CHAPTER 30

SPECIAL INFORMATION FOR LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PRISONERS*

A. Introduction[1]

Lesbian, gay, bisexual, and transgender ("LGBT") prisoners face the same challenges as other prisoners, but due to prejudice about sexual orientation and gender identity, LGBT prisoners often encounter additional difficulties.

Many of the issues unique to LGBT prisoners have not been litigated extensively.[2] And many of the issues that have been litigated may change significantly in light of a relatively new Supreme Court decision.[3] The outcomes of these claims are now less predictable. This unpredictability, combined with the fact that homophobia and transphobia may play a role in many judges' and juries' decision-making processes, means that LGBT prisoners face uphill battles when they bring claims in court. For this reason, you should consider contacting an LGBT impact litigation organization to see if its lawyers would be willing to take your case.[4] For a list of such organizations, see Appendix A at the end of this Chapter. This is especially important if you are seeking to apply new theories about sexual orientation or gender identity to your case. Even if such an organization cannot take your case, someone may be able to refer you to an attorney who has experience working with LGBT plaintiffs.

Throughout this Chapter, the term "transgender" is used to indicate a broad spectrum of people whose identity or lived experiences do not conform to those that are typically associated with the sex assigned at birth. This includes non-, pre-, and post-operative transgender people; people who live part or all of the time as a gender other than the one assigned to them at birth; people with intersex conditions; cross-dressers; masculine women; and feminine men. Gender identity is used to describe the gender a person identifies as, regardless of whether that gender is the same as the one they were assigned at birth.

This Chapter attempts to address the most pressing concerns of LGBT prisoners. Part B of this Chapter discusses important Supreme Court cases and how they may affect past and future prison regulations. Part C explains what to do if you are being treated unfairly because of your sexual orientation or gender identity. Part D discusses your remedies if you feel that homophobic or transphobic beliefs led to jury bias in your conviction. Part E addresses your right to control your gender identity while in prison and includes a discussion of your right to gender-related medical care such as hormone treatment. Part F explains your right to confidentiality regarding your sexual orientation or gender identity. Part G addresses assault and harassment by prison officials and other prisoners. Part H discusses protective custody and housing placements for transgender prisoners. Part I discusses visitation rights. Finally, Part J discusses your right to receive LGBT literature.

As you read this Chapter, you should always keep in mind that Title 42 of the United States Code, Section 1983 (known as "Section 1983"), is a federal statute that permits you to sue a person who, while

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1. Note that two cases before the Supreme Court at the time of publication, United States v. Windsor and Hollingsworth v. Perry, should be decided in 2013 and could impact some of the law in this Chapter. Please be sure to research them before taking any action.

2. Unfortunately, some legal decisions of significance to LGBT prisoners are unreported—that is, they do not appear in the Federal Reporter or Federal Supplement volumes available in prison law libraries. In the *JLM*, these cases have citations like "U.S. App. LEXIS 12345 (*unpublished*)." Make sure you read Chapter 2 of the *JLM*, "Introduction to Legal Research," for important information about unpublished cases. At the very least, even if you cannot cite an unpublished case in your claim, the case may help you predict the outcome of a similar lawsuit.

3. See the next section for a lengthy discussion of Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).

4. Impact litigation organizations litigate cases where the law is unresolved with the hope of creating favorable law for future cases. A list of such organizations appears in Appendix A at the end of this Chapter.

acting on behalf of the state, violates either one of your federal statutory rights or one of your constitutional rights, such as your right to be free from cruel and unusual punishment under the Eighth Amendment or your right to equal protection under the Fourteenth Amendment. If you are a state prisoner and prison officials have violated your rights, you should also check state and local laws. Depending on where you are located, bringing a lawsuit under Section 1983 may be your best option.[5] For a more detailed explanation of Section 1983, see Chapter 16 of the *JLM*. It is also very important to be aware of the constraints placed on prisoner litigation by the Prisoner Litigation Reform Act ("PLRA"). Please read Chapter 14 of the *JLM* for a more detailed explanation of the PLRA before filing any lawsuit.

B. Changes in the Law

This part begins by briefly explaining a relatively recent and very important Supreme Court case, *Lawrence v. Texas*, in which the Court ruled that states cannot pass laws prohibiting homosexual acts.[6] This case will be discussed alongside *Bowers v. Hardwick*,[7] which was overruled by *Lawrence v. Texas*, and *Romer v. Evans*,[8] which may affect claims brought by LGBT prisoners. Finally, this part discusses the general changes to the law that *Lawrence* and *Romer* might bring about. Because many of the cases discussed in this Chapter are based explicitly on the reasoning in *Bowers*, the issues may be open to new interpretation because of *Lawrence* and *Romer*. Please note that while both *Bowers* and *Lawrence* deal specifically with sexual orientation, they may also affect claims brought by transgender prisoners because prison officials may perceive a transgender prisoner to be homosexual, regardless of actual sexual orientation.

1. Lawrence v. Texas and Due Process Claims

In June 2003, the United States Supreme Court found a Texas law unconstitutional that made homosexual sex between consenting adults a crime.[9] While the practical effect of the decision may have little immediate impact on you or the conditions of confinement that you face, the *Lawrence* decision may ultimately have far reaching consequences. In the ruling, the Court held that the right to privacy, as guaranteed under the Fourteenth Amendment, includes the right to engage in consensual intimate or sexual activity, including same-sex activity.[10]

The vast majority of the cases in this Chapter were decided before *Lawrence*. Because of this, many cases in this Chapter still use the earlier reasoning in another famous Supreme Court case, *Bowers v. Hardwick*.[11] *Bowers*, decided in 1986, was in many ways the exact legal opposite of *Lawrence,* and cases that would have relied upon the ruling in *Bowers* may now be decided differently, since *Lawrence* is now the law.

Because of the far reaching consequences of *Lawrence* and because the decision is still relatively new, it is hard to know how courts will now treat LGBT claims.

(a) Bowers v. Hardwick

Bowers v. Hardwick was a Supreme Court case that found the constitutional right to privacy did not extend to homosexual acts between consenting adults.[12] Generally, the Fourteenth Amendment of the Constitution[13] prohibits the government from infringing upon fundamental rights unless there is a sufficient justification for the government's interference. The question of which rights are "fundamental" has been the subject of many court battles. The Supreme Court has held in the past that very private decisions, such as the decision to use birth control or have an abortion, are protected under the Fourteenth Amendment

5. To challenge the conduct of an official or employee of the federal government, you must bring a *Bivens* action. You can find an explanation of how to do this in Chapter 16 of the *JLM*.

6. Lawrence v. Texas, 539 U.S. 558, 567, 123 S. Ct. 2472, 2478, 156 L. Ed. 2d 508, 518–19 (2003).

7. Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986).

8. Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996).

9. Lawrence v. Texas, 539 U.S. 558, 567, 123 S. Ct. 2472, 2478, 156 L. Ed. 2d 508, 518–19 (2003).

10. Lawrence v. Texas, 539 U.S. 558, 567, 123 S. Ct. 2472, 2478, 156 L. Ed. 2d 508, 518–19 (2003).

11. Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986).

12. Bowers v. Hardwick, 478 U.S. 186, 191, 106 S. Ct. 2841, 2844, 92 L. Ed. 2d 140, 146 (1986).

13. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor 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 law." U.S. Const. amend. XIV, § 1.

because they involve a fundamental right to privacy.[14] In *Bowers*, the Court held that the right to engage in consensual homosexual acts is not protected under the right to privacy and that states could prohibit homosexual acts merely on the basis of views that consider homosexuality immoral.[15]

(i) The End of *Bowers*

When the Supreme Court decided *Lawrence v. Texas*, it explicitly overruled *Bowers v. Hardwick*.[16] As a result, many of the cases relying on *Bowers* and refusing to question the unequal treatment of LGBT prisoners might now be questionable. Several important issues arise after *Lawrence*. Keep them in mind if you are thinking about bringing suit about your treatment in prison.

First, *Lawrence* says that under the Constitution, all adults, including LGBT individuals, have the right to engage in intimate conduct with another adult in private.[17] This means that private, consensual homosexual sex is no longer a crime. This does not mean that you have the right to engage in sex in prison, but it probably does mean that prison officials cannot treat you differently because you identify as or are perceived to be LGBT.

Second, one Supreme Court Justice wrote in a concurring opinion in *Lawrence* that moral disapproval is an insufficient reason to treat people differently, relying on a prior Supreme Court opinion.[18] While that is not the holding of the *Lawrence* case, its use by a Justice in *Lawrence* indicates that the rule may be useful in court when arguing that your rights have been infringed because of your sexual orientation.

Third, *Lawrence* makes all the cases that relied on *Bowers* open to attack. When you are considering whether or not to bring a claim, pay close attention to whether *Bowers* played a role in any negative cases in your jurisdiction. If you feel that a case relied heavily on *Bowers* and negatively affects your case, contact one of the impact litigation organizations listed in Appendix A at the end of this Chapter. It may be possible to argue that the negative case no longer applies since *Bowers* was overruled.

(b) The Unknown Effect of *Lawrence*

Because *Lawrence* was decided fairly recently, it is hard to know how far-reaching its effects will be. Because the case holds that same-sex conduct is entitled to at least some legal protections, *Lawrence* may have the power to influence a vast number of cases regarding LGBT rights. But courts have been hesitant to read *Lawrence* broadly enough to establish a basis for LGBT rights beyond cases that are factually similar to *Lawrence*. For instance, sometimes courts will use other previous cases—such as *Romer v. Evans*,[19] which is discussed below and deals with equal protection—to avoid the *Lawrence* question.[20]

At least one post-*Lawrence* case has declined to extend *Lawrence* to the point where it would protect all kinds of homosexual conduct in prison. In *Willson v. Buss*, a prisoner sued the superintendent of his prison for the right to receive magazines with homosexual content.[21] The court noted that *Lawrence* had overruled *Bowers* and that there was a constitutionally-protected right in open society to engage in homosexual

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14. Griswold v. Connecticut, 381 U.S. 479, 485–86, 85 S. Ct. 1678, 1682, 14 L. Ed. 2d 510, 515–16 (1965) (holding that the right of married couples to access contraception falls within the right of personal privacy); Roe v. Wade, 410 U.S. 113, 154, 93 S. Ct. 705, 727, 35 L. Ed. 2d 147, 177–78 (1973) (holding that the abortion decision falls within the right of personal privacy, but qualifying that it must be considered against some important state interests).

15. Bowers v. Hardwick, 478 U.S. 186, 196, 106 S. Ct. 2841, 2846–47, 92 L. Ed. 2d 140, 149 (1986).

16. Lawrence v. Texas, 539 U.S. 558, 578, 123 S. Ct. 2472, 2484, 156 L. Ed. 2d 508, 525 (2003) ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. Bowers v. Hardwick should be and now is overruled.").

17. Lawrence v. Texas, 539 U.S. 558, 567, 123 S. Ct. 2472, 2478, 156 L. Ed. 2d 508, 518–19 (2003) ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.").

18. Lawrence v. Texas, 539 U.S. 558, 582, 123 S. Ct. 2472, 2486, 156 L. Ed. 2d 508, 528 (2003) (O'Connor, J., concurring) ("Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."); *see also* Romer v. Evans, 517 U.S. 620, 634, 116 S. Ct. 1620, 1629, 134 L. Ed. 2d 855, 867 (1996) (holding that action based on a bare desire to harm could not constitute a legitimate government interest, and so violated the Equal Protection Clause).

19. Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996).

20. *See, e.g.*, Johnson v. Johnson, 385 F.3d 503, 532–33 (5th Cir. 2004) (relying on *Romer* in holding the law clearly established a denial of protection to a prisoner because of his sexuality violated the Equal Protection Clause).

21. Willson v. Buss, 370 F. Supp. 2d 782 (N.D. Ind. 2005).

relationships. However, the court made a point of saying that the right does not necessarily extend to the prison context, where prison officials may limit constitutional rights for necessary reasons.[22]

2. Romer v. Evans and the Equal Protection Clause

While the ruling in *Lawrence v. Texas* was based upon the Due Process Clause of the Fourteenth Amendment and the right to privacy, an alternative basis for claims affecting LGBT prisoners is the Equal Protection Clause. The Equal Protection Clause prohibits the government from treating different classes of people differently unless there is a sufficient, legitimate governmental purpose in doing so.[23] The leading case affecting LGBT people bringing equal protection claims is *Romer v. Evans*.[24]

In considering equal protection claims, courts apply different legal standards to different classifications of people. It is more likely that a law will be found unconstitutional under the Equal Protection Clause of the Fourteenth Amendment when a higher standard of legal scrutiny applies. For example, if the government makes a distinction based upon race, it must show that the contested classification based on race is *necessary* to achieve a compelling government interest. This is known as a "strict scrutiny" legal standard. For a distinction based on gender, the contested classification must be substantially related to an important government objective. This standard is called an "intermediate scrutiny" legal standard. Other classifications, such as those based on age, only need to be rationally related to a legitimate government purpose to survive an equal protection challenge. This standard is known as "rational basis" legal review.

In *Romer v. Evans*, the plaintiffs challenged an amendment to a state constitution that invalidated and prohibited local laws that barred discrimination on the basis of sexual orientation. In hearing the case, the Supreme Court had to decide which level of scrutiny, from those described above, to apply to distinctions or classifications based on sexual orientation. While the Court held that classification based on sexual orientation is only entitled to a rational basis review, the lowest legal standard, the Court still invalidated the amendment under this rational basis test. The Court found that the only purpose behind the law was "animus [hatred] toward the class [homosexuals] that it affects," and held that neither animus nor hatred were legitimate government purposes. [25]

Romer v. Evans is significant for two reasons. First, it establishes that distinctions based on sexual orientation will be evaluated under the rational basis review test, not a stricter test. Second, it demonstrates a willingness on the part of the Supreme Court to use the rational basis test to protect the interests of LGBT people. Previously, it had been very hard to win an equal protection challenge under the rational basis test. So, while *Romer v. Evans* was a disappointment to LGBT people in that the Court did not extend a higher level of scrutiny to classifications based on sexual orientation, it is helpful because it shows how rational basis review can be used to successfully challenge policies that discriminate based on sexual orientation. In *Johnson v. Johnson*, for example, the Fifth Circuit relied on *Romer v. Evans* in discussing claims against prison officials.[26] In this case, a homosexual prisoner *alleged* that officials failed to protect him from violence and rape by other prisoners, even after he alerted officials of the assaults. The Court noted that:

> It is clearly established that all prison inmates are entitled to reasonable protection from sexual assault . . . . Neither the Supreme Court nor this court has recognized sexual orientation as a suspect classification [or protected group]; nevertheless, a state violates the Equal Protection Clause if it disadvantages homosexuals for reasons lacking any rational relationship to legitimate governmental aims.[27]

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22. Willson v. Buss, 370 F. Supp. 2d 782, 786 (N.D. Ind. 2005). See Part J of this Chapter for further discussion of your right to receive LGBT literature while in prison.

23. For further discussion of the federal Equal Protection Clause, see Part B(2)(g) of Chapter 16.

24. Romer v. Evans, 517 U.S. 620, 626–27, 116 S. Ct. 1620, 1624–25, 134 L. Ed. 2d 855, 859, 1996 U.S. Lexis 3245, at *9–12 (1996).

25. Romer v. Evans, 517 U.S. 620, 632, 116 S. Ct. 1620, 1627, 134 L. Ed. 2d 855, 865–66, 1996 U.S. Lexis 3245, at *20 (1996).

26. Johnson v. Johnson, 385 F.3d 503, 532, 2004 U.S. App. Lexis 18929, at *64 (5th Cir. 2004).

27. Johnson v. Johnson, 385 F.3d 503, 532, 2004 U.S. App. Lexis 18929, at *64–5 (5th Cir. 2004).

3. A Practical Example

To help you figure out how *Lawrence v. Texas* and *Romer v. Evans* can work together to protect LGBT rights in prison, it may be useful to briefly examine a past case about a lesbian prisoner, *Doe v. Sparks*,[28] which was decided before *Lawrence* and *Romer*, and to analyze how it might have been decided differently if it had been decided after both *Lawrence* and *Romer*.

In *Doe v. Sparks*, a lesbian prisoner was denied a visitation by her girlfriend.[29] The prison claimed that allowing homosexual visitation could incite anti-gay violence in the prison. The prisoner tried to bring a federal equal protection claim, saying that she was being unfairly targeted for being gay, and that the prison's reasons for denying her girlfriend's visit were not rationally related to a legitimate government purpose. The court, in considering the prisoner's claim, acknowledged that "the Equal Protection Clause dictates equal administration of rights and *privileges*, such as visitation, between similarly situated persons."[30]

Still, the court went on to decide that denying homosexuals visitation rights was not a violation of the federal Equal Protection Clause. The court determined that *Bowers v. Hardwick* prevented LGBT people from being treated as a "class" for equal protection purposes. The court also found that any group that is defined by sexual preference could not bring an equal protection claim.[31]

This case may have been decided differently under *Romer v. Evans* and *Lawrence v. Texas*. In *Doe*, the Court relied on *Bowers v. Hardwick* to conclude that since homosexual acts were not protected activities, homosexuals could not bring an equal protection claim based upon their sexual orientation. After *Romer*, a court hearing a case identical to *Doe* would instead analyze the visitation policy as an equal protection claim using the rational basis review test, and might be more likely to inquire more thoroughly into the governmental purpose served by the policy. In addition, since *Lawrence* overruled *Bowers* and held that homosexual conduct is entitled to some protection, the prisoner would have a better chance today of bringing a claim based upon her right to privacy, although as we saw in *Willson v. Buss*,[32] not all homosexual conduct or activity is protected in the prison context, even after *Lawrence*.

Thus, after *Lawrence*, the prisoner in *Doe* might now have a much stronger claim that the policy discriminated against her due to her homosexuality and interfered with her right to privacy.[33]

C. Unequal Treatment Because of Sexual Orientation or Gender Identity

1. Equal Protection

The Equal Protection Clause prohibits the government from treating different classes of people differently unless there is a sufficiently legitimate purpose for doing so.[34] If you believe that benefits are being withheld from you and that they are not being withheld from heterosexual prisoners, you may bring a Section 1983 claim against the prison or prison officials for violation of your equal protection rights. To do this successfully, you must convince the court that (1) "similarly situated" prisoners are treated differently by the prison; and (2) the difference between their treatment and your treatment is not justified by being somehow rationally related to a legitimate penological (prison-related) interest. In other words, the prison

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28. Doe v. Sparks, 733 F. Supp. 227, 1990 U.S. Dist. Lexis 3222 (W.D. Pa. 1990).

29. Doe v. Sparks, 733 F. Supp. 227, 228, 1990 U.S. Dist. Lexis 3222, at *1 (W.D. Pa. 1990).

30. Doe v. Sparks, 733 F. Supp. 227, 231, 1990 U.S. Dist. Lexis 3222, at *9 (W.D. Pa. 1990).

31. Doe v. Sparks, 733 F. Supp. 227, 232, 1990 U.S. Dist. Lexis 3222, at *12 (W.D. Pa. 1990) ("We hold that conduct which is not in itself protected by substantive due process, natural right, or some source of substantive protection cannot be the basis of an equal protection challenge by the class which engages in the conduct."). However, it should be noted that the court did hold that under Pennsylvania state law, homosexuals could not be discriminated against and thus struck down the visitation policy. Doe v. Sparks, 733 F. Supp. 227, 232–34, 1990 U.S. Dist. Lexis 3222, at *13–21 (W.D. Pa. 1990).

32. Willson v. Buss, 370 F. Supp. 2d 782, 786–88, 2005 U.S. Dist. Lexis 10619, at *8–15 (N.D. Ind. 2005) (finding that the right to homosexual relationships does not completely extend to the penal context, specifically referring to the receipt of homosexual magazines by prisoners).

33. For further discussion on how *Doe* might be decided today, *see* Derrick Farrell, *Crime and Punishment Law Chapter: Correctional Facilities: Prisoners' Visitation Rights, The Effect of* Overton v. Bazetta *and* Lawrence v. Texas, 5 Geo. J. Gender & L. 167, at 173–74 (2004); Kacy Elizabeth Wiggum, Note, *Defining Family in American Prisons*, 30 Women's Rts. L. Rep. 357, at 384–404 (2009).

34. U.S. Const. amend. XIV.

rule or policy that results in your being treated differently must have a common-sense connection to a valid goal or concern of the prison. For a more thorough discussion of equal protection claims, see Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law."

When faced with claims by LGBT prisoners that they are being treated differently than heterosexual prisoners, prisons have often tried to justify their actions by claiming that different treatment is necessary to protect LGBT prisoners, who are often more vulnerable to attack than other prisoners. For instance, two cases in the Sixth Circuit involved LGBT prisoners who, having been denied the opportunity to participate in religious services while in prison, brought suit under Section 1983 for a violation of their First Amendment rights. In both cases, the prison argued that because the LGBT prisoner was vulnerable to attack, his participation in the services posed a security risk. The restriction on the prisoner's First Amendment rights, the prison argued, served the valid penological interest of prison security and so was justified.[35]

Several LGBT prisoners have, with some success, sued prison officials, claiming they were terminated from their prison jobs because they are LGBT. For instance, in *Holmes v. Artuz*, a federal court in New York noted that a gay prisoner who alleged he was removed from his food service prison job may have stated a claim under Section 1983 for violation of his equal protection rights.[36] The court did not decide whether the equal protection guarantee of the Constitution had been violated because the plaintiff, appearing without counsel, had not presented enough information on which to base that decision.[37] However, the court was clearly sympathetic to the prisoner's claim, and the opinion contains strong language indicating that the state would have to show, rather than merely assert, that its decision was rationally related to the state's interest in maintaining security.[38]

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35. Brown v. Johnson, 743 F.2d 408, 412–13, 1984 U.S. App. Lexis 18710, at *8–12 (6th Cir. 1984) (holding a prison's total ban on group worship services by a church for gay people was reasonably related to the state interest in maintaining internal security in the prison); *but see* Phelps v. Dunn, 965 F.2d 93, 100, 1992 U.S. App. Lexis 11769, at *18–21 (6th Cir. 1992) (holding that a genuine issue of material fact existed as to whether a gay prisoner alleging he was denied permission to attend religious services was in fact so denied, and whether he posed a security risk because he was gay); *see also* Harper v. Wallingford, 877 F.2d 728, 733, 1989 U.S. App. Lexis 6917, at *13–16 (9th Cir. 1989) (affirming summary judgment for defendant prison because allowing plaintiff prisoner to receive mailings from North American Man/Boy Love Association would make him a likely victim of prisoner violence); Star v. Gramley, 815 F. Supp. 276, 278–79,1993 U.S. Dist. Lexis 3228, at *3–5 (C.D. Ill. 1993) (granting summary judgment to prison that refused to allow a prisoner in a men's facility to wear dresses and skirts because it could pose a security threat by promoting or provoking sexual activity or assault).

36. Holmes v. Artuz, No. 95 Civ. 2309 (SS), 1995 U.S. Dist. LEXIS 15926, at *3 (S.D.N.Y. Oct. 26, 1995) (*unpublished*); *but see* Counce v. Kemna, No. 02-6065-CV-SJ-HFS-P, 2005 U.S. Dist. LEXIS 4021, at *9–10 (W.D. Mo. Mar. 8, 2005) (*unpublished*) (granting defendant prison officials qualified immunity in case where plaintiff alleged job discrimination based on his sexual orientation).

37. The plaintiff was granted leave to replead (rewrite his complaint and bring it again). Holmes v. Artuz, No. 95 Civ. 2309 (SS), 1995 U.S. Dist. LEXIS 15926, at *6 (S.D.N.Y. Oct. 26, 1995) (*unpublished*).

38. The *Holmes* court reasoned as follows:

> Defendants argue that "the decision to reassign plaintiff from his job in food service is rationally related to a legitimate state interest in preserving order in the correction facility mess hall (sic)." However, defendants proffer no explanation of what this "rational relationship" might be. A person's sexual orientation, standing alone, does not reasonably, rationally or self-evidently implicate mess hall security concerns. It is not sufficient to assert, as defendants do in their motion papers, that the prison's exclusionary policy is designed to prevent "potential disciplinary and security problems which could arise from heterosexual inmates' reaction to and interaction with homosexual and/or transsexual inmates who serve and prepare food" in the mess hall. Defendants as yet have offered no evidence that these alleged disciplinary and security problems are real threats to prison life, or that the exclusionary policy is a rational response to such threats if they do exist.

Holmes v. Artuz, No. 95 Civ. 2309 (SS), 1995 U.S. Dist. LEXIS 15926, at *4 (S.D.N.Y. Oct. 26, 1995) (*unpublished*) (citations omitted); *see also* Johnson v. Knable, *decision reported at* 862 F.2d 314 (4th Cir. 1988), *opinion reported in full at* No. 88-7729, 1988 WL 119136, at *1 (4th Cir. Oct. 31, 1988) (*unpublished*) (vacating lower court's summary judgment dismissal of an equal protection claim brought by a gay prisoner after he was allegedly denied a job in the prison's education department because he was gay, and remanding for further proceedings, noting that "[i]f [the plaintiff] was denied a prison work assignment simply because of his sexual orientation, his equal protection rights may have been violated"); Kelley v. Vaughn, 760 F. Supp. 161, 163–64, 1991 U.S. Dist. Lexis 9695, at *6–9 (W.D. Mo. 1991) (denying defendant's motion to dismiss on the ground that a gay prisoner, bringing an action against the correctional center's food service manager to challenge his removal from his job as bakery worker, might have a valid equal protection claim); Howard v. Cherish, 575 F. Supp. 34, 36, 1983 U.S. Dist. Lexis 16265, at *9–10 (S.D.N.Y. 1983) (stating, that a gay prisoner who claimed he was punished because he was gay would have a claim under § 1983 if he

2. Sex Discrimination

Although your chances of prevailing on an equal protection claim may have increased substantially after *Lawrence v. Texas* and *Romer v. Evans*, you might also have a chance of prevailing if you state your grievance in terms of *sex* discrimination as opposed to *sexual orientation* discrimination.[39] Title VII of the Civil Rights Act of 1964 creates a federal cause of action for "discrimination because of . . . sex,"[40] and has been held to prohibit sex discrimination against both men and women.[41] Sex discrimination is discrimination that occurs based on whether you are a man or a woman and does not directly cover sexual orientation or sexual preference discrimination. But, LGBT persons are sometimes able to use a theory of "sex-stereotyping" to argue they have suffered from sex discrimination. This is useful because courts subject laws and policies that treat people differently according to their sex to "intermediate scrutiny." Intermediate scrutiny is a higher level of scrutiny than "rational basis scrutiny," which is the test applied to claims of discrimination for sexual orientation. Intermediate scrutiny requires the prisoner to show a *substantial* relationship between a prison rule and a legitimate goal of the prison to justify a sex-based classification.[42]

Sex-stereotyping claims cover claims of discrimination against people for not conforming to the expected behavior of their sex. The Supreme Court recognized this cause of action in *Price Waterhouse v. Hopkins*, finding sex discrimination when an accounting firm told an employee she had to "walk, talk, and dress more femininely, style her hair, and wear make-up and jewelry" to get a promotion.[43] This case is particularly useful for transgender prisoners who suffer from discrimination in prison. For many years, courts have been unsympathetic to transgender plaintiffs, particularly in prisons. But, several cases have held that *Price Waterhouse* protects transgender people and overrules previous decisions like *Ulane v. Eastern Airlines, Inc.*,[44] which denied transgender people protection under Title VII and similar sex discrimination laws.[45]

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had shown evidence in his claim that he was discriminated against solely because of his sexual preferences); *but see* Fuller v. Rich, 925 F. Supp. 459, 463, 1995 U.S. Dist. Lexis 20023, at *9–10 (N.D. Tex. 1995) (finding that mistaken rumors that a gay prisoner was HIV-positive were enough to raise a legitimate safety concern that justified firing him from food handling job).

39. There is only one known case that has used a sex discrimination theory in the prisoner context. *See* Schwenk v. Hartford, 204 F.3d 1187, 1200–02 (9th Cir. 2000) (discussing claim that attack by prison guard was at least in part due to sex discrimination, as guard was not interested in prisoner sexually until his discovery of her "true" sex). It is difficult to predict, then, how courts would respond, and you should be mindful of the consequences under the Prison Litigation Reform Act of filing claims deemed frivolous by the court. See Chapter 14 of the *JLM*, "The Prison Litigation Reform Act."

40. 42 U.S.C. § 2000e-2(a)(1) (2000). Numerous state statutes also prohibit sex discrimination; some apply the same standard as Title VII, while others define discrimination more broadly.

41. *See*, *e.g.*, Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 78, 118 S. Ct. 998, 1001, 140 L. Ed. 2d 201, 206 (1998); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682, 103 S. Ct. 2622, 2630, 77 L. Ed. 2d 89, 101 (1983).

42. *See* Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law."

43. Price Waterhouse v. Hopkins, 490 U.S. 228, 235, 109 S. Ct. 1175, 1782, 104 L. Ed. 2d 268, 278 (1989).

44. Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1084–85 (7th Cir. 1984) (construing "sex" in Title VII narrowly to mean only anatomical sex rather than gender); *see also* Holloway v. Arthur Andersen, 566 F.2d 659, 661 (9th Cir. 1977) (affirming trial court decision "that Title VII does not embrace transsexual discrimination").

45. *See* Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000) (holding *Price Waterhouse*'s logic overruled "the initial judicial approach" in cases like *Holloway*); Smith v. City of Salem, Ohio, 378 F.3d 566, 573 (6th Cir. 2004) ("It is true that, in the past, federal appellate courts regarded Title VII as barring discrimination based only on 'sex' (referring to an individual's anatomical and biological characteristics), but not on 'gender' (referring to socially-constructed norms associated with a person's sex) . . . . However, [this] approach . . . has been eviscerated by *Price Waterhouse*."); Schroer v. Billington, 525 F. Supp. 2d 58, 63 (D.D.C. 2007) ("Title VII is violated when an employer discriminates against any employee, transsexual or not, because he or she has failed to act or appear sufficiently masculine or feminine enough for an employer."); Mitchell v. Axcan Scandipharm, Inc., No. 05-243, 2006 U.S. Dist. LEXIS 6521, at *3 (W.D. Pa. Feb. 17, 2006) (*unpublished*) ("Plaintiff claims that he was fired because he began to present as a female. He claims that he was the victim of discrimination and a hostile work environment created by defendant due to plaintiff's appearance and gender-related behavior. These allegations, if true, state a claim under Title VII."); Kastl v. Maricopa County Cmty. College Dist., No. 02-1531-PHX-SRB, 2004 U.S. Dist. LEXIS 29825, at *7 (D. Ariz. June 3, 2004) (*unpublished*) (finding plaintiff's allegation that she was required to use the men's restroom stated a claim under Title VII where plaintiff was a biological female born with male genitalia); Tronetti v. TLC Healthnet Lakeshore Hosp., No. 03-CV-0375E(Sc), 2003 U.S. Dist. LEXIS 23757, at *12 (W.D.N.Y. Sept. 26, 2003) (*unpublished*) ("This Court is not bound by the *Ulane* decisions. More importantly, the *Ulane* decisions predate the Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S.

Sex-stereotyping can also be used by lesbian, gay, and bisexual people in making discrimination claims. For example, if you are a gay man and you believe you were fired from your prison job because you are gay, you could argue that you are a *man* who desires male sexual partners and therefore you were fired, where a female prisoner who desired male sexual partners (and who is thus similarly situated to you) would not have been fired.[46] By framing the argument in this way, you can perhaps get the court to be more rigorous in its review of the prison officials' actions.

3. State Laws

Many state laws (and constitutions) provide greater protection to LGBT people than the federal Constitution does, as interpreted by the courts. Examples are the Minnesota State Constitution[47] and California's Unruh Civil Rights Act.[48] You should research your state's laws to find out if you could have a stronger statutory claim under those laws than the constitutional claims (discussed in the above two subsections) that you could make. If you are in a state with LGBT-friendly statutes, you can bring a claim under a state statute as a "pendent claim" (supplemental to your Section 1983 claim) in federal court, or you can bring the state claim alone in state court. Also, sometimes state laws have been used by courts to determine what constitutes a violation of the federal Equal Protection Clause.[49]

D. Jury Bias

The Sixth Amendment of the United States Constitution guarantees defendants the right to trial by a *fair and impartial* jury in all criminal prosecutions.[50] If you suspect that homophobic or transphobic attitudes among the jurors who delivered the guilty verdict against you prevented them from making an impartial decision about your conviction, you may have grounds to challenge your conviction.[51]

Your right to a fair and impartial jury is supposed to be protected by a process called "voir dire." Voir dire happens before the trial begins. During voir dire, prospective jurors are asked questions so that the judge and the lawyers can learn more about them. Usually the judge asks the questions, although in some jurisdictions the lawyers also ask questions, and in many jurisdictions the lawyers are allowed to submit questions to the judge. Generally, the lawyers from each side are permitted to "strike," or exclude, jurors based on their answers to the questions. The lawyers have an unlimited opportunity to exclude jurors "for cause," which means they can exclude those whom they believe to be biased. The judge, too, has an obligation to exclude any prospective juror she believes to be biased.[52]

228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), which undermined the reasoning of the *Ulane* decisions."); *but see* Etsitty v. Utah Transit Auth., No. 2:04CV616 DS, 2005 U.S. Dist. LEXIS 12634, at *10–12 (D. Utah June 24, 2005) ("The *Price Waterhouse* prohibition against sex stereotyping should not be applied to transsexuals . . . [because] there is a huge difference between a woman who does not behave as femininely as her employer thinks she should, and a man who is attempting to change his sex and appearance to be a woman. Such drastic action cannot be fairly characterized as a mere failure to conform to stereotypes.").

46. *See* Rosa v. Park West Bank & Trust Co., 214 F.3d 213, 214–15 (1st Cir. 2000) (holding that it was *possible* that a bank that refused a loan application made by a man wearing a dress until he went home and changed into "male attire" had engaged in sex discrimination because it likely would not have refused a loan application to a woman wearing a dress); Baehr v. Lewin, 852 P.2d 44, 82, 74 Haw. 530, 580 (Haw. 1993) (holding that a state statute restricting the marital relation to one man and one woman should be subjected to strict scrutiny under the equal protection clause of the state constitution because it made a sex-based classification).

47. Minn. Const. art. I, § 2.

48. Cal. Civ. Code § 51 (2007).

49. *See* Doe v. Sparks, 733 F. Supp. 227, 232 (W.D. Pa. 1990) (finding that even though federal law allowed discrimination based on sexual activity, Pennsylvania State law did not, and Pennsylvania law could be used to evaluate the decision to bar a lesbian partner from visitation).

50. *See* Irvin v. Dowd, 366 U.S. 717, 721–22, 81 S. Ct. 1639, 1641–42, 6 L. Ed. 2d 751, 755–56 (1961).

51. There is evidence that lesbians are more likely to be convicted than heterosexual women, perhaps indicating that jurors' homophobia regularly plays an inappropriate role in their decision processes. Lesbians also serve longer sentences than heterosexual women. Robert Leger, *Lesbianism Among Women Prisoners: Participants and Nonparticipants*, 14:4 Criminal Justice and Behavior 448 (1987). *See also* Ruthann Robson, Sappho Goes to Law School 36 (1998).

52. In New York, a prosecuting attorney or a judge may not assume that a gay juror will be biased in favor of other homosexuals involved in the trial. So, simply the fact that both a defendant and a juror are gay should not be "cause" for dismissing the juror. *See* People v. Viggiani, 105 Misc. 2d 210, 214, 431 N.Y.S.2d 979, 982 (N.Y. Crim. Ct. N.Y. County 1980) ("To say that this entire group of citizens who may be otherwise qualified, would be unable to sit as

You might have a claim that your right to trial by an impartial jury was violated if:

(1) The court failed or refused to question jurors during voir dire about their attitudes towards gay or transgender people, *and* your sexual orientation or gender identity was raised at trial;[53]
(2) The court selected a juror even though that juror had indicated that, due to his homophobia or transphobia, he would have trouble being impartial[54]; or
(3) The prosecutor conducting the voir dire excluded all the gay or transgender people from the pool of prospective jurors because they were gay or transgender.[55]

A handful of prisoners have challenged their *sentences* or convictions for alleged anti-gay jury bias, with limited success. For example, in *Owens v. Hanks*, a Seventh Circuit case, a gay prisoner whose sexual orientation was raised in testimony during his murder trial petitioned for a writ of habeas corpus, contending, among other things, that he was denied an impartial jury because the court chose several jurors who had expressed their bias against gay people during jury selection.[56] The court found that these expressions of juror bias did not make his trial unfair because there was testimony at trial that *witnesses* for both the prosecution and the defense were gay, and so any prejudice on the part of the jurors regarding sexuality affected both parties.[57] If both parties are not affected, such a claim might be more likely to succeed.

On the other hand, a New Jersey court reversed the conviction of a defendant on appeal, finding that the trial court had deprived him of his fundamental right to be present during an individual voir dire from which spectators were excluded. At the voir dire, questions were asked about prospective jurors' attitudes

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impartial jurors in this case merely because of their homosexuality, is tantamount to a denial of equal protection under the United States Constitution.").

53. In conducting voir dire, the trial court judge is required to permit at least some questioning with respect to any material issue that may actually or potentially arise at trial. Aldridge v. United States, 283 U.S. 308, 311–13, 51 S. Ct. 470, 472, 75 L. Ed. 1054, 1056–57 (1931) (finding voir dire unfair where trial judge "failed to ask any question which could be deemed to cover the subject," in order to uncover a "disqualifying state of mind," in this instance, racial prejudice). The standard of review of jury voir dire is that the trial court's discretion must be exercised consistently with "the essential demands of fairness." Aldridge v. United States, 283 U.S. 308, 310, 51 S. Ct. 470, 471, 75 L. Ed. 1054, 1056 (1931). Nevertheless, the trial court is given wide latitude to determine how best to conduct the voir dire, and failure to ask specific questions is reversed only for abuse of this discretion. Rosales-Lopez v. United States, 451 U.S. 182, 190–91, 101 S. Ct. 1629, 1635–36, 68 L. Ed. 2d 22, 29–30 (1981).

54. *See* State v. Johnson, 706 So. 2d 468, 477–78 (La. Ct. App. 1998) (finding that it was proper to release one juror for anti-gay bias but improper to release a second juror, who claimed that if he knew defendant was gay he would "almost automatically" convict, because the second was merely parroting the released juror in an attempt to get out of jury duty and was therefore not actually biased).

55. Some courts have ruled that jurors cannot be removed "for cause" from a jury just for being gay. *See*, *e.g.*, People v. Viggiani, 105 Misc. 2d 210, 214, 431 N.Y.S.2d 979, 982 (N.Y. Crim. Ct. N.Y. County 1980) ("To say that [citizens] who may be otherwise qualified, would be unable to sit as impartial jurors in this case, merely because of their homosexuality is tantamount to a denial of equal protection under the United States Constitution."). Other courts have ruled that homosexuals may constitute a "class" of individuals that may not be entirely excluded from a jury. *See*, *e.g.*, People v. Garcia, 92 Cal. Rptr. 2d 339, 343–44, 77 Cal. App. 4th 1269, 1275–77 (Cal. Ct. App. 2000) (holding that "exclusion of lesbians and gay men [from the jury pool] on the basis of group bias violates the California Constitution").

56. For example, one impaneled juror stated at voir dire that "she would unwittingly be influenced by a witness' homosexuality because she believe[d] it [was] morally wrong." Owens v. Hanks, No. 96-1124, 1996 U.S. App. LEXIS 15465, at *3 (7th Cir. June 25, 1996) (*unpublished*). Another stated that she did not approve of homosexuality and "would be less likely to believe a homosexual." Owens v. Hanks, No. 96-1124, 1996 U.S. App. LEXIS 15465, at *3 (7th Cir. June 25, 1996) (*unpublished*). Please note, however, that Owens v. Hanks is an unpublished opinion and therefore may not be an acceptable case to cite in some jurisdictions.

57. Owens v. Hanks, No. 96-1124, 1996 U.S. App. LEXIS 15465, at *5–6 (7th Cir. June 25, 1996) (*unpublished*); *see also* Lingar v. Bowersox, 176 F.3d 453, 457–59 (8th Cir. 1999) (finding the admission of testimony that defendant was gay during the penalty phase of his trial for murder was harmless and did not contribute to the jury's finding, because it was brief and because the State did not refer to it during closing argument); United States v. Click, 807 F.2d 847, 850 (9th Cir. 1987) (finding refusal by trial court to ask questions of prospective jurors during voir dire to determine if they harbored bias against gay people did not amount to an abuse of discretion and that the proposed evidence was irrelevant, where trial judge had believed such questions would "unnecessarily call attention to [the defendant's] effeminate mannerisms"); State v. Lambert, 528 A.2d 890, 892 (Me. 1987) (finding no abuse of discretion where "questions concerning a personal involvement with sexual abuse, presumably including sexual abuse by a homosexual, were asked of the potential jurors in [a] confidential questionnaire," and "additional questions asked [to jurors en masse] did not contain a potential for such undue embarrassment to a potential juror as to require individual voir dire").

toward homosexuality. The defendant had expressly requested to be present.[58] The court held that "[s]ince . . . the evidence suggested that defendant was bisexual because he was a frequent patron of gay bars, it was important that defendant be present so that he could have formed his own impressions of the jurors' demeanor and visceral reactions when they responded to the questions about homosexuality."[59]

Though the case law is sparse, some cases indicate you might be granted a retrial if homosexuals were purposefully excluded from the jury. In *People v. Viggiani,* a New York state case, the court decided jurors could not be excluded from a jury "for cause" merely because they had a same-sex orientation and so did a participant in the trial.[60] The California Court of Appeals ruled in *People v. Garcia* that the prosecution could not use its peremptory challenges to exclude all lesbians from a jury. It found that homosexuals constitute a "cognizable class" and that completely barring them from a jury violated the California constitution.[61]

Although it cannot be predicted with any certainty, the claim that LGBT individuals form a class that cannot be barred from jury service is probably stronger after *Lawrence v. Texas.* Before *Lawrence*, some courts ruled that homosexuals could be barred from jury service because they were presumptively criminals. Not only are homosexuals no longer presumptively criminal in any state, but *Lawrence v. Texas* and *Romer v. Evans* also call into question any government action that is backed by stereotypical beliefs about the inferiority of a class of people.

If you believe homophobic or transphobic bias played a role in the selection of your jury, you may be able to convince a court to vacate or reverse the judgment against you, or to set aside your sentence.

E. Your Right to Control Your Gender Presentation While in Prison

Transgender prisoners often have difficulty expressing their gender while in prison. These difficulties range from denial of access to gender-related medical care to denial of access to personal effects like clothes and cosmetics.

1. Access to Gender-Related Medical Care

Many transgender prisoners seek access to gender-related medical care while in prison. The most common requests are for hormone treatments and gender reassignment surgery. For general information about your right to adequate medical care while in prison, see Chapter 23 of the *JLM*.

(a) Access to Gender Reassignment Surgery

Courts generally do not require a prison to pay for or conduct any surgery, either genital or non-genital, related to a prisoner's gender identity or transition.[62] Some states have even gone so far as to legislate a prohibition on prisoner sex-reassignment surgery.[63] But, if you experience health complications as a result of a prior gender-related surgery, you *are* entitled to the medical care necessary to treat those complications.

(b) Access to Hormonal Treatment

The federal Bureau of Prisons' medical policy is to "maintain a transsexual [sic] inmate at the level of change existing upon admission."[64] Nevertheless, many federal and state prisons have refused to provide

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58. State v. Dishon, 687 A.2d 1074, 1082, 297 N.J. Super. 254, 269 (N.J. Super. Ct. App. Div. 1997).

59. State v. Dishon, 687 A.2d 1074, 1082, 297 N.J. Super. 254, 269–70 (N.J. Super. Ct. App. Div. 1997).

60. *See* People v. Viggiani, 105 Misc. 2d 210, 214, 431 N.Y.S.2d 979, 982 (N.Y. Crim. Ct. N.Y. County 1980) ("To say that this entire group of citizens who may be otherwise qualified, would be unable to sit as impartial jurors in this case merely because of their homosexuality, is tantamount to a denial of equal protection under the United States Constitution.").

61. People v. Garcia, 92 Cal. Rptr. 2d 339, 343–44, 77 Cal. App. 4th 1269, 1275–77 (Cal. Ct. App. 2000).

62. Darren Rosenblum, *"Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 Mich. J. Gender & L. 499, 543 (2000); *see also* Lewis v. Berg, No. 9:00–CV–1433, 2005 U.S. Dist. LEXIS 39571, at *22, *30 (N.D.N.Y. Mar. 10, 2005) (*unpublished*) (finding it reasonable for prison grievance committee to deny prisoner's request for gender reassignment and cosmetic surgery and refer her back to medical personnel for other appropriate treatment).

63. *See* Inmate Sex Change Prevention Act, Wis. Stat. § 302.386(5m) (2007).

64. The Bureau's policy reads as follows:

> It is the policy of the [Bureau of Prisons] to maintain a transsexual inmate at the level of change existing upon admission. Should the Clinical Director determine that either progressive or regressive treatment changes are indicated, the Medical Director must approve these prior to implementation. The use of hormones to

hormone treatment to transgender prisoners, even though the cost of hormone treatment does not necessarily exceed the costs of other routine medical treatments administered to the general prison population.[65] In addition, prisons may deny hormone treatments if you do not have a doctor's prescription to show that you were previously taking hormones.

If you were undergoing hormone therapy at the time you were incarcerated, and prison officials deny you access to the treatment while you are in prison, you can sue those officials for violation of your constitutional right to medical care. As you will see in the following subsections, the issue of whether a transgender person is entitled to hormone therapy while in prison has been litigated extensively. In most cases, courts have found for the prison officials, but recently several courts have required prisons to provide transgender prisoners with hormonal treatment as long as they were undergoing such treatment before entering prison.[66]

(i) Serious Medical Need and Deliberate Indifference

The Supreme Court established in *Estelle v. Gamble* that "deliberate indifference" to a prisoner's "serious medical needs" violates that prisoner's Eighth Amendment right to be free from cruel and unusual punishment.[67]

Circuit courts have consistently considered "transsexualism," also known in this context as "gender dysphoria" or "gender identity disorder,"[68] a "serious medical need" for the purpose of the *Estelle* standard.[69] Many federal courts have held that transgender prisoners are therefore constitutionally entitled to *some* type of medical treatment for their condition. Nevertheless, most of these courts have held transgender prisoners do not have a constitutional right to any *particular* type of treatment, so long as they receive some kind of treatment, such as psychological counseling.[70] Under these rulings, prison officials do not violate the Eighth Amendment when, in the exercise of their professional judgment, they refuse to

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maintain secondary sexual characteristics may be continued at approximately the same levels as prior to incarceration (with appropriate documentation from community physicians/hospitals) and with the Medical Director's approval.

Farmer v. Moritsugu, 163 F.3d 610, 611–12 (D.C. Cir. 1998) (citing U.S. Dept. of Justice, Fed. Bureau of Prisons, Program Statement No. 6000.04, Health Services Manual, Ch. 15, § 4 (1994)).

65. Darren Rosenblum, *"Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 Mich. J. Gender & L. 499, 546 (2000).

66. *See* Phillips v. Mich. Dept. of Corr., 731 F. Supp. 792, 800–01 (W.D. Mich. 1990) (granting transgender prisoner's request for a preliminary injunction requiring prison officials to provide her with estrogen therapy where she had taken estrogen for the 16 years prior to incarceration); Gammett v. Idaho State Bd. of Corr., No. CV05-257-S-MHW, 2007 U.S. Dist. LEXIS 55564 (D. Idaho July 27, 2007) (*unpublished*) (granting prisoner's request for a preliminary injunction to provide estrogen therapy but only after self-castration required the provision of some type of hormone). Because many prisons refuse to prescribe hormones to prisoners who do not have a previous doctor's prescription, prisoners who had been getting hormones through informal means may have an additional challenge in bringing suit.

67. Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976). For general information about your right to adequate medical care while in prison, see Chapter 23 of the *JLM*.

68. Activists disagree as to whether or not characterizing transgender identities as medical conditions is strategically wise. On the one hand, it sometimes provides transgender people in and out of prison with access to gender-related medical treatment; on the other hand, these diagnoses often regulate gender expressions and may limit the ability of transgender people who are unable or choose not to access gender-related medical care to have their gender recognized. *See*, *e.g.*, Dean Spade, *Resisting Medicine, Re/modeling Gende*r, 18 Berkeley Women's L.J. 15 (2003).

69. *See*, *e.g.*, Cuoco v. Moritsugu, 222 F.3d 99, 106 (2d Cir. 2000) (finding that prisoner who claimed her constitutional rights were violated because she was denied estrogen treatments had a serious medical need as a transsexual); White v. Farrier, 849 F.2d 322, 325 (8th Cir. 1988) (finding that "transsexualism is a very complex medical and psychological problem" that constitutes a serious medical need); Meriwether v. Faulkner, 821 F.2d 408, 413 (7th Cir. 1987) (finding a transgender prisoner who is entitled to some type of medical care had a serious medical need); Kosilek v. Maloney, 221 F. Supp. 2d 156, 162 (D. Mass. 2002) (holding plaintiff's transgender healthcare was a serious medical need and prison officials were required to provide treatment, including psychotherapy with a professional experienced in treating gender identity disorder and potentially also including hormone therapy or gender reassignment surgery); *but see* Long v. Nix, 86 F.3d 761, 765 n.3 (8th Cir. 1996) (noting that court's holding in *White* that transgenderism is a "serious medical need" may be in doubt in light of Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)).

70. *See*, *e.g.*, Meriwether v. Faulker, 821 F.2d 408, 413 (7th Cir. 1987) (holding that a transgender prisoner is entitled to some type of medical treatment but has no constitutional right to any one particular type of treatment where another form of treatment is made available).

implement a prisoner's requested course of treatment.[71] Accordingly, most courts that have considered the question have denied transgender prisoners' requests for hormonal treatment while still upholding their right to medical care.[72]

Several more recent federal court decisions, however, suggest that courts are beginning to carve out a limited exception and recognize circumstances in which the provision of hormonal therapy by prisons should be mandatory. In *Phillips v. Michigan Department of Corrections*, for example, a Michigan federal court granted a preliminary injunction directing prison officials to provide estrogen therapy to a thirty-four-year-old transgender woman. The prisoner had been taking estrogen since she was a teenager and had been experiencing physical transformation and severe depression as a result of being prevented from continuing her estrogen treatment in prison.[73] The *Phillips* court held that denying hormonal treatment in this case caused "irreparable harm" and violated the Eighth Amendment:

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71. *See* De'Lonta v. Angelone, 330 F.3d 630, 635 (4th Cir. 2003) (finding prisoner with gender identify disorder was not entitled to continued hormone therapy, but was entitled to treatment for compulsion to self-mutilate after her hormone treatment was stopped); Long v. Nix, 86 F.3d 761, 765 (8th Cir. 1996) (holding a prison official was not deliberately indifferent for choosing a different course of treatment than the tranquilizers recommended by the prisoner's expert, where the prison medical staff tried to evaluate the prisoner's psychological condition and the prisoner failed to cooperate); White v. Farrier, 849 F.2d 322, 327 (8th Cir. 1988) (a different diagnosis by prison medical staff than by prisoner's experts does not itself establish deliberate indifference, since doctors are entitled to exercise their medical judgment; a prisoner is not entitled to hormone treatment if the prison instead decides to provide her with psychotherapy); Meriwether v. Faulkner, 821 F.2d 408, 413 (7th Cir. 1987) (holding a transgender prisoner is entitled to some type of medical treatment but has no constitutional right to any one particular type of treatment); Supre v. Ricketts, 792 F.2d 958, 963 (10th Cir. 1986) (holding that prison officials are not required to administer estrogen to treat transsexuals because it is one of a variety of treatment options and there is no medical consensus that it is the best option; therefore a transsexual denied estrogen treatment may have a claim for medical malpractice, but not for deliberate indifference); Kosilek v. Maloney, 221 F. Supp. 2d 156, 162 (D. Mass. 2002) (holding that prison could deny transsexual prisoner hormones or sex reassignment surgery if it considered them too much of a security threat, but was required to provide at least some kind of treatment, such as psychotherapy); Madera v. Corr. Med. Sys., No. 90-1657, 1990 U.S. Dist. LEXIS 11878, at *10 (E.D. Pa. Sept. 5, 1990) (*unpublished*) ("[T]here is no absolute constitutional right to hormonal treatments for a transsexual, any more than there is for any other specific therapy requested by a prisoner."); Farmer v. Carlson, 685 F. Supp. 1335, 1340 (M.D. Pa. 1988) (finding denial of plaintiff's estrogen medication did not stem from a deliberate indifference to her medical needs but instead resulted from an informed medical opinion, and therefore plaintiff did not have a legal claim of deliberate indifference); Lamb v. Mascher, 633 F. Supp. 351, 353 (D. Kan. 1986) (found for defendants who provided psychological treatment to a transgender prisoner but refused to provide hormones, stating, "the key question in this case is whether defendants have provided plaintiff with some type of treatment, regardless of whether it is what plaintiff desires"). The courts' refusal to recognize a specific right to hormone therapy, and the recognition instead of a broader right to medical care, has on at least one occasion prevented prison officials from avoiding liability by claiming qualified immunity. In a Ninth Circuit case, prison officials sued by a prisoner whose hormonal therapy they had terminated argued that because prisoners suffering from gender dysphoria have no clearly established right to female hormone therapy, the officers were entitled to qualified immunity. The Ninth Circuit rejected the officials' claim, holding that "with respect to prisoner medical claims, the right at issue should be defined as a prisoner's [8th] Amendment right 'to officials who are not deliberately indifferent to serious medical needs[,]'" and not as a right to something more specific. South v. Gomez, *decision reported at* 211 F.3d 1275 (9th Cir. 2000), *opinion reported in full at* No. 99-15976, 2000 U.S. App. LEXIS 3200, at *4 (9th Cir. Feb. 25, 2000) (*unpublished*). See Chapter 16 of the *JLM* for an explanation of qualified immunity and other defenses to § 1983 suits.

72. In Maggert v. Hanks, 131 F.3d 670, 671–72 (7th Cir. 1997), a court recognized what these other courts have not: that, at least sometimes, no treatment other than hormone therapy will be effective for transsexual prisoners. Nevertheless, the *Maggert* court held prisons should not be required to provide hormonal therapy—not because other treatments would work, but because such therapy exceeds the minimal treatment prisons are required to provide. Though a prison is required by the 8th Amendment to provide a prisoner with medical care, it need not provide care as good as the prisoner would receive if he were a free person; prisoners are entitled only to minimum care. Maggert v. Hanks, 131 F.3d 670, 671–72 (7th Cir. 1997) (citing Hudson v. McMillian, 503 U.S. 1, 9, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992)). The *Maggert* court reasoned that because neither public nor private health insurance programs typically pay for sex reassignment, it would be inaccessible to most transgender prisoners even if they were not in prison. "[M]aking the treatment a constitutional duty of prisons would give prisoners a degree of medical care that they could not obtain if they obeyed the law . . . [This would lead to] transsexuals committing crimes because it is the only route to obtaining a cure." Maggert v. Hanks, 131 F.3d 670, 672 (7th Cir. 1997). *See also* Praylor v. Tex. Dept. of Criminal Justice, 430 F.3d 1208, 1209 (5th Cir. 2005) (per curiam) (assuming that transsexualism is a serious medical need, the denial of hormone therapy was not deliberate indifference because of the length of the plaintiff's term, the prison's inability to perform sex change operations, the lack of medical necessity for the hormone, and the disruption to all-male prisons).

73. Phillips v. Mich. Dept. of Corr., 731 F. Supp. 792 (W.D. Mich. 1990).

> It is one thing to fail to provide an inmate with care that would improve his or her medical state, such as refusing to provide sex reassignment surgery or to operate on a long-endured cyst. Taking measures which actually reverse the effects of years of healing medical treatment . . . is measurably worse, making the cruel and unusual determination much easier.[74]

A recent New York district court case is especially encouraging, as it found a prison denying a transgender prisoner hormone therapy violated the Eighth Amendment. In *Brooks v. Berg*, the plaintiff only began to officially identify himself as a transgender person while in prison and so was not using hormonal therapy when he entered prison. The court therefore did away with other courts' distinction between prisoners already using hormone therapy at the time of entry into prison and those seeking to start hormone therapy after entry into prison.[75]

Despite these encouraging developments in a few federal courts, courts in many other jurisdictions have continued to deny claims by transgender prisoners for hormonal treatment.[76] Prisoners who are unable to demonstrate that they previously received hormone treatment before incarceration face an uphill battle. For example, in *Brown v. Zavaras*, the court held that estrogen treatment specifically was not necessary because the plaintiff had not received such treatment prior to incarceration.[77] Nevertheless, receiving hormone therapy prior to incarceration does not guarantee access to similar treatment while incarcerated.[78] Recent cases indicate that the original determination made by prison medical personnel, rather than prior treatment history, will be given the greatest weight by the courts.[79]

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74. Phillips v. Mich. Dept. of Corr., 731 F. Supp. 792, 800 (W.D. Mich. 1990); *see also* De'Lonta v. Angelone, 330 F.3d 630, 634 (4th Cir. 2003) (holding that termination of a transgender prisoner's hormone treatment could constitute deliberate indifference where such treatment was terminated because of prison policy rather than because of medical judgment); South v. Gomez, *decision reported at* 211 F.3d 1275 (9th Cir. 2000), *opinion reported in full at* No. 99–15976, 2000 U.S. App. LEXIS 3200, at *5–6 (9th Cir. Feb. 25, 2000) (*unpublished*) (distinguishing between failing to provide hormonal therapy in the first instance and abruptly terminating an existing prescription; when a prisoner was already receiving hormones at the time of her transfer to a prison, it was a violation of her 8th Amendment rights for that prison to halt all hormone treatment at once rather than end it gradually); Wolfe v. Horn, 130 F. Supp. 2d 648, 653 (E.D. Pa. 2001) (ruling that where a prison doctor discontinued a patient's hormone treatment that she had been receiving for almost a year, there was "at least a fact question as to whether each of the defendants was deliberately indifferent to treating [the plaintiff's] gender identity disorder"). The *Wolfe* court found that, while it may be defensible for a prison to reject demands for hormonal therapy by transgender prisoners who did not take hormones outside of the prison setting, the case is different when prison officials terminate medical treatment that was previously recommended and administered by a medical professional outside of the prison.

75. Brooks v. Berg, 270 F. Supp. 2d 302, 312 (N.D.N.Y. 2003) (finding an 8th Amendment violation where prisoner was not permitted to begin hormonal therapy while in prison; the court reasoned that the "prison policy . . . makes a seemingly arbitrary distinction between inmates who were and were not diagnosed with GID prior to incarceration[,]" rather than a distinction based on medical judgment). Defendants also admitted that the New York Department of Correctional Services' policy did not prevent a prisoner who was first diagnosed with gender dysphoria while incarcerated from potentially receiving hormone replacement treatments.

76. *See*, *e.g.*, Praylor v. Tex. Dept. of Criminal Justice, 430 F.3d 1208, 1209 (5th Cir. 2005) (holding that denial of hormone therapy and sex change operation does not constitute deliberate indifference when the prison's medical director found no medical necessity for such treatment and the prison was unable to perform a sex change operation); Farmer v. Moritsugu, 163 F.3d 610, 615 (D.C. Cir. 1998) (denying prisoner's claim against the medical director of the Bureau of Prisons because he was not in a position to diagnose and treat individual patients); Maggert v. Hanks, 131 F.3d 670, 672 (7th Cir. 1997) (holding that prisons are not required to provide hormone therapy because it is unnecessary and expensive, and because gender dysphoria is not a serious enough condition).

77. Brown v. Zavaras, 63 F.3d 967, 970 n.2 (10th Cir. 1995).

78. *See*, *e.g.*, Stevens v. Williams, No. CV-05-1790-ST, 2008 WL 916991, at *12–13 (D. Or. Mar. 27, 2008) (*unpublished*) (finding that prisoner, who had received hormone therapy in the past, had previously and unsuccessfully litigated his denial of continued hormone therapy while in prison and therefore was barred from relitigating this claim in federal court); Scribner v. Surapaneni, No. 1:05-CV-642, 2006 WL 3761976, at *5 (E.D. Tex. Dec. 21, 2006) (*unpublished*) (holding that despite prisoner's prior hormone therapy treatment, including treatment while incarcerated, he was not entitled to continued treatment after treating physician found that sex-reassignment surgery was highly unlikely and that the prisoner's age increased concerns about the negative side effects of continued treatment).

79. *See*, *e.g.*, Praylor v. Tex. Dept. of Criminal Justice, 430 F.3d 1208, 1209 (5th Cir. 2005) (deferring to treating physician's recommendations).

2. Access to Personal Items Associated with Gender Identity

Clothing, cosmetics, jewelry, and personal care products are often significant components of a person's gender presentation. Prisons vary as to whether they permit prisoners to access the clothing of their choice and other personal items.[80] Prisoners have challenged prison policies that deny them access to certain kinds of clothing and products, as well as specific refusals of prison staff to provide them with such property, under Section 1983. In both situations, prisoners allege that the prison policies and refusals violate their constitutional rights. These challenges have been largely unsuccessful, however, because courts show significant deference to prison officials' decisions about how to oversee daily life in prison.

Claims under the First Amendment generally fail in the face of arguments by prisons that restrictions on dress, jewelry, and makeup are justified by legitimate penological interests.[81] Several courts have noted that such deprivations are simply not of a constitutional nature.[82]

As one court stated:

> "Because routine discomfort is part of the penalty that criminal offenders pay for their offenses against society, only those deprivations denying the minimal civilized measures of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation." . . . [c]osmetic products are not among the minimal civilized measure of life's necessities.[83]

Additionally, courts have held that different grooming regulations for male and female prisoners do not trigger a prisoner's equal protection rights.[84]

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80. *See*, *e.g.*, Tates v. Blanas, CIV S-00-2539, 2003 U.S. Dist. LEXIS 26029, at *31 (E.D. Cal. Mar. 11, 2003) (*unpublished*) (rejecting a categorical rule that denies a prisoner a bra simply because he is transgender or is housed in a men's ward; the possibility that the bra could be misused as a weapon or noose must be balanced against any medical or psychological harm resulting from denial of a bra); Lucrecia v. Samples, No. C-93-3651-VRW, 1995 U.S. Dist. LEXIS 15607, at *1–2, *15–16 (N.D. Cal. Oct. 16, 1995) (*unpublished*) (noting that transgender prisoner was permitted access to "female clothing and amenities" in one prison, but denying relief for second facility's refusal of permission to wear female undergarments because of significant penological interests and lack of demonstration that wearing the female undergarments was a medical necessity).

81. *See*, *e.g.*, Star v. Gramley, 815 F. Supp. 276, 278–79 (C.D. Ill. 1993) (holding that restrictions on clothing prisoners can wear are reasonably related to a legitimate penological interest and hence do not violate the 1st Amendment; allowing prison to prevent a prisoner from wearing women's makeup and apparel on the ground that the prisoner would be more vulnerable to attack if he dressed that way); Lamb v. Maschner, 633 F. Supp. 351, 353 (D. Kan. 1986) (denying request by transgender prisoner for cosmetics and female clothing, and holding that "prison authorities must have the discretion to decide what clothing will be tolerated in a male prison"); Ahkeen v. Parker, No. 02A01-9812-CV-00349, 2000 Tenn. App. LEXIS 14, at *25 (Tenn. Ct. App. Jan. 10, 2000) (*unpublished*) (upholding prison policy denying men the right to wear earrings, which was challenged on equal protection grounds, because by discouraging transsexual dressing, the policy discouraged sexual assaults); s*ee also* Claybrooks v. Tennessee Dept. of Corr., No. 98-6271, 1999 U.S. App. LEXIS 15174, at *3 (6th Cir. July 6, 1999) (*unpublished*) (affirming lower court's dismissal of transgender prisoner's § 1983 claim for denial of female clothing, not on constitutional grounds, but on the grounds that the Tennessee Department of Corrections is immune from suit in federal court under the 11th Amendment because it is a state agency and the state has not waived immunity).

82. Remember that in order to bring a successful § 1983 claim, you must allege a violation of a federal constitutional or statutory right. *See* Lamb v. Maschner, 633 F. Supp. 351, 353 (D. Kan. 1986) (failing to be "convinced that a denial of female clothing and cosmetics is a constitutional violation"); Ahkeen v. Parker, No. 02A01-9812-CV-00349, 2000 Tenn. App. LEXIS 14, at *22 (Tenn. Ct. App. Jan. 10, 2000) (*unpublished*) (holding that confiscation of the prisoner's earrings by prison officials did not violate the prisoner's privacy rights, as "loss of freedom of choice and privacy are inherent incidents of confinement" (quoting Hudson v. Palmer, 468 U.S. 517, 528, 104 S. Ct. 3194, 3201, 82 L. Ed. 2d 393, 404 (1984))); Murray v. U.S. Bureau of Prisons, No. 95-5204, 1997 U.S. App. LEXIS 1716, at *7–8 (6th Cir. Jan. 28, 1997) (*unpublished*) (holding that denial of access to hair and skin products that transgender prisoner claimed were necessary for her to maintain a feminine appearance did not state a constitutional claim).

83. Murray v. U.S. Bureau of Prisons, No. 95-5204, 1997 U.S. App. LEXIS 1716, at *7–8 (6th Cir. Jan. 28, 1997) (*unpublished*) (quoting Hudson v. McMillian, 503 U.S. 1, 9, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992)).

84. *See*, *e.g.*, Hill v. Estelle, 537 F.2d 214, 215–16 (5th Cir. 1976) (holding that difference in application of state prison regulations, in failing to enforce hair length regulations against female prisoners, impinged on no fundamental right, created no suspect classification, and did not constitute violation of equal protection); Poe v. Werner, 386 F. Supp. 1014, 1019 (M.D. Pa. 1974) (holding that state prison hair length regulation does not violate the Equal Protection

F. Your Right to Confidentiality Regarding Your Sexual Orientation or Gender Identity

If you are an LGBT prisoner, you may not have disclosed your sexual orientation or transgender status to fellow prisoners. The disclosure by a prison official of your sexual orientation or gender identity could subject you to harassment or abuse by other officials or fellow prisoners. If a prison official has told others that you are gay, lesbian, transgender, or bisexual, you might have a claim under Section 1983 that the official violated your Eighth Amendment right to be free from cruel and unusual punishment and/or your right to privacy under the Fourteenth Amendment.

1. Disclosure of Sexual Orientation or Gender Identity as an Eighth Amendment Violation

(a) Sexual Orientation

One case specifically addresses a prisoner's Eighth Amendment right to be free from disclosure of his or her sexual orientation. *Thomas v. District of Columbia* involved a corrections officer at the Maximum Security Facility in Lorton, Virginia, who allegedly sexually harassed a prisoner and spread rumors that the prisoner was gay and a "snitch."[85] As a result of these rumors, the prisoner claimed he suffered emotional distress and feared for his safety when confronted and threatened with bodily harm by other prisoners. The prisoner sued the corrections officer under Section 1983, claiming the officer had violated his Eighth Amendment rights, and the officer moved to dismiss the complaint.[86]

The U.S. District Court for the District of Columbia found that the prisoner had stated a valid Eighth Amendment claim against the officer.[87] The court held that the officer's "alleged conduct, the physical harm with which [the prisoner] was threatened, and the psychic injuries that are alleged to have resulted from such unnecessary, cruel, and outrageous conduct, are sufficiently harmful to make out an Eighth Amendment excessive force claim."[88]

The rumors about the prisoner's homosexuality were just one part of the abuse the officer allegedly visited on the prisoner, and it is impossible to know whether in the absence of the other allegations the court would have reached the same conclusion. However, there is language in *Thomas* that, when read in the context of other Section 1983 cases, could be useful to prisoners bringing suits against prison officials who have revealed their sexual orientation or gender identity to other prisoners.

(b) Gender Identity

If you are a transgender prisoner, you might have a stronger desire for privacy when bathing and changing clothes than traditionally gendered prisoners. If this is not provided, you may bring a claim against the prison for violating your privacy and/or Eighth Amendment rights. The court will balance your interests against the prison's interest in security and will usually find in favor of the prison.[89]

Clause, even though it does restrict female hair length or style).

85. Thomas v. District of Columbia, 887 F. Supp. 1, 3 (D.D.C. 1995). *See also* Montero v. Crusie, 153 F. Supp. 2d 368, 376–77 (S.D.N.Y. 2001) (denying summary judgment for correctional officers who spread rumor that prisoner was gay and tried to incite fight between him and other prisoners).

86. Thomas v. District of Columbia, 887 F. Supp. 1, 3 (D.D.C. 1995).

87. Thomas v. District of Columbia, 887 F. Supp. 1, 5 (D.D.C. 1995) (denying the defendant's motion to dismiss and allowing the case to go to trial).

88. Thomas v. District of Columbia, 887 F. Supp. 1, 4 (D.D.C. 1995).

89. *See* Hudson v. Palmer, 468 U.S. 517, 527–28, 104 S. Ct. 3194, 3200–01, 82 L. Ed. 2d 393, 403–04 (1984) (holding that a prisoner's expectation of privacy always yields to what must be considered the paramount interest in institutional security). *See, e.g.*, Pollock v. Brigano, 130 Ohio App. 3d 505, 511–12, 720 N.E.2d 571, 576 (Ohio App. 1998) (relying on Hudson v. Palmer to hold that "privacy concerns" of transgender prisoner who was forced to shower, change clothes, and use the toilet in front of other prisoners "[did not] rise above the paramount need for institutional security for the other prisoners and the staff" of the prison and that the claims of "lack of privacy do not constitute cruel and unusual punishment under the 8th Amendment because prison policy" had penological justification).

2. Disclosure of Sexual Orientation or Gender Identity as Fourteenth Amendment Violation

The Supreme Court has held that the Fourteenth Amendment to the U.S. Constitution guarantees the right to privacy regarding disclosure of certain personal information.[90] These holdings come out of a Supreme Court tradition of finding a general right to privacy in the Constitution that protects certain intimate matters.[91] Further, many other courts have also found that a constitutional right of privacy protects against disclosure of some kinds of personal information.[92] If a prison official discloses private information about you, you could be subject to harassment or abuse by other officials or fellow prisoners. If this has happened to you, you might be able to bring a claim under Section 1983 against the official who made the disclosure for violating your constitutional right to privacy. While many cases have focused on disclosure of medical information, you might be able to bring a similar claim for unwarranted disclosure of other personal information.

(a) Privacy Regarding Gender Identity

The Second Circuit has found that a person's transgender status is among those constitutionally protected personal matters, and that a prison official may not violate a prisoner's right to privacy through disclosure of gender identity when that disclosure is not "reasonably related to legitimate penological interests."[93] In other words, the prison official must have a legitimate reason, related to the prison system's goals, for giving away such private information.

Because it is hard to imagine a situation in which a prison could claim a legitimate interest in "outing" a transgender prisoner, you might succeed if you bring a Section 1983 claim arguing that a prison official who told others that you were transgender violated your right to privacy. In *Powell v. Schriver*, a transgender prisoner argued that a corrections officer had violated her constitutional right to privacy when the officer told another corrections officer in the presence of other prison staff and prisoners that she had undergone gender reassignment surgery. The Second Circuit held the corrections officer's "gratuitous disclosure" of the prisoner's "confidential medical information as humor or gossip . . . [was] *not* reasonably related to a legitimate penological interest" and therefore violated her right to privacy.[94] Because the sharing of personal

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90. *See*, *e.g.*, Whalen v. Roe, 429 U.S. 589, 599–600, 97 S. Ct. 869, 876–77, 51 L. Ed. 2d 64, 73–74 (1977) (holding that the "individual interest in avoiding disclosure of personal matters" is one of the interests protected by a constitutional zone of privacy, but ultimately finding that a New York statute requiring that the state be provided with a copy of prescriptions for certain drugs did not violate the constitution because it included appropriate confidentiality protections and furthered a legitimate state interest).

91. *See, e.g.,* Griswold v. Connecticut, 381 U.S. 479, 485–86, 85 S. Ct. 1678, 1682, 14 L. Ed. 2d 510, 515–16 (1965) (holding that prohibiting the use of contraceptives violates the Constitution because the marital relationship is one that lies within the zone of privacy created by several constitutional guarantees); Roe v. Wade, 410 U.S. 113, 153, 93 S. Ct. 705, 727, 35 L. Ed. 2d 147, 177 (1973) (holding that the constitutional right to privacy includes a woman's decision whether or not to have an abortion).

92. *See, e.g.*, Bloch v. Ribar, 156 F.3d 673, 683–84 (6th Cir. 1998) (holding that there is a right to privacy of information and a constitutional right to avoiding unwarranted disclosure of certain types of private information that concern a fundamental liberty interest); Eastwood v. Dept. of Corr., 846 F.2d 627, 631 (10th Cir. 1988) (finding the right to privacy is violated "when an individual is forced to disclose information regarding personal sexual matters," which in this case involved forced disclosure of plaintiff's sexual history to an employer when she complained of sexual assault); Thorne v. City of El Segundo, 726 F.2d 459, 468 (9th Cir. 1983) ("The interests [plaintiff] raises in the privacy of her sexual activities are within the zone protected by the constitution."). The cases involving prisoners' rights to privacy largely involve disclosure of medical information. *See*, *e.g.*, Powell v. Schriver, 175 F.3d 107, 110–13 (2d Cir. 1999) (finding the disclosure of a prisoner's confidential medical information regarding transsexual status as humor or gossip is not reasonably related to a legitimate penological interest and therefore violates prisoner's constitutional right to privacy); Nolley v. County of Erie, 776 F. Supp. 715, 728–36 (W.D.N.Y. 1991) (finding that red stickers disclosing plaintiff's HIV status to non-medical staff and automatic segregation of HIV-positive prisoners violated constitutional and statutory rights to privacy); Doe v. Coughlin, 697 F. Supp. 1234, 1238–41 (N.D.N.Y. 1988) (holding that the identification of prisoners with HIV and/or AIDS violated their right to privacy and that "the prisoners subject to this program must be afforded at least some protection against the non-consensual disclosure of their diagnosis").

93. Powell v. Schriver, 175 F.3d 107, 112 (2d Cir. 1999). *See also* Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987) (holding that a regulation that violates prisoner's constitutional rights is only valid if it is "reasonably related to legitimate penological interests").

94. Powell v. Schriver, 175 F.3d 107, 112 (2d Cir. 1999) (emphasis added). Despite this finding, the *Powell* court ultimately found for the corrections officer because that officer was protected by qualified immunity. Qualified immunity

information had no real legitimate reason, it was a violation of the prisoner's constitutional right to privacy. Keep in mind, however, that *Powell* focused on the prisoner's transgender status as a medical condition, and not on the sexual orientation of the prisoner.[95]

(b) Privacy Regarding Sexual Orientation

Importantly, at least one court has also held that sexual orientation is one of those "personal matters" protected by the Fourteenth Amendment.[96] There is also at least one case containing such a privacy claim brought by a prisoner specifically related to sexual orientation,[97] though it is important to recognize that the novelty of your claim makes it somewhat unlikely to succeed. Keep in mind, however, that in *Lawrence v. Texas*,[98] the Supreme Court held that homosexual activity was within the zone of privacy protected by the Constitution. After *Lawrence*, a privacy claim might be much stronger.

3. Potential Obstacles to Suit

The Prison Litigation Reform Act ("PLRA") prohibits actions for emotional distress without related physical injury (that rises above a "de minimis," or minimal, level). Therefore, a prison official's violation of your right to confidentiality would have to create a risk of serious harm to be actionable under the Constitution. For more information, review *JLM*, Chapter 14 on the PLRA.

If this rule prevents you from bringing suit under the Constitution, you may still have a state law remedy available to you. Many states recognize the *tort* of invasion of privacy. If the state in which you are incarcerated recognizes this tort, and has *waived* Eleventh Amendment sovereign immunity, you can sue for disclosure of your sexual orientation or gender identity under state law.[99]

G. Assault and Harassment

1. Assault[100]

LGBT prisoners are often more vulnerable than other prisoners to assault (including sexual assault), at the hands of both fellow prisoners and guards, and to illegal searches by prison guards. If you have experienced such assault, you may be able to bring a Section 1983 claim for violation of your Eighth Amendment rights against prison officials either for assaulting you or for failing to protect you from assault.

You should read Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," and Chapter 24 of the *JLM*, "Your Right to Be Free From Assault" of the *JLM* if you are considering bringing a suit against prison officials for assault.

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shields government officials from liability for damages on account of their performance of discretionary official functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Powell v. Shriver, 175 F.3d 107, 113 (2d Cir. 1999) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982)). The *Powell* court found that the right of a prisoner to maintain the privacy of her "transsexualism" was not clearly established at the time the defendant in *Powell* made the disclosure, so he could not be held liable. Since the *Powell* case was decided, however, a court within the Second Circuit would likely find that the right to privacy about one's gender identity is "clearly established."

95. Powell v. Schriver, 175 F.3d 107, 112 (2d Cir. 1999).

96. *See* Sterling v. Borough of Minersville, 232 F.3d 190, 196 (3d Cir. 2000) (holding that the disclosure—or even threat of disclosure—of a person's sexual orientation by a state actor constitutes a violation of the person's constitutional right to privacy because sexual orientation is an "intimate aspect of [one's] personality entitled to privacy protection" and "it is difficult to imagine a more private matter than one's sexuality and a less likely probability that the government would have a legitimate interest in disclosure of sexual identity").

97. *See* Johnson v. Riggs, No. 03-C-219, 2005 U.S. Dist. LEXIS 44428, at *36–39 (E.D. Wis. Sept. 15, 2005) (recognizing *Sterling*'s right to privacy in one's sexual orientation in the prison context and denying any sort of legitimate penological purpose in disclosing this information without prisoner's consent, but finding for the defendant on grounds of qualified immunity).

98. Lawrence v. Texas, 539 U.S. 558, 578, 123 S. Ct. 2472, 2484, 156 L. Ed. 2d 508, 525–26 (2003) (holding that the "petitioners are entitled to respect for their private lives" and the state "cannot demean their existence or control their destiny by making their private sexual conduct a crime," relying on the right to liberty under the due process clause and noting that there is an area of personal liberty that the government may not enter).

99. For more information on state tort actions, see Chapter 17 of the *JLM*.

100. See Chapter 24 of the *JLM* for information on assault in prisons generally.

(a) Assault by Prison Employees

The Eighth Amendment protects you from punishment that is cruel or unusual.[101] Courts have been reluctant to find constitutional violations when prison officials use force to maintain or restore security within the prison.[102] However, if the force has no identifiable purpose and is simply meant to harm the prisoner, an official may be found to have used excessive force.

To show that an assault by a prison official violates the Eighth Amendment, you must prove that: (1) the prison official acted "maliciously and sadistically"; and (2) you suffered some physical injury.[103] This standard was explained by the Supreme Court in *Hudson v. McMillian*, and is known as "the *Hudson* standard."

To determine whether an official acted maliciously and sadistically, courts will consider factors such as:

(1) The extent of the injury suffered;[104]
(2) The need for the official to have used force under the circumstances;
(3) The relationship between the need to use force and the amount of force that was actually used;
(4) The size of the threat as a prison official would reasonably perceive it; and
(5) Efforts made by prison guards to lessen the severity of a serious use of force.[105]

Under the *Hudson* standard, you do not need to show you suffered serious injury, but you must show that you suffered some physical injury. The extent of your injury is one of the factors a court will consider in determining whether the use of force violated the Eighth Amendment's ban on cruel and unusual punishment. Also, the PLRA prohibits actions for emotional distress without some accompanying physical injury.[106]

(b) Assault by Other Prisoners

If you have been attacked or feel at risk of attack by fellow prisoners, you may bring suit under Section 1983 to claim that prison officials who failed to protect you violated your Eighth Amendment right to be free from cruel and unusual punishment.[107]

To show that a prison official violated the Eighth Amendment by failing to protect you from assault by other prisoners, you must prove that: (1) the prison official exhibited "deliberate indifference" to your health or safety by disregarding an excessive risk to it; and (2) the injury you suffered was severe.[108]

Deliberate indifference is a standard that is harder to meet than *negligence*, but not as difficult as the standard of "malicious and sadistic intent."[109] Generally, if prison officials were negligent, it means that they should have known of a danger or failed to take the precautions a reasonable person would have taken. If prison officials were acting with malicious and sadistic intent, it would mean that they acted with the intention of causing you harm. Deliberate indifference is between those two standards; generally, it means that the prison officials were aware of a substantial risk to your safety but ignored it.

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101. U.S. Const. amend. VIII.

102. *See* Hudson v. McMillian, 503 U.S. 1, 6–7, 112 S. Ct. 995, 998–99, 117 L. Ed. 2d 156, 165–66 (1992).

103. Hudson v. McMillian, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992).

104. While the injury does not have to be "significant" to prevail on an 8th Amendment claim, the extent of the injury "may suggest 'whether the use of force could plausibly have been thought necessary' in a particular situation 'or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur.'" Hudson v. McMillian, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992) (quoting Whitley v. Albers, 475 U.S. 312, 321, 106 S. Ct. 1078, 1085, 89 L. Ed. 2d 251, 261–62 (1986)).

105. Hudson v. McMillian, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992).

106. The Prison Litigation Reform Act (PLRA) also requires that you exhaust administrative options before bringing an action under § 1983. See Chapter 14 of the *JLM* for more information on the PLRA and its requirements.

107. *See* Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) (holding unanimously that prison officials can be liable for damages if they are deliberately indifferent in failing to protect prisoners from harm caused by other prisoners).

108. Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) (holding that a prison official cannot be liable under the 8th Amendment for denying a prisoner humane confinement conditions unless the official knows of and disregards an excessive risk to prisoner's health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and must draw that inference).

109. Farmer v. Brennan, 511 U.S. 825, 835, 114 S. Ct. 1970, 1978, 128 L. Ed. 2d 811, 824 (1994).

The leading case for Section 1983 claims involving assault and deliberate indifference is *Farmer v. Brennan*, in which a transgender prisoner brought a Section 1983 suit based on prison officials' failure to protect her from other prisoners because of her feminine appearance.[110] The Supreme Court defined "deliberate indifference" as the failure of prison officials to act when they know of a "substantial risk of serious harm."[111] The Court went on to say that an "inference from circumstantial evidence" could be used to demonstrate that prison officials had knowledge of a risk.[112] "Circumstantial evidence" is evidence that tends to show something as being true. This means that a prisoner can present evidence showing that it is likely that the prison officials knew of the risk, even if there is no "direct evidence" (such as statements from the officials or documented complaints from the prisoner) that shows this risk.

One important thing to keep in mind is that the "inference from circumstantial evidence" does not mean that an official can be held responsible for something he *should have known* but did not know. Rather, it means the circumstantial evidence should demonstrate that the official *actually knew* of something he denies knowing.

Under *Farmer v. Brennan*, you do not have to wait until you have actually been attacked to bring a viable Section 1983 claim of deliberate indifference. If prison officials did not protect you from a mere *risk* of harm, they may still have deprived you of your rights under the Eighth Amendment. Your status as gay, lesbian, bisexual, or transgender may make it easier for you to prove that you are at risk of harm. If prison officials know your status, then they know you are at a higher risk for harm. For example, in *Greene v. Bowles*, the Sixth Circuit recognized an Eighth Amendment deliberate indifference claim where the warden admitted knowing that the plaintiff was placed in protective custody because she was transsexual and that a "predatory inmate" was being housed in the same unit.[113] The court held a vulnerable (e.g. gay or transsexual) prisoner could prove prison officials knew of a substantial risk to his safety by showing the officials knew of the prisoner's vulnerable status, and of the general risk to his safety from other prisoners, even if they did not know of any specific danger.[114] Although it may be easier to prove you are at risk if you are such a vulnerable prisoner, you should still report any threats against you so that officials know about any specific problems, because there must be a *substantial* risk to actually prove deliberate indifference.[115]

In your complaint, you should ask for a temporary injunction while your case is pending. An injunction is an order from a court making the prison officials take or not take a certain action. In your case, you may seek an injunction to be immediately transferred into protective custody while your claim is pending. Note, however, that for the court to grant temporary injunctive relief you will have to show that you are likely to prevail, or win, in your case. You should also be aware that, under the PLRA, any temporary injunction that a court grants you is likely to expire before your case is resolved.

Because the PLRA also bars prisoners from suing for emotional or mental distress without an accompanying physical injury, and punishes prisoners who file multiple lawsuits that courts deem "frivolous" or that fail to state a claim, you should be certain that your claim is one a court will recognize as valid. Be sure to review Chapter 14 of the *JLM* on the PLRA and Chapter 16 of the *JLM* on Section 1983 suits.

(c) Sexual Assault

Sexual assault includes rape and unwanted physical contact of a sexual nature, such as fondling someone else's breasts and/or genitals. Generally, bringing a Section 1983 suit for sexual assault in prison

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110. Farmer v. Brennan, 511 U.S. 825, 831, 114 S. Ct. 1970, 1975, 128 L. Ed. 2d 811, 821 (1994).

111. Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994).

112. Farmer v. Brennan, 511 U.S. 825, 842, 114 S. Ct. 1970, 1981, 128 L. Ed. 2d 811, 828 (1994).

113. Greene v. Bowles 361 F.3d 290, 294 (6th Cir. 2004). Note that the plaintiff in *Greene* was actually attacked and severely beaten by the other prisoner.

114. Greene v. Bowles, 361 F.3d 290, 294 (6th Cir. 2004) ("[A] prison official cannot 'escape liability . . . by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault.'" (quoting Farmer v. Brennan, 511 U.S. 825, 843, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811, 829 (1994))). The court also noted that deliberate indifference can be shown alternatively by proving that prison officials knew that a predatory prisoner presented a substantial risk to a large class of prisoners without segregation or other protective measures.

115. *See* Purvis v. Ponte, 929 F.2d 822, 825–26 (1st Cir. 1991) (*per curiam*) (stating the 8th Amendment was not violated when the prisoner had a general fear of "gay bashing" and suspected that homophobic cellmates threatened his physical safety, since he did not show likelihood that violence would occur and officials had tried six different cellmates).

requires the same elements of proof explained above for physical assaults.[116] That is, if a prison official sexually assaults you, you must show that the prison official acted maliciously, and that you suffered harm. If another prisoner assaulted you, you need to show that prison officials acted with deliberate indifference and that you suffered harm.[117]

In addition, Title 18 of the United States Code, Section 2243, criminalizes sexual intercourse or any type of sexual contact between persons with "custodial, supervisory or disciplinary" authority and prisoners in federal correctional facilities.[118] Moreover, Section 2241 makes it a felony for a prison official to use or threaten force to engage in sexual intercourse in a federal prison.[119] Many states also have laws criminalizing sexual contact between prison officials and prisoners. See Chapter 24 of the *JLM*, "Your Right to be Free From Assault by Prison Guards and Other Prisoners," for more information about assaults.

2. Harassment

(a) Sexual Harassment

Sexual harassment is common in prisons, and LGBT prisoners are often even more vulnerable to such harassment than are other prisoners.[120] Federal courts have recognized that sexual harassment of prisoners by prison staff can be a constitutional "tort" (an action for damages that you can bring against a government or individual defendants if they violate your constitutional rights), violating prisoners' Eighth Amendment right to be free from cruel and unusual punishment.[121] A prisoner can state an Eighth Amendment claim for sexual harassment only if the alleged harassment is so harmful that it could be considered a departure from "the evolving standards of decency that mark the progress of a maturing society," and only if the defendant acted with intent to harm the prisoner.[122] As explained below, prisoners generally do not succeed in claims against prison staff for sexual harassment involving words alone. However, prisoners have succeeded in

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116. *See* Boddie v. Schnieder, 105 F.3d 857, 861 (2d Cir. 1997) (holding that there are 8th Amendment limitations to imprisonment and that sexual abuse is unconstitutional); Hovater v. Robinson, 1 F.3d 1063, 1068 (10th Cir. 1993) (stating that "an inmate has a constitutional right to be secure in her bodily integrity and free from attack by prison guards" (citing Alberti v. Klevenhagen, 790 F.2d 1220, 1224 (5th Cir. 1986))).

117. *See*, *e.g.*, Johnson v. Johnson, 385 F.3d 503, 527 (5th Cir. 2004) (finding a deliberate indifference claim where prison officials continued to house a gay prisoner in the general population where he was gang raped and sold as a sexual slave for over 18 months); Taylor v. Mich. Dept. of Corr., 69 F.3d 76, 84 (6th Cir. 1995) (holding that a warden who knows of a risk of physical and sexual assault posed to a vulnerable prisoner and fails to take reasonable steps to protect against such abuse may be found to have acted with deliberate indifference).

118. 18 U.S.C. § 2243 (2006).

119. 18 U.S.C. § 2241 (2006).

120. "In a questionnaire . . . administered to eighty self-identified homosexual inmates, 53% reported that they had been frequently victimized via 'sexual innuendo, sexual harassment, verbal and physical threats.'" James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 Am. Crim. L. Rev. 1, 17 (1999) (quoting Wayne S. Wooden and Jay Parker, *Men Behind Bars* 134 (1982)). The Wooden & Parker study also found white prisoners were more likely to be sexually harassed than Latino or African-American ones.

121. *See* Daskalea v. District of Columbia, 227 F.3d 433, 450 (D.C. Cir. 2000) (finding the District of Columbia deliberately indifferent to a pattern of particularly heinous and widespread sexual harassment and abuse of female prisoners, including forced stripteases); Schwenk v. Hartford, 204 F.3d 1187, 1197 (9th Cir. 2000) (holding that a pre-operative male-to-female transsexual prisoner's 8th Amendment rights were violated by a guard's attempted rape, which constituted sexual assault offensive to human dignity); Boddie v. Schnieder, 105 F.3d 857, 861–62 (2d Cir. 1997) (noting that sexual abuse by corrections officers could be an 8th Amendment violation, but ultimately holding that the particular allegations of verbal harassment and bodily contact made by prisoner were not sufficiently serious to be a violation); Freitas v. Ault, 109 F.3d 1335, 1338 (8th Cir. 1997) (recognizing sexual harassment as a constitutional claim where plaintiff alleges that the harassment objectively caused physical or psychological pain and that the officer acted with a sufficiently culpable state of mind); Johnson v. Phelan, 69 F.3d 144, 147 (7th Cir. 1995) (noting that "a prisoner has a remedy for deliberate harassment, on account of sex, by guards of either sex"); Minifield v. Butikofer, 298 F. Supp. 2d 900, 904 (N.D. Cal. 2004) (dismissing plaintiff's sexual harassment claim because, although the Ninth Circuit has recognized that sexual harassment may constitute a claim for an 8th Amendment violation, "the Court has specifically differentiated between sexual harassment that involves verbal abuse and that which involves allegations of physical assault, finding the latter to be in violation of the constitution."). *See also* James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 Am. Crim L. Rev. 1, 19–23 (1999) (looking at cases both involving physical contact and no physical contact).

122. Thomas v. District of Columbia, 887 F. Supp. 1, 4 (D.D.C. 1995) (citing Hudson v. McMillian, 503 U.S. 1, 8 (1992)).

claims against prison staff for sexual harassment that *did* involve repeated physical touching or assault or that threatened the prisoner's safety.[123]

The 1996 passage of the PLRA made it much harder for a prisoner to succeed in a sexual harassment claim against prison staff. While the PLRA does not explicitly state that prisoners cannot sue for sexual harassment, it does say they cannot recover damages "for mental or emotional injury . . . without a prior showing of physical injury."[124] Many courts have interpreted this to mean that you cannot receive money damages for sexual harassment unless the harasser physically hurt you.[125] But other sorts of relief, like "injunctions" (where you ask the court to order someone to stop or start some action other than the payment of money damages), may be available to you.[126] For this reason it is important to learn about the PLRA, particularly its physical injury requirement, before you file a suit.[127]

(b) Verbal Harassment

Prisoners who try to sue based on verbal harassment face two obstacles: (1) an interpretation of the Eighth Amendment's prohibition of cruel and unusual punishment exempting verbal harassment; and (2) the PLRA's physical injury requirement. Courts often find that words alone, no matter how abusive, do not violate the Eighth Amendment.[128] So, claims by prisoners against prison staff for harassment consisting only of words generally do not succeed.[129]

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123. Watson v. Jones, 980 F.2d 1165, 1165–66 (8th Cir. 1992) (finding a valid 8th Amendment claim where correctional officer sexually harassed two prisoners on an almost daily basis for two months by conducting deliberate examination of their genitalia and anuses); Webb v. Foreman, No. 93 Civ. 8579 (JGK), 1996 U.S. Dist. LEXIS 15227, at *9–10 (S.D.N.Y. Oct. 16, 1996) (*unpublished*) (holding that when a guard conducts a strip search that includes grabbing the prisoner's genitals, the conduct may be a valid 8th Amendment claim); Thomas v. District of Columbia, 887 F. Supp. 1, 4–5 (D.D.C. 1995) (finding a valid 8th Amendment claim where correctional officer harassed prisoner and spread rumors that he was gay, thereby endangering him).

124. 42 U.S.C. § 1997e(e) (2006).

125. Cobb v. Kelly, No. 4:07CV108-P-A, 2007 WL 2159315, at *1 (N.D. Miss. July 26, 2007) (*unpublished*) (finding PLRA's physical injury requirement not met when plaintiff's case manager fondled his genitals); Smith v. Shady, No. 3:CV-05-2663, 2006 U.S. Dist. LEXIS 24754, at *5–6 (M.D. Pa. Feb. 8, 2006) (*unpublished*) (finding PLRA's physical injury requirement not met when correctional officer held and fondled prisoner's penis); Ashann-Ra v. Virginia, 112 F. Supp. 2d 563, 565–66 (W.D. Va. 2000) (finding PLRA's physical injury requirement not met when corrections officers viewed prisoner naked and encouraged him to masturbate); *but see* Kemner v. Hemphill, 199 F. Supp. 2d 1264, 1270 (N.D. Fla. 2002) (finding prisoner who was forced to perform oral sex on fellow prisoner suffered physical injury sufficient to satisfy PLRA's physical injury requirement).

126. Zehner v. Trigg, 133 F.3d 459, 462–63 (7th Cir. 1997) (finding that even where the PLRA bars recovery of monetary damages, injunctive relief remains available).

127. See Chapter 14 of the *JLM*, "The Prison Litigation Reform Act."

128. *See*, *e.g.*, Adkins v. Rodriguez, 59 F.3d 1034, 1037 (10th Cir. 1995) (holding that a jail deputy who had made comments to a female prisoner about her body and his own sexual prowess, and entered her cell, stood over her bed, and told her she had nice breasts, engaged in "outrageous and unacceptable" conduct, but that the conduct did not violate the 8th Amendment, because it did not include "physical intimidation"); Minifield v. Butikofer, 298 F. Supp. 2d 900, 903 (N.D. Cal. 2004) ("Allegations of verbal harassment and abuse fail to state [an 8th Amendment] claim cognizable under 42 U.S.C. § 1983."); Ellis v. Meade, 887 F. Supp. 324, 328–29 (D. Me. 1995) (holding that a correctional officer allegedly tapping or spanking a prisoner's buttocks and asking "How's the little boy doing?" did not violate the 8th Amendment because the comment was isolated and carried no threat of violence); Maclean v. Secor, 876 F. Supp. 695, 699 (E.D. Pa. 1995) (holding that threats alone do not make a constitutional claim even if the threatened prisoner has a particular vulnerability to assault).

129. *See*, *e.g.*, Austin v. Terhune, 367 F.3d 1167, 1171–72 (9th Cir. 2004) (holding that a guard who exposed genitalia to a prisoner from a glass-walled control booth for a 30–40 second "isolated incident" was not sufficiently serious to constitute an 8th Amendment violation, and noting generally that "[a]lthough prisoners have a right to be free from sexual abuse, whether at the hands of fellow inmates or prison guards the Eighth Amendment's protections do not necessarily extend to mere verbal sexual harassment" (citation omitted)); DeWalt v. Carter, 224 F.3d 607, 612 (7th Cir. 2000) (finding that a guard's use of sexually explicit and racially derogatory language was not a constitutional violation, stating that "[s]tanding alone, simple verbal harassment does not constitute cruel and unusual punishment, deprive a prisoner of a protected liberty interest, or deny a prisoner equal protection of the laws"); Barney v. Pulsipher, 143 F.3d 1299, 1310 n.11 (10th Cir. 1998) (holding that verbal harassment and intimidation alone, without allegations of sexual assault, was insufficient to state an 8th Amendment cause of action); Blueford v. Prunty, 108 F.3d 251, 254–55 (9th Cir. 1997) (holding that prison guard engaging in "vulgar same-sex trash talk" with prisoners was entitled to qualified immunity because a prisoner's right to be free from such behavior was not clearly established at the time the behavior took place). In some cases, allegations of touching may still fail to rise to the level of a constitutional violation. *See*, *e.g.*,

Additionally, even where prisoners have alleged valid Eighth Amendment violations, courts have often determined that the PLRA bars the suits if there is not a physical injury.[130] For instance, harassment by prison staff *has* been found to violate the Eighth Amendment when it includes threats of attack with a lethal weapon.[131] But where no physical injury results, some courts have determined that these cases are barred by the PLRA's physical injury requirement.[132] Also, some courts have held the PLRA blocks the recovery of money damages in cases where harassing language or threats are accompanied by groping or abusive touching.[133]

H. Housing and Protective Custody

1. Housing Issues for Transgender Prisoners[134]

Like most other institutions, prisons are structured around the assumptions that all people are easily classified as either male or female, gender is assigned at birth, and a person's gender remains constant throughout life. These assumptions present challenges for transgender, intersex, and other gender-variant prisoners, as the overwhelming majority of prisons recognize only two genders and segregate male from female prisoners.

Prison authorities rarely recognize the gender identity of transgender prisoners. Transgender prisoners are generally housed either according to the gender they were assigned at birth or by their genitalia.[135] Because few transgender people are able to access genital gender reassignment surgery, large numbers of transgender prisoners are housed in facilities for a gender with which they do not identify.

To date, the gendered housing policies of prisons placing transsexual prisoners in housing for genders with which they do not identify have not been successfully challenged in court.[136] The Supreme Court has

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Boddie v. Schnieder, 105 F.3d 857, 861 (2d Cir. 1997) (finding that a prisoner's claim that female officer touched his genitals and pushed her breasts and genitals against his body did not rise to a violation of the prisoner's constitutional rights). See, however, Chapter 24 of the *JLM*, which cites cases holding that prisoners may recover for psychological injury inflicted by prison staff.

130. See Chapter 14 of the *JLM* for more information on the PLRA.

131. *See*, *e.g.*, Northington v. Jackson, 973 F.2d 1518, 1524–25 (10th Cir. 1992) (finding some forms of verbal harassment can inflict cruel and unusual punishment when they involve threatened use of lethal weapons); Burton v. Livingstone, 791 F.2d 97, 100–101 (8th Cir. 1986); Douglas v. Marino, 684 F. Supp. 395, 397–98 (D.N.J. 1988).

132. *See*, *e.g.*, Walker v. Akers, No. 98-C-3199, 1999 U.S. Dist. LEXIS 14995, at *15–17 (N.D. Ill. Sept. 22, 1999) (*unpublished*) (holding that the PLRA's physical injury requirement bars the recovery of monetary damages where corrections officer threatened prisoner and held electric stun gun to his head).

133. *See*, *e.g.*, Cobb v. Kelly, No. 4:07CV108-P-A, 2007 WL 2159315, at *1 (N.D. Miss. July 26, 2007) (*unpublished*) (finding PLRA's physical injury requirement not met when plaintiff's case manager fondled his genitals); Smith v. Shady, No. 3:CV-05-2663, 2006 U.S. Dist. LEXIS 24754, at *5–6 (M.D. Pa. Feb. 8, 2006) (*unpublished*) (finding PLRA's physical injury requirement not met when correctional officer held and fondled prisoner's penis); Ashann-Ra v. Virginia, 112 F. Supp. 2d 563, 565–66 (W.D. Va. 2000) (finding PLRA's physical injury requirement was not met when female corrections officers viewed male prisoner naked and encouraged him to masturbate).

134. All known transgender prisoners who have filed lawsuits contesting their conditions of imprisonment that have resulted in reported opinions have been male-to-female (MTF) transgender people. This, of course, does not mean that female-to-male (FTM) transgender prisoners do not face challenges while incarcerated. If you are a FTM prisoner who wishes to sue officials of the prison in which you are housed, the lack of precedent for such cases should not stop you from doing so. But, it might be advisable to contact an impact litigation organization specializing in transgender rights for help in preparing your claim. *See* Appendix A of this Chapter for information on these organizations.

135. *See*, *e.g.*, Farmer v. Brennan, 511 U.S. 825, 829–30, 114 S. Ct. 1970, 1975, 128 L. Ed. 2d 811, 820 (1994) (noting that a preoperative male-to-female transgender prisoner was housed in male housing despite receiving hormone treatments and dressing femininely); Farmer v. Haas, 990 F.2d 319, 320 (7th Cir. 1993) (noting plaintiff's incarceration with the male population despite undergoing estrogen therapy and receiving silicone breast implants). *But see* Crosby v. Reynolds, 763 F. Supp. 666, 669–70 (D. Me. 1991) (upholding placement of pre-operative transgender person undergoing hormone treatment, at her request and on the recommendation of the jail's contract physician, within the female population, even in the face of a challenge by the prisoner's female cellmate, who alleged it was a violation of her right to privacy); Lucrecia v. Samples, No. C-93-3651-VRW, 1995 U.S. Dist. LEXIS 15607, at *1–2 (N.D. Cal. Oct. 16, 1995) (*unpublished*) (noting that prisoner who "had not as yet completed the transformation" from male to female, while incarcerated in a federal prison, "lived within a female housing unit as a female").

136. *See*, *e.g.*, Meriwether v. Faulkner, 821 F.2d 408, 415 (7th Cir. 1987) (denying transgender prisoner's equal protection claim for not being classified as a woman and housed with female prisoners on ground that a prison administrative decision may give rise to an equal protection claim only if the plaintiff can establish "state officials had purposefully and intentionally discriminated against" her); Lucrecia v. Samples, No. C-93-3651-VRW, 1995 U.S. Dist.

explicitly held that prisoners do not have a constitutional right to choose their place of confinement.[137] Moreover, courts generally respect prison officials' choices about how to manage their institutions,[138] and classification within prisons has not been found to violate a liberty interest.[139]

Courts have been especially hostile towards the requests of transgender prisoners for transfer to gender-appropriate facilities.[140] Thus, it is unlikely that you will be able to successfully challenge your housing classification in court. If being housed with the general population is difficult or harmful for you, however, you can request to be placed in segregation or protective custody.

2. Segregation and Protective Custody

Many state prisons segregate LGBT prisoners from the general prison population, either because a prisoner asks for this or sometimes the prison officials decide to do this on their own. In the past, the separation of LGBT-identified prisoners from heterosexual prisoners was used to punish LGBT people or was sometimes based on the false assumption that because a prisoner was not heterosexual, he would be more likely to sexually assault other prisoners in the general population.

Today, segregation of LGBT prisoners in state or municipal institutions is often done to protect LGBT prisoners, who might be more vulnerable to attack from other prisoners. While protecting LGBT prisoners may be good, the conditions of protective custody often are not.[141] By law, the warden in a federal prison may not segregate an LGBT prisoner solely for his or her own protection.[142] This really means that, absent other circumstances or threats, a warden may not segregate someone only for being LGBT.

Segregation means different things in different prisons. Some prisons house a high enough number of LGBT prisoners that they have a wing for people identifying themselves as LGBT; other prisons can offer only single rooms, or certain cells within a larger segregation unit, for the occasional LGBT prisoner.[143]

LEXIS 15607, at *14–15 (N.D. Cal. Oct. 16, 1995) (*unpublished*) (holding a transgender prisoner's legal challenge alleging that her incarceration in a male cell violated due process must fail because no liberty interest was infringed and "housing decisions are within the discretion of prison officials"); Lamb v. Maschner, 633 F. Supp. 351, 353 (D. Kan. 1986) ("Prison authorities must be given great deference to formulate rules and regulations that satisfy a rational purpose and segregation of the sexes is a rational purpose."). See Chapter 22 of the *JLM* for more information on challenging administrative decisions.

137. Meachum v. Fano, 427 U.S. 215, 216, 96 S. Ct. 2532, 2534, 49 L. Ed. 2d 451, 454 (1976) (reversing lower court decision ruling in favor of plaintiff prisoners who sought injunctive and declaratory relief for being transferred to prisons with less desirable conditions following a fire at their previous facility).

138. *See*, *e.g.*, Sandin v. Conner, 515 U.S. 472, 482, 115 S. Ct. 2293, 2299, 132 L. Ed. 2d 418, 429 (1995) ("[F]ederal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment."); Grayson v. Rison, 945 F.2d 1064, 1067 (9th Cir. 1991) ("When prison officials have legitimate administrative authority, such as the discretion to move inmates from prison to prison or from cell to cell, the Due Process Clause imposes few restrictions on the use of that authority."); McCray v. Sullivan, 509 F.2d 1332, 1334 (5th Cir. 1975) ("The federal courts are extremely reluctant to limit the freedom of prison officials to classify prisoners as they in their broad discretion determine appropriate.").

139. For example, prisoners who have challenged their classification on other bases, such as security or gang classifications, have also been unsuccessful. See Chapter 31 of the *JLM* for a detailed discussion of legal challenges to security classification decisions and the definition of liberty interests in the prison context.

140. As one federal court noted in response to a male-to-female transgender prisoner's request for transfer to a women's prison, "[a] male prisoner cannot be housed in a women's prison. Even though a transfer may relieve plaintiff's anxieties, clearly a violation of the women's rights would be at issue." Lamb v. Maschner, 633 F. Supp. 351, 353 (D. Kan. 1986).

141. Furthermore, at least one federal court has found the practice of placing LGBT prisoners in isolation wards to violate the Due Process Clause of the Constitution. *See* R.G. v. Koller, 415 F. Supp. 2d 1129, 1154–55 (D. Haw. 2006).

142. "The Warden may not refer an inmate for placement in a control unit . . . on the basis that the inmate is a protection case, e.g., a homosexual, an informant, etc., unless the inmate meets other criteria as described in paragraph (b) of this section." 28 C.F.R. § 541.41(c)(2) (2011).

143. The New York City prison system, for example, provides separate housing for gay prisoners. Darren Rosenblum, *"Trapped" in Sing Sing: Transgender Prisoners Caught in the Gender Binarism*, 6 Mich. J. Gender & L. 499, 524 (2000). The Los Angeles County Jail includes a "homosexual ward" separate from the general prison population where (as of 1990) 350 gay prisoners were housed. Patricia Klein Lerner, *Jailer Learns Gay Culture to Foil Straight Inmates*, L.A. Times, Dec. 27, 1990, at B1. *See also* Falls v. Nesbitt, 966 F.2d 375, 376 (8th Cir. 1992) (describing a "special section of the prison reserved for those prisoners who are slight of build, physically weaker than the typical inmate, preyed upon, or, in many cases, homosexuals"); McCray v. Bennett, 467 F. Supp. 187, 190 (M.D. Ala. 1978) (describing segregation unit housing for, among others, "[k]nown homosexuals," prisoners who have histories of

(a) Getting Into Protective Custody

If you have been placed in general population and have experienced ill treatment there (attack or threat of attack), you may request to be transferred into protective custody through administrative channels.[144]

If your request is not granted when brought through administrative channels, including all administrative appeals processes, you may bring a Section 1983 claim against prison officials for violating your Eighth Amendment right to be free from cruel and unusual punishment. As explained in Part G of this Chapter, a prison official may be held liable under Section 1983 for violating the Eighth Amendment if he acted with "deliberate indifference" to your health or safety—that is, if he knew you faced a substantial risk of serious harm but disregarded that risk by not taking reasonable action to stop it.[145] In general, the more serious the threats or attacks against you and the more evidence you can produce that the prison officials knew about the risk but did nothing, the better your chances of winning in court.

Few Section 1983 suits about the failure to house a prisoner in protective custody have been brought by LGBT prisoners,[146] but several courts have recognized the vulnerability of prisoners who do not fit with traditional gender norms.[147] Before *Farmer v. Brennan*, the few such claims that were filed had very limited success.[148] The *Farmer* Court's extensive discussion of the meaning of "deliberate indifference," however, may make it easier to win on such claims.[149] Also strengthening the deliberate indifference argument of LGBT prisoners is the fact that courts have acknowledged the heightened vulnerability of prisoners known to be LGBT, or who might be thought to be LGBT, by giving lighter sentences.[150] These cases may make it

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institutional violence, and those who are being punished for violating prison rules); Inmates of Milwaukee Cnty. Jail v. Peterson, 353 F. Supp. 1157, 1160–61 (E.D. Wis. 1973) (describing cell block housing for, among others, homosexuals and narcotic addicts undergoing treatment or detoxification).

144. See Chapter 31 of the *JLM,* "Security Classification and Gang Validation," for more information on requesting protective custody.

145. *See* Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) (holding that "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference"). See Chapter 16 of the *JLM* for more information about Section 1983 and the deliberate indifference standard.

146. *But see* Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) (allowing an 8th Amendment claim by a transgender prisoner to go forward where she was placed in the general population and subsequently sexually assaulted, even though the prisoner did not express safety concerns beforehand).

147. *See*, *e.g.*, Taylor v. Michigan Dept. of Corr., 69 F.3d 76, 82–84 (6th Cir. 1995) (noting that "small, youthful prisoners are especially vulnerable to sexual pressure"); Young v. Quinlan, 960 F.2d 351, 362 (3d Cir. 1992) (noting that "fellow inmates subjected [plaintiff] to sexual assault on several documented occasions, most likely because of [plaintiff]'s youthful appearance and slight stature"); United States v. Gonzalez, 945 F.2d 525, 526–27 (2d Cir. 1991) (noting that "even if [plaintiff] is not gay or bisexual, his physical appearance, insofar as it departs from traditional notions of an acceptable masculine demeanor, may make him . . . susceptible to homophobic attacks . . . ."). *See also* Chapter 24 of the *JLM* and Part G(1) of this Chapter.

148. *See*, *e.g.*, Purvis v. Ponte, 929 F.2d 822, 825–27 (1st Cir. 1991) (holding that the 8th Amendment rights of a prisoner were not violated even after he stated a general fear of "gay bashing" and a suspicion that homophobic cellmates threatened his physical safety, since prisoner presented no evidence of strong likelihood that violence would occur and officials had tried six different cellmates); Falls v. Nesbitt, 966 F.2d 375, 380 (8th Cir. 1992) (holding that guard who failed to protect gay prisoner from a cellmate who ultimately stabbed him was not deliberately indifferent). *But see* Young v. Quinlan, 960 F.2d 351, 362–63 (3d Cir. 1992) (holding that the rights of a prisoner described as small, young, and effeminate may have been violated when he was subjected to sexual assaults by other prisoners after officials in the federal prison where he was housed ignored his requests for protection), *superseded by statute on other grounds*.

149. *But see* Poole v. Yeazel, No. 94-3199, 1995 U.S. App. LEXIS 16195, at *3–4 (7th Cir. June 29, 1995) (*unpublished*) (holding that a guard who knew prisoner had been "labeled a homosexual" did not exhibit deliberate indifference when he failed to protect him from attack, rather "at best the defendants negligently failed to recognize a potential for assault," a failure that does not rise to the level of a constitutional deprivation).

150. The U.S. Sentencing Guidelines are advisory guidelines that assist judges' decisions in sentencing for federal crimes. Before 2005, federal courts had to follow the U.S. Sentencing Guidelines, but federal courts permitted what were called "downward departures" or reduced sentences when sentencing defendants known to be gay or who might be perceived to be gay, in order to protect these defendants from prison abuse. *See* United States v. Gonzalez, 945 F.2d 525, 525–26 (2d Cir. 1991) (finding downward departure of convicted homosexual's sentence was authorized, under the U.S. Sentencing Guidelines as interpreted in United States v. Lara, 905 F.2d 599 (2d Cir. 1990), to ensure his safety in prison due to his feminine features which would make him vulnerable to attack by other prisoners); *see also* United States v. Wilke, 156 F.3d 749, 754–55 (7th Cir. 1998) (departing from sentencing guidelines because of prisoner's sexual

more difficult for a prison official to prove he did not have the required knowledge that LGBT prisoners are at risk. If you plan to bring a Section 1983 claim for violation of your Eighth Amendment rights, be sure to also read Chapter 16 of the *JLM* on bringing Section 1983 and Section 1331 claims.

(b) Getting Out of Protective Custody

Although segregation from the general prison population may afford LGBT prisoners protection from harassment and assault, the conditions of segregated cells are often worse than those in general population. Also, segregation may make you ineligible for work detail and may deny you access to libraries and other facilities, visitation, proper medical treatment,[151] and other privileges available in general population.[152]

If you have been placed in segregation and wish to be housed among the general population, you may request transfer through administrative channels.[153] If unsuccessful, you may file a complaint under Section 1983 and claim that the physical conditions of your segregation violate your Eighth Amendment rights or that the decision to place you in segregation is a violation of your equal protection rights. A Section 1983 claim seeking transfer out of protective custody is far less likely to succeed than an administrative claim requesting transfer *into* protective custody. Courts have held involuntary segregation—even for non-punitive reasons—does not infringe a liberty interest except in narrow circumstances.[154]

For example, in a Seventh Circuit case, the court noted that, while it sympathized with the prisoner's desire not to be segregated, it had to take into account that there might not be feasible alternatives to the prisoner's prolonged segregation.[155] Nevertheless, the court did not dismiss the plaintiff's claim as a matter of law and *remanded* the case to the district court to determine the actual conditions of the prisoner's confinement and to see if any feasible alternatives existed.[156]

(c) Challenging the Conditions of Protective Custody

If you cannot or do not want to secure a transfer out of protective custody, but the conditions under which you are living in such custody are bad, you may bring a claim under Section 1983 for:

(1) Violation of your Eighth Amendment right against cruel and unusual punishment (if, for example, the cell is unsanitary, or you are not being provided with food and water often enough);[157] or
(2) Violation of your equal protection rights (if conditions in protective custody are much worse than those in the cells where the general population is housed and the difference is not justified by a legitimate interest, such as security).[158]

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orientation and demeanor). Note that the Federal Sentencing Commission has discouraged, but not prohibited, the use of physical appearance alone in determining a prisoner's potential for victimization and thus reduction in sentence. *See* Koon v. United States, 518 U.S. 81, 107, 116 S. Ct. 2035, 2050–51, 135 L. Ed. 2d 392, 418 (1996) (recognizing that use of physical appearance was discouraged by the Commission).

151. If you are in protective custody and believe you are being denied proper medical treatment, read Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care."

152. *See*, *e.g.*, Hansard v. Barrett, 980 F.2d 1059, 1065 (6th Cir. 1992) (finding evidence insufficient to establish that gay prisoners were denied equal opportunity to discretionary reductions in sentences, in violation of equal protection, after being moved to administrative segregation). However, the Hall of Justice Jail for gay prisoners in Los Angeles is "better in many respects than in the main jail," in that "[t]elevisions and telephones are on every row. The atmosphere is more relaxed and it is less crowded. The Hall of Justice Jail has 60 fewer prisoners than the 1,800 for which it was designed. The County Jail, designed for 5,276 inmates, has 6,482." Patricia Klein Lerner, *Jailer Learns Gay Culture to Foil Straight Inmates*, L.A. Times, Dec. 27, 1990, at B1.

153. See Chapter 31 of the *JLM*, "Security Classification and Gang Validation."

154. *See*, *e.g.*, Martin v. Scott, 156 F.3d 578, 580 (5th Cir. 1998) (holding that, "'absent extraordinary circumstances, administrative segregation as such, being an incident to the ordinary life of a prisoner, will never be a ground for a constitutional claim' because it 'simply does not constitute a deprivation of a constitutionally cognizable liberty interest,'" (quoting Pichardo v. Kinker, 73 F.3d 612, 612–13 (5th Cir. 1996)); Collins v. Sullivan, 392 F. Supp. 621, 626 n.12 (M.D. Ala. 1975) (holding that placing an allegedly gay prisoner in a one-man cell for medical reasons was legitimate). See also Chapter 18 of the *JLM*, "Your Rights at Prison Disciplinary Hearings."

155. Meriwether v. Faulkner, 821 F.2d 408, 417 (7th Cir. 1987) ("Given her transsexual identity . . . it is unlikely that prison officials would be able to protect her from the violence, sexual assault and harassment about which she complains.").

156. Meriwether v. Faulkner, 821 F.2d 408, 417–18 (7th Cir. 1987).

157. *See* Wilson v. Seiter, 501 U.S. 294, 303, 111 S. Ct. 2321, 2327, 115 L. Ed. 2d 271, 282 (1991) (holding that challenges to physical living conditions of prisons are governed by the deliberate indifference standard). For an explanation of the deliberate indifference standard, see Part G(1)(b) of this Chapter.

I. Visitation Rights: Special Issues for LGBT Prisoners

Most state prisons and all federal prisons have policies that, subject to restrictions, allow prisoners to visit with their family members. Unfortunately, because many of these policies define "family" narrowly, LGBT prisoners whose partners wish to visit them in prison may face special difficulties. Prisoners do not have an absolute right to visitation.[159] Even though prisons may place limitations on visitation or exclude visitation all together, those limitations can only be put in place if the prison has a legitimate penological objective for them. The rehabilitation of prisoners and the security of the prison are justifications that will be accepted by a court if they are proven.[160] A prison official cannot merely assert that limitations on your visitation privileges serve security or rehabilitation interests; the officials must instead show that the visitation policies actually further the objectives they claim and that prisoners are given adequate "procedural safeguards."[161] This means that if a prison forbids you to visit with your partner on the grounds that homosexuality poses a security risk to the institution, you can challenge the policy on the grounds that this objective is not actually advanced by the denial of visitation. Although the visitation policies vary from state to state, and state policies vary from the policies in federal prison, the justifications prison officials use are similar everywhere. The rest of this part will help explain why prisons have denied LGBT prisoners the right to visitation and whether or not those policies can be challenged.

1. Federal Prison Visiting Guidelines

If you are in a federal prison and you want to have regular visitors, you must submit a list of proposed visitors to prison staff members.[162] When prison officials are deciding whether to allow the people on your list to visit you, they will divide your visitors into three categories: (1) members of the immediate family; (2) other relatives; and (3) friends and associates.

Members of your immediate family include your spouse and children. In order to exclude a member of your immediate family, prison officials would have to show "strong circumstances" which justify excluding them.[163] To exclude a relative who is not a member of your immediate family (including aunts, uncles, and cousins), the prison must have a specific reason.[164] To exclude friends and associates, a prison official only needs to show that they "could reasonably create a threat to security."[165]

Unfortunately for LGBT prisoners, federal law prohibits treating a same-sex partner as either a member of the immediate family or as another relative. The federal regulations do not explicitly preclude prisons from counting same-sex partners as immediate family members. Instead, same-sex partners simply do not appear on the list of immediate family members, presumably indicating that they cannot be given the designation of immediate family member.[166] Even federal prisons in states like Vermont, where domestic partners are recognized as spouses for many state purposes, will not treat domestic partners as spouses.[167]

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158. *See*, *e.g.*, Williams v. Lane, 851 F.2d 867, 881–82 (7th Cir. 1988) (holding state provisions for programming and living conditions for protective custody prisoners violated the Equal Protection Clause because they were unequal in comparison with general population prisoners, and not justified by security concerns). *But see* Griffin v. Coughlin, 743 F. Supp. 1006, 1009–16 (N.D.N.Y. 1990) (holding that differences in treatment of protective custody prisoners at Clinton Correctional Facility with those in other protective custody units in New York State and with those in special programs did not violate equal protection rights of protective custody prisoners). For more information about what you need to prove to prevail on a Section 1983 equal protection claim in prison, see Chapter 16 of the *JLM* and Part C(1) of this Chapter.

159. Block v. Rutherford, 468 U.S. 576, 585–89, 104 S. Ct. 3227, 3232–34, 82 L. Ed. 2d 438, 446–49 (1984) (finding the denial of visitation appropriate when the denial furthered legitimate governmental purposes and was not for the purpose of punishment).

160. Bell v. Wolfish, 441 U.S. 520, 547, 99 S. Ct. 1861, 1878, 60 L. Ed. 2d 447, 473 (1979) ("Even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security.").

161. *See* Rudolph v. Locke, 594 F.2d 1076, 1077 (5th Cir. 1979) (stating that courts must determine if given justifications actually further stated purposes); Hamilton v. Saxbe, 428 F. Supp. 1101, 1112 (N.D. Ga. 1976) (stating that officials may not arbitrarily deny a prisoner's visitation request but must provide a meaningful written response).

162. 28 C.F.R. § 540.44 (2007).

163. 28 C.F.R. § 540.44(a) (2007).

164. 28 C.F.R. § 540.44(b) (2007).

165. 28 C.F.R. § 540.44(c) (2007).

166. 28 C.F.R. § 540.44 (2007).

167. Baker v. State, 744 A.2d 864, 170 Vt. 194 (Vt. 1999) (holding that Vermont was constitutionally required to

In 2004, Massachusetts began issuing marriage licenses to same-sex couples.[168] In 2008, California began issuing marriage licenses to same-sex couples as well,[169] and Connecticut followed later in 2008.[170] None of these marriages will count as "marriages" for federal purposes, including in federal prisons, though court challenges are likely to be brought. The Defense of Marriage Act mandates that no state need recognize same-sex unions from other states and also, for federal purposes, defines "spouse" as "a person of the opposite sex who is a husband or a wife." [171] Because of this law, anyone who is not related to you—including your partner or girlfriend/boyfriend—will be classified in the third category as a friend or associate.

Classification in the third category means that prison officials only need to reasonably fear that your visitor will harm security or your rehabilitation in order to exclude them. In the past, prison officials have generally given two reasons for strict visitation policies for LGBT prisoners. The first reason was rehabilitation. Since homosexual sex was illegal in several states and could be outlawed by the federal government, it was possible for prison officials to claim that allowing prisoners visitation with same-sex partners harmed their rehabilitation. After *Lawrence v. Texas*,[172] this reason is inadequate. *Lawrence* said that a state cannot outlaw homosexual sex. Since a state cannot outlaw homosexual sex, it is difficult to imagine how a state could have a rehabilitative interest in preventing homosexual activity.

The other more common justification given for restricting a homosexual prisoner's visitation was security. Prison officials have sometimes claimed that allowing a homosexual's partner to visit or allowing homosexuals to show affection during visitation would open the gay prisoner up to possible violence and retribution.[173] While this justification has worked in other contexts (notably the right to receive LGBT literature—see Part J of this Chapter), courts have often been harsh on prison officials who try to restrict visitation policies. In *Doe v. Sparks*,[174] prison officials had a policy that allowed heterosexual boyfriends or girlfriends to visit prisoners but did not allow same-sex partners to visit. The prison officials claimed that the policy against homosexual visitation furthered the purpose of promoting the internal security of the prison. Although this case challenged a state prison policy, the case was decided under constitutional equal protection standards. The court looked closely at the "security" reasons given by the prison. In *Doe*, visitors were not allowed any physical contact, nor were the relationships between the prisoners and the visitors announced in any way. The court said that there was no way for other prisoners to know of the same-sex relationship between the prisoner and the visitor, and therefore any threat to the security of the prison was "so remote as to be arbitrary."[175] The court found that the prison policy was not reasonably related to security concerns and therefore it violated the Fourteenth Amendment.

A similar outcome was reached in a case where prison officials denied a gay prisoner the ability to kiss and hug his visiting partner. In *Whitmire v. Arizona*,[176] prison policy allowed prisoners to kiss and hug family members and heterosexual partners briefly at the beginning and end of visits. The prison claimed that allowing a homosexual prisoner to hug and kiss his partner would cause other prisoners to label him as gay and therefore open him up to attack from other prisoners. In *Whitmire*, the prisoner was openly gay—he told other prisoners and the court felt that it was implied since he had no problem showing homosexual affection. The court held the prison policy lacked "a common-sense connection" to security since the prisoner

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extend to same-sex couples the common benefits and protections that flowed from marriage under Vermont law).

168. Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 949–50, 440 Mass. 309 (Mass. 2003). *See also* Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. Times, May 17, 2004, at A1.

169. *In re Marriage Cases*, 43 Cal. 4th 757, 183 P.3d 384, 76 Cal. Rptr. 3d 683 (Cal. 2008). *See also* Jesse McKinley, *A Landmark Day in California as Same-Sex Marriages Begin to Take Hold*, N.Y. Times, Jun. 17, 2008, at A19. However, same-sex marriages were later banned in California by the passage of Proposition 8 during the 2008 elections, and the fate of those same-sex marriages performed prior to the ban remains uncertain. *See* Jesse McKinley and Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. Times, Nov. 6, 2008, at A1.

170. Kerrigan v. Comm'r of Pub. Health, 289 Conn. 135, 957 A.2d 407, 411 (Conn. 2008). *See also* Lisa W. Foderaro, *Gay Marriage Begins in Connecticut*, N.Y. Times, Nov. 12, 2008, at A1.

171. 1 U.S.C. § 7 (2006).

172. Lawrence v. Texas, 539 U.S. 558, 578, 123 S. Ct. 2472, 2483, 156 L. Ed. 2d 508 (2003).

173. *See* Whitmire v. Arizona, 298 F.3d 1134, 1136 (9th Cir. 2002) (holding that there is no common sense basis for prisons to prevent, for safety reasons, displays of affection between same sex couples when a prisoner is openly gay).

174. Doe v. Sparks, 733 F. Supp. 227, 234 (W.D. Pa. 1990).

175. Doe v. Sparks, 733 F. Supp. 227, 234 (W.D. Pa. 1990).

176. Whitmire v. Arizona, 298 F.3d 1134, 1135 (9th Cir. 2002).

was already labeled as gay—or was at least willing to be so labeled.[177] The court thus determined that the prison was potentially in violation of the prisoner's First, Third, Fifth, and Fourteenth Amendment rights.

These cases show that if a federal prison denies you the same visitation privileges as heterosexual prisoners merely because of your sexual orientation, you may have a strong claim.

2. New York Visitation Policies

New York state's visitation policies are very similar to those of the federal government, with some notable differences. A New York prison's visitation policies should allow visits at times designed to "encourage maximum visiting"; contact visits are generally to be allowed and encouraged; and the prison should not limit the number of visits unless the safety and security of the prison is threatened.[178]

Also like federal prisons, New York prisons require that prisoners submit a list of visitors they would like to have visit.[179] These visitors are admitted unless prison officials show some legitimate security reason for excluding them.[180] While prison officials generally have a lot of discretion in deciding what constitutes a safety concern, keep in mind that your prison will probably have to follow the same general rules as federal prisons. Merely stating that your same-sex partner would cause a security concern is likely not enough.[181]

New York prisons generally allow physical contact between prisoners and visitors.[182] This contact can involve a small amount of kissing, hugging, and hand-holding (as long as it all takes place in plain view). All of this can occur at the beginning and end of a visit, and brief kisses and embraces should also be allowed during the course of the visit as long as it does not offend other prisoners' sense of decency.[183] The "decency" exception in the New York visitation guidelines might mean that a prison official could try to deny you physical contact with your same-sex partner. If prison officials try to prevent you from engaging in the same physical contact with your partner that heterosexual prisoners are allowed to engage in, you may have a valid claim under both federal and state law.[184]

(a) New York's Family Reunion Program

Currently, New York has a Family Reunion Program that allows close family members a chance for more private visits with prisoners.[185] Unfortunately, the program only applies to close relatives and spouses who are in legal marriages and so does not apply to same-sex partners.[186]

Because of the way the law is written, partners of homosexual prisoners are not eligible for the Family Reunion Program. New York state courts have upheld treating prisoners differently based on whether or not they are married,[187] but these cases generally involve treatment of heterosexual, unmarried prisoners. No challenge to the Family Reunion Program by homosexual partners based on federal or New York law has been reported to date. If you are a homosexual prisoner with a domestic partner who is being denied visitation under the Family Reunion Program, it might be worth contacting one of the impact litigation groups listed at the end of this Chapter about possible federal or state equal protection claims.

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177. Whitmire v. Arizona, 298 F.3d 1134, 1136 (9th Cir. 2002).

178. N.Y. Comp. Codes R. & Regs. tit. 7, § 200.2(b)(2) (1995).

179. N.Y. Comp. Codes R. & Regs. tit. 7, § 200.2(a)(1) (1995).

180. N.Y. Comp. Codes R. & Regs. tit. 7, § 200.2(b)(2) (1995).

181. *See* Doe v. Sparks, 733 F. Supp. 227, 234 (W.D. Pa. 1990) (striking down prison policy against visits by homosexual prisoners' partners on grounds that the connection between the policy and the supposed security concerns the policy is supposed to address is too remote).

182. N.Y. Comp. Codes R. & Regs. tit. 7, § 200.4(k) (1995).

183. N.Y. Comp. Codes R. & Regs. tit. 7, § 200.4(k)(1)–(4) (1995).

184. *See generally* Whitmire v. Arizona, 298 F.3d 1134, 1135–36 (9th Cir. 2002) (holding that there is no common-sense basis for prisons to prevent, for safety reasons, displays of affection between same sex couples when a prisoner is openly gay and similar displays of affection are permitted for heterosexual couples).

185. N.Y. Comp. Codes R. & Regs. tit. 7, § 220.1 (1995).

186. N.Y. Comp. Codes R. & Regs. tit. 7, § 220.3 (1995). Note, however, that the governor of New York issued an executive order on May 14, 2008, requiring all state agencies to recognize same-sex marriages legally performed in other jurisdictions. *See* Jeremy W. Peters, *New York to Back Same-Sex Unions from Elsewhere*, N.Y. Times, May 29, 2008, at A1. Though not all agencies have enacted these changes yet, if you married your same-sex partner in Massachusetts, for instance, but are now in prison in New York, you could be eligible for this program.

187. *See*, *e.g.*, Mary of Oakknoll v. Coughlin, 101 A.D.2d 931, 475 N.Y.S.2d 644 (3d Dept. 1984).

(b) New York City's Domestic Partnership Laws

Unlike the rest of New York state and the federal government, New York City's Domestic Partnership Law requires city correctional facilities to give registered domestic partners of prisoners the same visitation rights as those granted to married couples.[188] This not only means that your domestic partner can visit you under the same rules governing married couples but also that domestic partners may visit other family members in the same way that heterosexual spouses may.

Very little case law involving the Domestic Partnership Law exists. This may reflect the fact that prisons are treating domestic partners in the same manner as heterosexual spouses, or it may reflect the relative newness of the Domestic Partnership Law. At the very least, the law has been upheld under challenges from various opposition groups.[189]

J. Right to Receive LGBT Literature[190]

Under *Thornburgh v. Abbott*, prisons may restrict your right to receive publications that may cause a threat to the daily operation of the prison.[191] In other words, you may not be able to receive publications if the prison administration decides that the publication could cause problems with security, order, or discipline. This rule has posed special problems for LGBT prisoners.

1. Sexually Explicit Material with Homosexual Content

(a) Federal Prisons

In *Thornburgh*, the Supreme Court found constitutional a federal prison regulation that gave prison officials discretion to withhold from prisoners—among other types of mail—sexually explicit publications, if they reasonably believed that those publications posed a threat to prison order or security.[192] The *Thornburgh* Court also upheld as constitutional a 1985 Bureau of Prisons program statement that, in providing guidance on the meaning of the term "sexually explicit," specifically listed "homosexual (of the same sex as the institution population) material" as material a warden could decide not to allow prisoners to receive. The Court justified its decision on two grounds: (1) "homosexual" material would, once in the prison, circulate and lead to "disruptive conduct"; and (2) if prisoners observed a fellow prisoner reading such material, they might draw inferences about the prisoner's sexual orientation and "cause disorder by acting accordingly."[193] After *Thornburgh*, then, all sexually explicit material is potentially censorable, but it is even easier and more defensible for a warden to censor homosexual sexually explicit material.

Note that the holding in *Thornburgh* does not necessarily mean that you may never receive publications with explicit homosexual sexual content while in prison. The *Thornburgh* Court merely held that a warden may exercise discretion to restrict your access to such material. The decisions of different wardens will result in different regulations in different prisons.

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188. Admin. Code of the City of N.Y. § 3-244 (2002).

189. *See*, *e.g.*, Slattery v. City of New York, 179 Misc. 2d 740, 686 N.Y.S.2d 683 (Sup. Ct. N.Y. County 1999) (holding that New York City had the statutory power to enact the Domestic Partnership Law).

190. For general information about your right to communicate with the outside world, including your right to engage in non-legal correspondence, your right to communicate with your lawyer, your right to receive non-LGBT publications, your right to have access to news media, and your access to visitation while in prison, see Chapter 19 of the *JLM*, "Your Right to Communicate with the Outside World."

191. Thornburgh v. Abbott, 490 U.S. 401, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989). Note that the *Thornburgh* standard has replaced the previous and more relaxed standard articulated in Procunier v. Martinez, 416 U.S. 396, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974). Therefore, cases decided before 1989 are unlikely to be helpful to you because courts will probably only take into account precedent decided under the currently prevailing *Thornburgh* test.

192. Thornburgh v. Abbott, 490 U.S. 401, 413, 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 473 (1989).

193. Thornburgh v. Abbott, 490 U.S. 401, 412–13, 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 472–73 (1989). Other courts have upheld similar state prison policies on the grounds that pornographic material leads to security risks. *See*, *e.g.*, Frost v. Symington, 197 F.3d 348, 357–58 (9th Cir. 1999) (upholding prison regulation banning sexually explicit materials depicting sexual penetration on grounds that such material could lead to sexual harassment of female guards); Mauro v. Arpaio, 188 F.3d 1054, 1060 (9th Cir. 1999) (upholding regulations prohibiting prisoners from possessing sexually explicit materials on grounds that regulation was "reasonably related to legitimate penological interests"); Allen v. Wood, 970 F. Supp. 824, 831 (E.D. Wash. 1997) (granting defendant prison's motion for summary judgment on ground that prison regulations prohibiting certain sexually explicit materials satisfied the reasonable relation standard).

Further, though federal regulations allow the censorship of heterosexual sexually explicit material and several courts have, since *Thornburgh*, upheld restrictions on such material,[194] if wardens in the prison where you are incarcerated are exercising their discretion selectively (for example, allowing prisoners to receive heterosexual explicit material and not homosexual explicit material), you may be able to bring a claim under Section 1983 to challenge this conduct on equal protection grounds.[195] If a warden in a federal prison is censoring homosexual content and not heterosexual content, keep in mind how some of the cases from earlier in this Chapter might help you make an equal protection challenge. First, it is not clear whether courts will allow prisons to make life more difficult for you simply because other prisoners dislike your sexual orientation.[196] Second, if you are already openly gay, lesbian, or bisexual, the warden will have a difficult time justifying a decision based on the idea that other prisoners who observe you reading homosexual magazines would make life more difficult for you.[197]

Finally, in 1999, the Bureau of Prisons issued a new Program Statement to replace the one addressed by the *Thornburgh* Court. The new Program Statement does not include "homosexual" in the list of types of sexually explicit material the warden may reject, as the 1985 Program Statement did. A court could still allow censorship of sexually explicit homosexual material if the prison could demonstrate legitimate prison-related justifications for restricting the material. However, it would not be as easy for the court as it was when "homosexual material" was enumerated in the Program Statement. A prisoner challenging a warden's decision to restrict his access to sexually explicit homosexual publications, then, might have a stronger case under the new Program Statement than under the previous one.

(b) State Prisons

Regulations governing many state prisons also contain provisions that permit censorship of sexually explicit homosexual material. State courts have similarly found state prisons' regulations prohibiting explicit homosexual literature to be constitutional.[198] For example, the New Hampshire Department of Corrections Policy and Procedure Directive governing prisoner mail service in New Hampshire State Prisons bans "[o]bscene material, including publications containing explicit descriptions, advertisements, or pictorial representations of homosexual acts, bestiality, bondage, sadomasochism, or sex involving children."[199]

2. Non-Sexually Explicit LGBT Publications

(a) Federal Prisons

The 2003 Program Statement on incoming publications, elaborating on the Federal Bureau of Prisons regulations, provides that "[s]exually explicit material does not include material of a news or information type. Publications concerning research or opinions on sexual, health, or reproductive issues, or covering the

194. *See*, *e.g.*, Frost v. Symington, 197 F.3d 348, 358 (9th Cir. 1999) (holding that a prison's restrictions on a prisoner's possession of images depicting heterosexual penetration did not violate the prisoner's 1st Amendment rights); Mauro v. Arpaio, 188 F.3d 1054, 1060 (9th Cir. 1999) (upholding regulation prohibiting prisoners from possessing sexually explicit materials on grounds that regulation was "reasonably related to legitimate penological interests"); Amatel v. Reno, 156 F.3d 192, 202 (D.C. Cir. 1998) (holding that regulation banning use of Bureau of Prisons funds to distribute sexually explicit material to prisoners was reasonable means of advancing penological interests); Snelling v. Riveland, 983 F. Supp. 930, 936 (E.D. Wash. 1997) (rejecting prisoner's claim that prison policy banning receipt of written or graphic sexually explicit material violated his 1st Amendment rights), *aff'd*, 165 F.3d 917 (9th Cir. 1998).

195. The state could counter such a claim by showing that it has a rational basis for its regulation; for example, that explicit material depicting men engaged in sexual acts with each other is more likely to lead to "disorder" in an all-male prison than is material depicting heterosexual acts because the acts depicted in the heterosexual material cannot be performed in prison the same way that the acts in the homosexual material can.

196. *See* Watkins v. U.S. Army, 875 F.2d 699, 729–30 (9th Cir. 1989) (showing that, under Palmore v. Sidoti, 466 U.S. 429, 104 S. Ct. 1879, 80 L. Ed. 2d 421 (1984), the court is unwilling to allow the Army to use the private prejudice of heterosexuals as grounds for discriminating against homosexuals, even for their protection).

197. *See* Whitmire v. Arizona, 298 F.3d 1134, 1136 (9th Cir. 2002) (finding prison officials could not justify a discriminatory policy based on protecting prisoner from rumors of his homosexuality where prisoner was already "out" in prison).

198. *See* Willson v Buss, 370 F. Supp. 2d 782, 790–91 (N.D. Ind. 2005) (upholding prison supervisor's denial of plaintiff's "blatantly homosexual" literature, claiming a legitimate penological interest in prison security).

199. Lepine v. Brodeur, No. CV 97-72-M, 1999 WL 814277, at *5 (D.N.H. Sept. 30, 1999) (*unpublished*) (finding prison regulations forbidding prisoners from receiving pornographic publications depicting homosexual intercourse constitutional).

activities of gay rights organizations or gay religious groups, for example, should be admitted unless otherwise a threat to legitimate institution interests."[200] This language seems to indicate that you should be allowed to receive a wide variety of LGBT publications with political, religious, social, and fictional content while you are in prison. Because prejudice against LGBT people often creates the view that everything about sexual orientation is sexual, and anything related to homosexuality is about sex, even if it explicitly is not, prison wardens may attempt to keep you from receiving issues of magazines such as *The Advocate* or *Out* on the grounds that they are sexually explicit. Under the 2003 Program Statement quoted above, such conduct in federal prisons is impermissible and open to challenge.[201]

(b) State Prisons

The right of prisoners to receive non-sexually explicit LGBT publications in state prisons is less clear and possibly less strong than in the federal context.[202] Most states do not have statements similar to the federal one, and the discretion given to prison officials in *Thornburgh v. Abbott* may result in many different decisions and regulations even within the same state.[203]

K. Conclusion

Being lesbian, gay, bisexual, or transgender can make the experience of incarceration especially hard, and the lack of case law involving prisoners who are LGBT may make you hesitant to bring a claim due to uncertainty about how a court will rule on it. Contact the legal organizations in the Appendix for help with your case and send information about the challenges you face in prison to the non-legal advocacy groups listed there. You are in a better position than anyone else to educate LGBT activists about the challenges LGBT prisoners face so that they can better advocate for laws and policies that will improve your situation.

200. Fed. Bureau of Prisons, U.S. Dept. of Justice, Program Statement 5266.10, Incoming Publications 4 (2003).

201. It is worthwhile noting that publishers also have 1st Amendment rights regarding subscribers' ability to receive publications in prison. This is important because, unlike prisoners, publishers are not subject to the Prison Litigation Reform Act and its exhaustion procedures and fee caps, and so can sue the prison more freely.

202. *See*, *e.g.*, Harper v. Wallingford, 877 F.2d 728, 730 (9th Cir. 1989) (holding that prisoner's 1st Amendment rights were not violated when a non-sexually explicit membership application and organization bulletin for the North American Man/Boy Love Association were withheld from him, primarily because they posed a threat to prison security); Espinoza v. Wilson, 814 F.2d 1093, 1099 (6th Cir. 1987) (finding that censorship was justified because homosexual activity had presented security problems at prison in the past and homosexual publications posed a danger to institutional security); Willson v. Buss, 370 F. Supp. 2d 782, 787–91 (N.D. Ind. 2005) (finding prisoner did not have the right to receive two gay advocacy magazines, although lacking in sexually explicit material, and that the prison regulation banning "blatant homosexual materials" was constitutional).

203. Thornburgh v. Abbott, 490 U.S. 401, 417 n.15, 190 S. Ct. 1874, 1883 n.15, 104 L. Ed. 2d 459, 475 n.15 (1989) (noting that "[t]he exercise of discretion called for by these regulations may produce seeming 'inconsistencies' . . . [but that given the] likely variability within and between institutions over time . . . greater consistency might be attainable only at the cost of a more broadly restrictive rule against admission of incoming publications").

APPENDIX A

LGBT RESOURCES

Below is a list of organizations that serve as a resource for information, counseling, and support for LGBT prisoners. The JLM makes no endorsement or recommendation of any of the organizations and does not guarantee that they will be able to help you.

American Civil Liberties Union Lesbian, Gay, Bisexual, Transgender Project
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2627 or (212) 549-8000

Gay & Lesbian Advocates & Defenders (GLAD)
30 Winter Street, Suite 800
Boston, MA 02108
(617) 426-1350
Hotline: 1-800-455-GLAD (1-800-243-7692)
GLAD is a public interest legal organization working to defend and expand the rights of gay men, lesbians, bisexuals, transgender individuals and people with HIV. GLAD responds to over 3,000 requests for information and assistance each year and litigates impact cases.

Gay Men's Health Crisis
446 West 33rd Street
New York, NY 10001
Hotline: 1-800-AIDS-NYC (1-800-243-7692)
Legal Services and Advocacy: (212) 367-1040.

Immigration Equality
40 Exchange Place, Suite 1300
New York, NY 10005
(212) 714-2904
Immigration Equality is a coalition of immigrants, lawyers, and other activists providing education, outreach, legal services, information, and referrals to combat discrimination in immigration law.

Lambda Legal Defense & Education Fund
National Headquarters
120 Wall Street, 19th Floor
New York, NY 10005
(212) 809-8585
Western Regional Office
3325 Wilshire Boulevard, Suite 1300
Los Angeles, CA 90010
(213) 382-7600
Midwest Regional Office
11 East Adams, Suite 1008
Chicago, IL 60603
(312) 663-4413
Southern Regional Office
730 Peachtree Street, NE, Suite 1070
Atlanta, GA 30308
(404) 897-1880

South Central Regional Office
3500 Oak Lawn Avenue, Suite 500
Dallas, TX 75219
(214) 219-8585
Lambda is a national organization committed to achieving full civil rights of lesbians, gay men, and people with HIV/AIDS through impact litigation, education, and public policy work.

National Center for Lesbian Rights
870 Market Street, Suite 370
San Francisco, CA 94102
(415) 392-6257
NCLR is a progressive, feminist, multicultural legal center devoted to advancing the rights and safety of lesbians and their families through direct litigation and advocacy.

National Gay and Lesbian Task Force
National Headquarters
1325 Massachusetts Ave., NW, Suite 600
Washington, DC 20005
(202) 393-5177
New York Office
80 Maiden Lane, Suite 1504
New York, NY 10038
(212) 604-9830
NGLTF is a national progressive organization working for the civil rights of gay, lesbian, bisexual and transgender people.

Sylvia Rivera Law Project
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Sylvia Rivera Law Project fights discrimination against gender non-conforming people, particularly intersex and transgender people, and focuses on people of color and poor people.