discussing two different fact-specific analyses).

much weight; it should not be the standard that we wait for someone's condition to reach a life-threatening point to finally evaluate, and in rare cases validate, their need for medical care. This normalizes violence and may push inmates to feel like attempting castration is the only way to access the medical care they need. More emphasis should be put on their own testimony, including how they feel and why they believe GCS is necessary for them to feel the most like themselves. The WPATH standards should be followed, as they provide a reputable way to analyze the necessity of GCS surgery and treatment for gender dysphoria in general, but evaluators should not only validate the most extreme claims. In addition to putting more emphasis on plaintiff's testimony, courts should focus less on the logistics of the surgery, including the feasibility of postoperative housing and security concerns. While it is important to consider security concerns and give some deference to prison officials in deciding what is the best for a prison, security concerns are too often used as an excuse to validate denying inmates' genuine need for medical care when the underlying reason may not actually be security.

The experience transgender folks have in prison is one filled with stress and trauma, starting with the sentencing process, including housing placement, treatment in prison, and ability to access necessary medical care. While circuit courts are currently split on the standard to apply to deliberate indifference claims surrounding one's right to GCS while in prison, the First and Ninth Circuit courts have taken the most favorable approach of applying a fact-specific analysis. Moving forward, courts should continue to apply this analysis, but be wary not to only validate those cases that are so extreme—like in *Edmo*—as evidenced by suicidal ideation or multiple attempts at self-harm. Moreover, thinking about supporting transgender individuals outside the court system means taking a more wholistic approach to change. One first step we

can all take is to listen to the people affected by legal issues, such as Ms. Resto. In her words, “this is what I fight for, for people’s rights; and I am so proud of myself.”²¹

²¹ *See* Interview with Angelina Resto in Boston, Mass. (Nov. 19, 2021).