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October 2021

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Strategies for Crafting an Artful Defense

Incarcerated Transgender Individuals

By Christopher D. Balch

These cases are not easy—nor should they be—and will challenge jail and prison administrators and their lawyers for years to come. But preparation, diligence, and a solid foundation in the law and the science will help the practitioner reach the correct result.

By some estimates, as much as ten percent of the United States population is incarcerated. The cause of this mass imprisonment may be subject to debate (a debate well beyond the scope of this article); but the fact remains that as our citizenry ages, as its demographics change, and as the ability of our citizens to express who they are and how they wish to be perceived changes, those same challenges face our sheriffs and their deputies, our municipal police forces, and our elected leaders at all stages and phases of government.

This article will focus on incarcerated transgender persons: persons whose expression of themselves to the world does not match the gender they were assigned at birth. It will discuss the possible theories of recovery, the conduct by jailers, correctional officers, or policymakers that might give rise to the claims, and the trends or disagreements among the courts on how to address this population.

It is important, and indeed crucial, to remember that incarcerated persons are indeed people. If one spends enough time around jails or prisons and guards and correctional officers, one becomes inured to the "inmate" who is a soulless, manipulative, and untrustworthy sort, generally unfit to be let loose among law abiding folks, and who may only be marginally human. If the person is further marginalized, even within the jail or prison environment because of their ethnicity, country of origin, or their sexual orientation or expression, then the consideration of their worth as a human can often be further discounted.

The cases often have horrific allegations (and often facts) that span years of assault and abuse at hands of guards, jailers, and other incarcerees. Even a cursory read of the caselaw or literature concerning transgender inmates recounts tales of horror that are difficult to believe, much less understand. Defense counsel must be prepared to address these tales and articulate cogent reasons for why the choices made by the jail or prison are appropriate, reasoned, and lawful.

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Claims by Incarcerated Persons

If you are an old hand at jail litigation or medical care in jails litigation, you can skip this section and not miss anything. If you are new to the area, this primer is offered as a place to start.

The Eighth Amendment to the United States Constitution prohibits a person jailed for an offense from being subjected to cruel and unusual punishment. U.S. Const. Amend. 8. That is not to say that the Constitution mandates comfortable prisons. *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981). The mandate is applied to the states through the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660 (1962).

Generally speaking, the Eighth Amendment prohibits a person being intentionally harmed while incarcerated or being denied adequate medical care, food, clothing, and hygiene, because such failure constitutes cruel and unusual punishment prohibited by the amendment. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (*citing Trop v. Dulles,* 356 U.S. 86, 101 (1958)); see also, *Taylor v. Riojas*, 141 S. Ct. 52 (2020). The harm need not be inflicted by jailers or corrections officers, but could be caused by another inmate or some other third party. *Helling v. McKinney*, 509 U.S. 25 (1993). More than negligence is required. *Whitley v. Albers*, 475 U.S. 312, 319 (1986). So long as the officer is not deliberately indifferent to the risk of harm or the serious medical need, there is no constitutional violation. *Estelle*, 429 U.S. at 106. A cognizable claim requires the prison official to be subjectively aware of the risk of harm and deliberately indifferent to the consequences of that harm. *Farmer v. Brennan*, 511 U.S. 825, 847 (1994).

Persons who are jailed while awaiting trial are not convicted and cannot, therefore, be punished, rendering the Eighth Amendment inapplicable. *Bell v. Wolfish*, 441 U.S. 97, 104 (1979); *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239 (1983). The U.S. Supreme Court held that the rights of pretrial detainees are measured under the Fourteenth Amendment's due process clause and must be "reasonably related to a legitimate governmental interest. *Bell*, 441 U.S. at 104; *but see Youngblood v. Romeo*, 457 U.S. 307, 317 (1989) (involun-

tarily committed person "wholly dependent on the State" is entitled through the substantive component of the Fourteenth Amendment's due process clause to food, shelter, clothing, and medical care.)

There is some difference of opinion in the circuits about the precise limits of the constitutional duties to pretrial detainees. In the majority of circuits, all that is necessary is an objectively provable claim of deliberate indifference. *Hardeman v. Curran*, 933 F.3d 816, 823 (7th Cir. 2019); *Darnell v. Peneiro*, 849 F.3d 17 (2d Cir. 2017); *Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) *cert denied*, 137 S. Ct. 831 (2017); *Colbrunno v. Kessler*, 928 F.3d 1155, 1161–63 (10th Cir. 2019). In the United States Courts of Appeals for the Fifth and Eleventh Circuits, the subjective component of the Eighth Amendment jurisprudence still prevails. *Taylor v. Hughes*, 920 F.3d 729, 732–33 (11th Cir. 2019); *Baughton v. Hickman*, 935 F.3d 302, 306–07 (5th Cir. 2019).

In general, the cases note that there is no dispute among experts for plaintiffs or defendants that gender dysphoria is a serious medical issue that requires professional attention and, usually, medication. Thus, the first prong of a deliberate indifference to medical needs claim is satisfied, i.e., the existence of a serious medical condition.

Claims by Transgender Incarcerated Persons

Before jumping into the heart of this matter, it is important to put a couple of issues to rest. Gender dysphoria is a diagnosable condition where a sufferer feels that their identity does not coincide with their sex assigned at birth that was premised based solely on a visual inspection of the baby's external sex organs. Am. Psychol. Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychologist 832, 834 (2015). It was first added to the Diagnostic and Statistical Manual (DSM) as Gender Identity Dysphoria and appeared with that nomenclature through the DSM-IV-TR published in 2003, and this is how it was described in older cases. Its current classification in the DSM-V (updated and published in 2013) drops the "identity" part of the nomenclature, but the diagnostic criteria remain largely the same. For a person to be diagnosed with gender dysphoria, the person must exhibit a "marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months duration as manifested by at least 2 of the following":

> a marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics, a strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender, a strong desire for the primary and/or secondary sex characteristics of the other gender, a strong desire to be of the other gender, a strong desire to be treated as the other gender, or a strong conviction that one has the typical feelings and reactions of the other gender.

Am. Psychiatric Ass'n, *Diagnostic & Statistical Manual of Mental Disorders* 452 (5th ed. 2013); see also *Edmo v. Corizon, Inc.*, 935 F.3d 757, 768–69 (9th Cir. 2019). In addition, the person's condition must exhibit "clinically significant distress," that is the person's ability to function in a meaningful way is severely impacted or limited and they have reached a point that medical or surgical intervention or both is required. *DSM-V* at 453, 458.

In general, the cases note that there is no dispute among experts for plaintiffs or defendants that gender dysphoria is a serious medical issue that requires professional attention and, usually, medication. Thus, the first prong of a deliberate indifference to medical needs claim is satisfied, *i.e.*, the existence of a serious medical condition. *See Edmo*, 935 F.3d at 769; *Gibson v. Collier*, 920 F.3d 212, 219 (5th Cir. 2019) (no dispute that Gibson suffers a serious medical need, but affirming summary judgment to defendants on claim for gender reassignment surgery); *Battista v. Clarke*, 645 F.3d 449 (1st Cir. 2011); *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988) (concluding that "transsexualism is a serious medical need"); *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011); *Phillips v. Michigan Dep't of Corr.*, 932 F.2d 969 (6th Cir. 1991).

Second, seven of the eleven circuit courts of appeals have held sexual abuse of inmates to violate constitutional standards. *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997); *Ricks v. Shover*, 891 F.3d 468, 473 (3d Cir. 2018); *Rafferty v. Trumbull County*, 915 F.3d 1087 (6th Cir. 2019); *Washington v. Hively*, 695 F.3d 641, 643 (7th Cir. 2012); *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000); *Giron v. Correctional Corp. of America*, 191 F.3d 1281, 1290 (10th Cir. 1999); *Sconiers v. Lockhart,* 946 F.3d 1256, 1259 (11th Cir. 2020). The other four circuits do not seem to have addressed the specific question. In 2010, the Supreme Court eliminated the requirement that an Eighth Amendment claim result in a physical injury, concluding rather that conduct offended the Constitution when the force is applied "maliciously and sadistically to cause harm." *Wilkins v. Gaddy*, 559 U.S. 34, 36 (2010). This led the United States Court of Appeals for the Eleventh Circuit (not a circuit court known to recognize per se constitutional torts, *see, e.g.*, *Hope v. Pelzer*, 536 U.S. 730 (2002), *reversing* 240 F.3d 975 (11th Cir. 2001)) to conclude that sexual abuse is always wrong regardless of whether a physical injury occurs. *Sconiers*, 946 F.3d at 1259. In these circuits, at least, the right appears "clearly established." *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The reported cases appear to establish little dispute that transgender persons are at greater risk of sexual abuse, sexual assault, and sexual harassment than other inmates, and that prison officials should be aware of this increased risk. The ques-

tion then becomes what the obligations of the jail or prison are to respond.

This section of the article will examine the different places where jail or prison officials interact with transgender incarcerees and discuss what risks of liability arise from each interaction. All of the legal claims will arise either from the Eighth Amendment for convicted persons or the Fourteenth Amendment for persons in pretrial detention, as described above. Cases from the various circuit courts, or if especially illuminating the district courts, will be discussed so that a general sense of the trends can be discerned and illuminated.

Classification

Jail and prison officials have a constitutional duty to keep their charges safe. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *Hudson v. McMillian*, 503 U.S. 1 (1992). This duty includes an obligation to protect prisoners from violence at the hands of other inmates. *Farmer*, 511 U.S. at 833 (quoting *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 558 (1st Cir. 1988). Phrased in terms applicable to transgender persons, the issue can be stated as whether an incarceree who appears as a gender different from their assigned birth gender is appropriately placed in a prison or jail population consistent only with their assigned birth gender?

In two early cases, *Guzman-Martinez v. Corrections Corp. of America,* 2012 WL 2873835 (D. Ariz. July 13, 2012), and *Saw v. District of Columbia*, 944 F. Supp. 2d 43 (D.D.C. 2013), the outcome turned on whether the transgender incarceree was legally male or female. In *Guzman-Martinez*, the plaintiff was placed in general population and in a cell with a male offender who brutally assaulted and raped her. The district court found no liability and concluded, in part, that placing a pre-operative transgender woman in a female population would offend the privacy rights of those other women at least as much as requiring her to remain with other biological males. 2012 WL 2873835 at *9. The District Court for the District of Columbia disagreed and found that where the plaintiff had undergone gender reassignment surgery and was legally recognized as a woman, the guards and supervisors were required to acknowledge and treat her as a woman, including in her classification for housing. 944 F. Supp. 2d at 58.

This distinction is not currently recognized in the standards and guidelines published by the World Professional Association for Transgender Health (WPATH). If a person manifests sufficient indicia of living as a person of a gender different from the one assigned at their birth, that appears to be sufficient for WPATH to apply its criteria for treatment.

The key lesson from this and other cases is that qualified medical testimony from physicians with experience treating persons with gender dysphoria will be necessary. Defense counsel would be well advised to secure the services of an advising expert upon assignment and to get an initial opinion of the case as soon as all of the relevant medical records can be accumulated.

Medical Treatment

Hormone Treatment

When considering cases involving adult incarcerees, it appears clear that providing hormone treatment to inmates diagnosed with gender dysphoria may be required unless there is a medically reasonable reason to discontinue treatment. Almost no case finds that an abject or unjustified failure to treat a transgender person with hormone therapy is appropriate. As the United States District Court of the District of Massachusetts noted in *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 188 (D. Mass 2002), "if [plaintiff] had cancer, and was depressed and suicidal because of that disease, the DOC would discharge its duty to h[er] under the Eighth Amendment by treating both h[er] cancer and h[er] depression." One of the requirements of a gender dysphoria diagnosis is a conclusion by the treating or consulting therapist that the disconnect between assigned gender and gender identity must result in clinical signs. Those clinical signs often include depression, anxiety, suicidal ideation, and attempts at self-harm (including attempted self-castration, *see* Jae Sevelius & Valerie Jenness, Challenges and Opportunities for Gender-Affirming Healthcare for Transgender Women in Prison, 13 Int'l J. Prisoner Health 32, 36 (2017)). Picking and choosing what ailments will be treated, for whatever the reason selected, is likely to be deemed per se unreasonable and unconstitutional.

The United States Court of Appeals for the Eleventh Circuit held that the refusal of a medical director to provide hormone therapy for a transgender inmate was a violation of clearly established law; therefore, qualified immunity did not absolve the medical director of potential liability.

Defense counsel would be well advised to secure the services of an advising expert upon assignment and to get an initial opinion of the case as soon as all of the relevant medical records can be accumulated.

Kothman v. Rosario, 558 Fed. Appx. 907 (11th Cir. 2014). Kothman was a 38-year-old transgender man incarcerated in Florida's Lowell Correctional Institution for women from 2010 to 2011. Dr. Rosario was the chief health officer while Kothman was at Lowell. Kothman had lived as a man throughout his life. While in prison, Kothman received some mental health therapy, but the records submitted did not reveal that he received any specific treatment for gender dysphoria (called gender identity dysphoria (GID) in the court's opinion). 558 Fed Appx. 907 n.2 (detailing the revision in the nomenclature in the DSM and the reason for the language adopted by the court). Kothman's evidence established that he had been diagnosed with GID in 2005 and had been treated with hormones since that time. Neither the complaint nor the record established that Kothman had ever received treatment for his GID while under Dr. Rosario's care. On this record and with these facts, the Eleventh Circuit held that Dr. Rosario was not entitled to qualified immunity because GID was rec-

ognized as a serious medical condition prior to her interaction with Kothman and the record established that hormone treatment was the medically necessary and appropriate. *See also*, *Diamond v. Owens*, 131 F. Supp. 3d 1346 (M.D. Ga. 2015).

Gender Reassignment Surgery

There is a clear split in the circuits between courts that will require, on the right record, gender reassignment surgery and those that will not. *Compare Edmo v. Corizon, Inc.*, 935 F.3d 757 (9th Cir. 2019) (denial of gender reassignment surgery constitutes deliberate indifference) *with Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014) *en banc* (because of dispute in medical community about the appropriateness of gender reassignment surgery, refusal is not deliberate indifference) *and Gibson*, 920 F.3d at 220 (same); *but see Fisher v. Federal Bureau of Prisons*, 484 F. Supp. 3d 521, 542 (N.D. Ohio 2020) (allegation of a blanket policy by state prison officials not to perform sex reassignment surgery is not related to individualized determination of medial need and may violate the Eighth Amendment). This is perhaps not surprising given that the medical community cannot agree on what care is required for a person diagnosed with gender dysphoria.

It is incumbent on defense counsel to obtain expert testimony to address the WPATH Standards of Care and to offer testimony on whether they are appropriate and whether the incarcerating agency has satisfied the constitutional standard of care.

As mentioned briefly above, the international organization dedicated to healthcare for transgender individuals is the World Professional Association for Transgender Health (WPATH). This organization has been recognized by a number of courts, *see, e.g., Soneeya v. Spencer*, 851 F. Supp. 2d 228 (D. Mass. 2012); *Campbell v. Kallas*, 2020 WL 7230235 (W.D. Wis. Dec. 8, 2020); *Tay v. Dennison*, 457 F. Supp. 3d 657 (S.D. Ill. 2020); *Hicklin v. Precynthe*, 2018 WL 806765 (E.D. Mo. Feb. 9, 2019), and the experts who have been accepted by those courts, as the authority on the standard of care for transgender persons. Their publication is available as a **free download**. The WPATH standards have also been endorsed by the National Center for Correctional Health Care in Chicago.

But the WPATH standards are not without their challenges. They are discussed at length by the United States Court of Appeals for the First Circuit in *Kosilek v. Spencer*, 774 F.3d 63, 74–79 (1st Cir. 2014), which offers both a road map to cross-examination for a competing expert and one possible path to summary judgment for defense counsel. Dr. Chester Schmidt, a psychiatrist and the associate director of the Johns Hopkins School of Medicine, testified for the Illinois Department of Corrections, and referred to the WPATH Standards of Care (SOC) as guidelines, not standards, because there is not a consensus in the medical community about sex reassignment surgery (SRS). Unsurprisingly, the plaintiff's experts disagreed. One of those opinion witnesses, Dr. George Brown, was a participating author for the WPATH Standards of Care. 774 F.3d at 74. The court then appointed its own expert, Dr. Stephen Levine, who was also a participating author of the WPATH SOC and serves as a clinical professor of psychiatry at Case Western Reserve School of Medicine. 774 F.3d at 77. Dr. Levine acknowledged the advocacy role of WPATH and wrote in his report that, "The [Standards of Care] are the product of an enormous effort to be balanced, but it is not a politically neutral document. …The limitations of the [Standards of Care] are not primarily political. They are caused by a lack of rigorous research in the field." 774 F.3d at 78. He concluded that the treatment option adopted by Dr. Schmidt was not medically unsound, even if most treating physicians would disagree with it.

The United States Court of Appeals for the Ninth Circuit provides a competing roadmap to a conclusion. *Edmo*, 935 F.3d at 780; *see also*, *Edmo v. Corizon, Inc.*, 358 F.3d 1103, 1111 *et seq.* (D. Id. 2018) (injunction against Corizon, Inc. vacated on appeal because it was a private company running the prison where plaintiff was assigned by the Idaho Department of Correction). In each of the *Edmo* cases, the court largely rejects the arguments made by defense counsel in favor of the treatment of the inmate. Years of abuse based on biological gender placement and classification by prison officials and the opinions of treating physicians (both rejected by the First Circuit) persuaded the district court and the Ninth Circuit that surgery and reclassification were needed to address Edmo's serious medical needs and physical safety.

It is incumbent on defense counsel to obtain expert testimony to address the WPATH Standards of Care and to offer testimony on whether they are appropriate and whether the incarcerating agency has satisfied the constitutional standard of care. In *Monroe v. Meeks*, 2020 WL 1048770 (S.D. Ill. Mar. 4, 2020), the court expressly criticized the Illinois Department of Corrections for not presenting any evidence to address the plaintiff's claims the WPATH standards applied or were appropriate under the facts as presented.

Personal Safety

A series of nationwide studies of inmates seem to establish that transgender persons are more likely to be assaulted while incarcerated than others. Bureau of Justice Statistics, United States Department of Justice, **National Inmate Study**. These studies are required under the Prison Rape Elimination Act (discussed in detail in the next section). In 2011–12, the U.S. Bureau of Justice reported that thirty-nine percent of transgender inmates in federal custody had been assaulted in the previous twelve months. Allen J. Beck, *et al.*, "Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12," *Bureau of Justice Statistics*, 2013. Thus, it would appear that data is readily available that transgender persons, and women especially, are significantly more likely to be assaulted or harassed, either by other inmates or by jail/prison staff, supervisors, or administrators. *Diamond*, 131 F. Supp. 3d at 1362

(complaint alleged that warden stated, during a grievance hearing, placed plaintiff in solitary confinement for "pretending to be a woman"). *See also*, *Doe v. District of Columbia*, 215 F. Supp. 3d 62 (D.D.C. 2016) *quoting* Amnesty International USA, "Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual, and Transgender People in the US" 60 (2005).

As the district court found in *Diamond*, the existence of these studies provides circumstantial evidence of a need to protect transgender inmates. *Id*. at 1376. Pursuant to the standard announced by the Supreme Court in *Farmer v. Brennan*, 511 U.S. at 825, the background studies establish the objective prong of the deliberate indifference standard. When coupled with actual knowledge from direct communications to prison officials by the inmate (usually required as part of the administrative exhaustion requirements of the Prison Litigation Reform Act. 42 U.S.C. §1997e(a)) then arguable liability may be established.

Because of the inability of the incarceree to make decisions to protect themselves or care for themselves, jails and other involuntary detention facilities owe a duty to protect those in their custody. It does not mean that jail is supposed to be a pleasant place. But it does mean that prison officials need to accept they have a responsibility to control violence to the extent they can.

Prison Rape Elimination Act (PREA)

Passed in 2003, and evolving somewhat over time in its application and scope, the Prison Rape Elimination Act, 34 U.S.C. §30301 *et seq*. and 42 U.S.C. §15601 *et seq*., 117 Stat. 972, PL 108-79 (the Act), establishes a national priority to eliminate sexual assault, sexual abuse, and sexual harassment in the nation's prisons and jails. 34 U.S.C. §30302 and 42 U.S.C. §15606(a) (as amended by the Consolidated Appropriations Act of 2005, P.L. 108-447, 118 Stat. 2809). The Act requires the U.S. Department of Justice to establish national standards for "the detection, prevention, reduction, and punishment of prison rape." The current rule can be found at 28 C.F.R. Part 115 issued on June 20, 2012. The rule was not amended during the previous administration.

The Act's only enforcement mechanism is to withhold federal funds and grants to jails and prisons that do not comply with the standards established by the regulation. 34 U.S.C. §30307(e). It does not provide a private claim or purport to create a privately enforceable claim by an individual if a violation of the Act or of the regulations occurs. *See, e.g.*, *Jones v. Schofield*, 2009 WL 902154 (M.D. Ga. 2009) (citing *Blessing v. Freestone*, 520 U.S. 329, 340 (1997), *Gonzaga University v. Doe*, 536 U.S. 273, 290-91 (2002) (§1983 only provides a mechanism of redress where a federally protected right has been infringed)); *Smith v. Malone*, 2018 WL 4781146 (W.D. Wis. 2018); *Law v. Whitson*, 2009 WL 5029564 (E.D. Cal. 2009). However, to the extent the regulations purport to establish "national standards" for control and elimination of sexual abuse in jails and prisons, there is at least an argument that a breach of the standards could be used as evidence of a failure to train or a failure of adequate policy. *See*, *JKJ v. Polk County*, 960 F.3d 367, (7th Cir. 2020) *en banc, cert. denied* 141 S. Ct. 1125 (2021) (failure to train on a known and obvious risk of abuse of female inmates by male security staff justifies verdict against county defendant); *Lucente v. County of Suffolk*, 840 F.3d 284, 305 (2d Cir. 2020); *Zollicoffer v. Livingston*, 169 F. Supp. 3d 687 (S.D. Tex. 2016). In *Chao v. Ballista*, 772 F. Supp. 2d 337, (D. Mass. 2011), the United States District Court for the District of Massachusetts noted that the conversation over preventing sexual abuse in prison created in part by the PREA was sufficient to place supervisory officers, including the commissioner of the Massachusetts Department of Corrections, on notice that the risk of harm to inmates required more and different training and supervision in the past. That notice, coupled with other systemic problems in the department, led to the court denying the supervisor's motions for summary judgment. In addition, the court later denied the Rule 60 motions for judgment as a matter of law following the jury's verdict for the plaintiff, as applied to facility superintendent (the jury did not find the commissioner liable). 806 F. Supp. 2d at 358.

PREA offers substantial fodder for opposing counsel to address and seek documents related to policy, training, supervision, and other systemic issues (cameras and surveillance, or areas outside of visual supervision, etc.). In short, the statute may provide a basis for a *Monell* claim. Furthermore, the cases arising under PREA often provide road maps to liability (particularly *JKJ v. Polk County*) or at least a path to explore toward liability against the entity running the jail or prison. When defending cases involving transgender inmates, counsel would be well advised to review the regulations, and make sure any experts you interview are familiar with the regulations as well as other relevant standards.

PREA offers substantial fodder for opposing counsel to address and seek documents related to policy, training, supervision, and other systemic issues (cameras and surveillance, or areas outside of visual supervision, etc.).

An Artful Defense

The presence of these hurdles and the likely emotional hook established by the factual assertions in the complaint or in a plaintiff's testimony does not render counsel for the defense without weapons in response. Courts continue to recognize the responsibility and ability of jailers and prison officials to take steps to ensure the facility is secure, that is that persons held there for lawful reasons remain in custody, that those held are treated safely and humanely, and that those incarcerated are appropriately disciplined for misbehavior while incarcerated.

Security of the Facility

Those who run jails and prisons prefer bright lines and policies that limit discretion. There are two reasons for this: (1) bright lines are easier to manager and administer; (2) ambiguity or discretion cre-

ates places for inmates to exploit and cause trouble. Those may be the same reason, but they are often articulated separately. But they each boil down to the need to support the standard from *Hudson v. McMillan*, 503 U.S. 1 (1992), that a prisoner's rights are violated if the actions of the jailers or administrators was not related to security and discipline. If there is discretion in policy, not only is the inmate likely to exploit the gaps, but plaintiff's counsel will also likely attempt to exploit those same gaps and others to establish that the exercise of discretion was in bad faith and unrelated to permissible penological goals.

Security is often a balancing act for jail or prison administrators. *Richardson v. District of Columbia*, 322 F. Supp. 3d 175 (D.D.C. 2018). But the balancing must arguably relate to an actual or perceived security or safety related to the facility. In *Tates v. Blanas*, 2003 WL 23864868 (E.D. Cal. Mar. 11, 2003), the jail treated transgender inmates in a manner ordinarily reserved for the most dangerous detainees. Inmates are classified upon arrival to the jail. Some may be classified as requiring protective custody, or "T-sep" for total separation from the rest of the population, or they may be assigned to the general population. All transgender inmates are categorized as T-sep regardless of their risk of harm, their danger to other inmates or staff, or any other qualifying criteria. The district court held that the jail's policies and procedures established that the classification process, its associated stigma, and lack of privileges constituted conduct without a legitimate penalogical, security, or safety justification.

It would be nice if *Tates* and *Diamond* were isolated incidents. They are not. Whether in the literature on this subject or in the cases, jail staff and other inmates often treat transgender persons as less than human, as fakers, or as pretenders who need to be punished or beaten into submission. The results are often tragic for the individual and can be expensive for the jails or their employees.

Safety of Other Inmates/Incarcees

Often jail supervisors or prison administrators will claim that they are protecting their female population from assault by not housing a pre-surgical transgender woman with that population. This explanation has often been proffered in defense of a claim seeking re-classification of the inmate away from others of their birth-assigned gender. But the explanation is not universally accepted. *Tay v. Dennison*, 457 F. Supp. 3d 657 (S.D. Ill. 2020) (refusal to house transgender woman unrelated to rational basis and supported only by discriminatory logic). Nonetheless, there are anecdotal reports of transgender inmates sexually assaulting female inmates while in prison. Diana Shaw, **"Transgender" Inmates Are Raping Female Prisoners at a Shocking Rate, Ministry of Justice Reveals**, womenarehuman.com (May 18, 2020) (last accessed June 8, 2021). This remains a viable defense, so long as it is supported with rational testimony divorced from stereotypes and "discriminatory logic."

Veracity of Diagnosis

Not every transgender person suffers from gender dysphoria. The diagnostic criteria are quite stringent and require the practitioner to undertake a rigorous interview with the patient to determine an appropriate conclusion.

Every effort should be made to determine any bias possessed by the diagnosing practitioner. Do they specialize in transgender patients or in treating gender dysphoria? How many times have they interviewed a patient and *not* concluded they suffered from gender dysphoria? Where have they testified before? Have they ever testified against a finding of gender dysphoria? What articles have they authored or relied on in reaching any treatment opinions? There are potentially limitless grounds for attacking the credibility of the diagnosing therapist who seeks to further a cause rather than treat a person.

The same can be said of the plaintiff. Their credibility is legally suspect solely because of any prior felony conviction. Fed. R. Evid. 609. Similarly, deposing the treating physician involves whether the therapist undertook any critical analysis of the information they received from their patient. Often, a therapist may take what is said at face value without examining the value, consistency, or authenticity of what was said. In one case, the therapist reported a litany of problems reported by the plaintiff/patient that were demonstrably different from what the patient said at deposition or how he interacted with people in his life. The therapist was committed to their diagnosis despite the obvious problems with the credibility of what they had been told. Credibility is always at issue.

Qualified Immunity or: What Did the Defendant Know and When Did They Know It?

The subjective prong of the deliberate indifference inquiry also generally resolves the defendant's entitlement to qualified immunity. Fundamentally, a jailer, supervisor, or even an administrator will be denied qualified immunity if the court concludes there is evidence the jail official possessed actual knowledge of a risk of harm or of a serious medical need and either ignored that knowledge or refused to take action in the face of such knowledge. The facts recounted in *Diamond*, are illustrative. In that case, the court found that the plaintiff had asserted a widespread pattern by department of corrections employees over a period of years and at multiple facilities denied her treatment solely because she was transgender. 131 F. Supp. 3d at 1382. Based on those facts, the court had little trouble determining that the statewide medical director was not entitled to qualified immunity.

As discussed above, when it comes to claims related to medical care or the failure to protect the safety of incarcerated persons, even the United States Court of Appeals for the Eleventh Circuit has little trouble finding qualified immunity does not protect a jailer, so long as there is evidence to support the underlying factual predicate, which obviously includes the actual subjective knowledge of the jail supervisor or official of the need for different action.

Entity Liability

Entity liability is established in these cases like any other claim under *Monell*. If there is a pattern, practice, policy, or procedure of the entity itself that is a moving force in the harm suffered by the plaintiff, liability will attach. *Monell v. Dept of Social Services*, 436 U.S. 658 (1978). Additionally, the plaintiff must show that the government's action or inaction was the "moving force" behind the injury alleged. *Bryan County v. Brown*, 520 U.S. 397 (1997). That remains a very high bar to overcome.

Similarly, failure to train claims are established by ignoring a known risk. *City of*

Canton v. Harris, 489 U.S. 378 (1989); *see also Diamond*, 131 F. Supp. 3d at 1383. Given the state of the data and information ostensibly available to administrators, the risk of sexual assault on transgender persons is increasingly going to be a known risk. The failure to address that risk may similarly result in entity and supervisory liability becoming more common on these claims.

Conclusion

Litigating a case involving an incarcerated transgender person presents a number of risks and pitfalls for the defendant and for defense counsel. As defense counsel the case comes pre-packaged: policies are already in place, the conduct has occurred, the training record is established, and the response has been made. If there is an opportunity on the front side, that is in the risk management role or during policy formulation, then these issues may be positively influenced before an event occurs that raises the specter of a lawsuit and adverse publicity.

The Supreme Court has settled, for now, the rights of people to live, love, and exist as they deem appropriate for themselves. That journey began with the school cases in the 1920s (*Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1924)), traveled through *Loving v. Virginia*, 388 U.S. 1 (1967), and currently ends with *United States v. Windsor*, 570 U.S. 744 (2013), and *Obergfell v. Hodges*, 576 U.S. 644 (2015). Those choices do not end when one is incarcerated, absent some overriding security purpose or the ability to describe the change based on a penological basis, not some arbitrary and capricious or malicious and sadistic purpose. *Hudson v. McMillian*, 503 U.S. 1 (1992) (Eighth Amendment to the U.S. Constitution is violated if there is no good faith effort to restore or maintain discipline and security).

One issue bears highlighting for which there is no answer at present: What will the long-term effect of *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), be? Justice Gorsuch asserted the Court's ruling was intended to be quite narrow. 140 S. Ct. at 1753. Justice Kavanaugh worried that "the implications of this Court's usurpation of the legislative process will likely reverberate in unpredecitable ways for years to come. *Id*. at 1836–37 (Kavanaugh, J., dissenting). But Justice Thomas lamented that the Court's qualified immunity jurisprudence had "been turned on its head" in his dissent to *Hope v. Pelzer*, 536 U.S. 730, 748 (2002) (Thomas, J., dissenting), and that has not come to pass.

As noted in a June 1, 2021, article in *USA Today,* lower federal courts are reading *Bostock* quite broadly. John Fritze, *LGBTQ rights helped by landmark Supreme Court* Bostock, USA Today, June 1, 2021. In just over a year, the case has been cited 282 times. In August of last year, the Fourth Circuit cited *Bostock* in a case overturning the ban on transgender children using the bathroom of their expressed sexuality versus their assigned gender. *Grimm v. Gloucester County School Board*, 972 F.3d 586, 616 (4th Cir. 2020). In December, the North Carolina Court of Appeals relied, in part, upon Justice Gorsuch's majority opinion in holding that the North Carolina statute that barred same-sex couples from obtaining domestic violence protection orders was unconstitutional under the Fourteenth Amendment to the U.S. Constitution. *M.E. v. T.J.*, 854 S.E.2d 74, 91 (N.C. App. 2020). How and whether *Bostock* will influence decisions for pretrial detainees, whose rights while incarcerated flow from that same Fourteenth Amendment, remains to be seen.

Additionally, science seems to have settled the question whether gender dysphoria is a serious medical need. As discussed above, the open question is what treatment is reasonably necessary for the patient, and that cannot be decided without a fact intensive inquiry. Where a policy is made that does not account for that factual resolution, the policy is often found to be unlawful. Where there is only disagreement over treatment options as applied to the particular inmate, no constitutional tort exists. *Snell v. Neville*, 2021 WL 2102927 *15 (1st Cir. May 25, 2021); *Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir. 1998); *Spruill v. Gillis*, 372 F.3d 218, 235 (3d Cir. 2004); *Russell v. Sheffer*, 528 F.2d 318, 318–19 (4th Cir. 1975); *Austin v. Kroger Tex., LP*, 864 F.3d 326, 328 (5th Cir. 2017); *Street v. Corrections Corp. of America*, 102 F.3d 810, 816 n.13 (6th Cir. 1996); *Thomas v. Martija*, 991 F.3d 763 (7th Cir. 2021); *Smith v. Marcantonio*, 910 F.2d 500, 502 (8th Cir. 1990); *Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004); *Perkins v. Kansas Dept. of Corrections*, 165 F.3d 803, 811 (10th Cir. 1999); *Hoffer v. Florida Dept. of Corrections*, 973 F.3d 1263, 1273 (*citing Harris v. Thigpen*, 941 F.2d 1495, 1504 (11th Cir. 1991).

Finally, the damages landscape has changed substantially in the last eighteen months. Minneapolis has settled the George Floyd case for $27 million. That number is out there for every potential juror to know. Whether it will have any effect on the perceived value of cases, whether by plaintiffs and their counsel or by jurors, remains to be seen. It may be that some jurors will continue to devalue persons who are incarcerated. *Chao II*, 806 F. Supp. 2d 358 (D. Mass. 2011) (damages awarded for hundreds of sexual encounters with a prison guard over a 5 year period of $97,000 and $6200 in punitive damages).

Given the state of the data and information ostensibly available to administrators, the risk of sexual assault on transgender persons is increasingly going to be a known risk. The failure to address that risk may similarly result in entity and supervisory liability becoming more common on these claims.

These cases will continue to challenge jail and prison administrators and their lawyers for many years. They are not easy, nor should they be. But preparation, diligence, and a solid foundation in the law and the science should help the practitioner reach the correct result for each case. FD