CHAPTER 30

SPECIAL INFORMATION FOR LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND/OR QUEER INCARCERATED PEOPLE*

A. Introduction

Lesbian, gay, bisexual, transgender, and/or queer ("LGBTQ") incarcerated people face the same challenges as other incarcerated people, but due to prejudice and a lack of knowledge about issues surrounding sexual orientation and gender identity, LGBTQ incarcerated people often encounter additional difficulties.

Many of the issues unique to LGBTQ incarcerated people have not been litigated extensively.[1] And many of the issues that have been litigated may change significantly in light of relatively recent Supreme Court decisions.[2] The outcomes of these claims are now less predictable. This unpredictability, combined with the fact that prejudice against LGBTQ individuals may play a role in many judges' and juries' decision-making processes, means that LGBTQ incarcerated people face uphill battles when they bring claims in court. For this reason, you should consider contacting an LGBTQ impact litigation organization to see if its lawyers would be willing to take your case.[3] 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 LGBTQ plaintiffs.

Throughout this Chapter, the term "transgender" is used to describe people whose gender identity is different from their assigned sex at birth. 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. Male pronouns (he, him, his) are used throughout this chapter and manual. The use of male pronouns is not intended to suggest that only people who identify as men can use the manual. The information contained in this chapter can be helpful to anyone, regardless of their gender identity.

This Chapter attempts to address the most pressing concerns of LGBTQ incarcerated people. Part B explains what to do if you are being treated unfairly because of your sexual orientation or gender identity. Part C through Part H address day-to-day issues that may arise as a lesbian, gay, bisexual, transgender or queer person in prison. Part C 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 D explains your right to confidentiality regarding your sexual orientation or gender identity. Part E addresses assault and harassment by prison officials and other incarcerated people. Part F discusses protective custody and housing placements for transgender incarcerated people. Part G discusses visitation rights. Part H discusses your right to receive LGBTQ literature. Part I of this Chapter discusses important Supreme Court cases and how they may affect past and future prison

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1. Unfortunately, some legal decisions of significance to LGBTQ incarcerated people 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.

2. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015); Hollingsworth v. Perry, 570 U.S. 693, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (2013); United States v. Windsor, 570 U.S. 744, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013).

3. Impact litigation organizations fight 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.

regulations more generally. Finally, Part J discusses your remedies if you feel that homophobic or transphobic beliefs (prejudice against LGBTQ individuals) led to jury bias in your conviction.

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 acting on behalf of the state, violates either your federal statutory rights or 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.[4] If you are a federal incarcerated person, you will file a *Bivens* action or a Federal Tort Claim if you are looking for monetary damages. If you are held in state or municipal custody, Section 1983 may also apply to you. Also, if you are a state or municipal incarcerated person 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. For a more detailed explanation of Section 1983, see Chapter 16 of the *JLM*, "Using 42 U.S.C. 1983 to Obtain Relief From Violations of Federal Law."

It is also very important to be aware of the restrictions placed on prisoner litigation by the Prisoner Litigation Reform Act ("PLRA"). Please read Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," for a more detailed explanation of the PLRA before filing any lawsuit.

B. Unequal Treatment Because of Sexual Orientation or Gender Identity

1. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment prohibits the government from treating different classes of people differently unless there is a sufficiently legitimate purpose for doing so.[55] If you believe that benefits are being withheld from you and that they are not being withheld from heterosexual incarcerated people, 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" incarcerated people are treated differently by the prison; and (2) the difference between their treatment and your treatment is not rationally related to a legitimate penological (prison-related) interest.[6] In other words, the prison rule or policy that results in your being treated differently must have a commonsense 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 to Obtain Relief From Violations of Federal Law."

When LGBTQ incarcerated people claim that they are being treated differently than heterosexual incarcerated people, prisons have often tried to justify their actions by claiming that different treatment is necessary to protect LGBTQ incarcerated people because they are often more vulnerable to attack than other incarcerated people. For instance, two cases in the Sixth Circuit involved LGBTQ incarcerated people 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 LGBTQ incarcerated person was vulnerable to attack, his

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4. To challenge the conduct of an official or employee of the federal government, you must bring a *Bivens* action. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). You can find an explanation of how to do this in 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."

5. U.S. Const. amend. XIV, § 1; *see also* Romer v. Evans, 517 U.S. 620, 635, 116 S. Ct. 1620, 1629, 134 L. Ed. 2d 855, 868 (1996) (holding that an amendment to the Colorado Constitution prohibiting the Colorado government from protecting gay men or lesbians from discrimination failed to serve any legitimate government purpose).

6. 42 U.S.C. § 1983; *see also* Turner v. Safley, 482 U.S. 78, 89—91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79—80 (1987); Overton v. Bazzetta, 539 U.S. 126, 132, 123 S. Ct. 2162, 2168, 156 L. Ed. 2d 162, 171 (2003) ("In Turner we held that four factors are relevant in deciding whether a prison regulation affecting a constitutional right that survives incarceration withstands constitutional challenge: whether the regulation has a valid, rational connection to a legitimate governmental interest; whether alternative means are open to incarcerated people to exercise the asserted right; what impact an accommodation of the right would have on guards and incarcerated people and prison resources; and whether there are ready alternatives to the regulation.") (internal citations omitted).

participation in the services posed a security risk. The prison argued that the restriction on the incarcerated person's First Amendment rights served the valid penological interest of prison security and so was justified.[7]

Several LGBTQ incarcerated people have, with some success, sued prison officials, claiming they were terminated from their prison jobs because they are LGBTQ. For instance, in *Holmes v. Artuz*, a federal court in New York said that a gay incarcerated person who claimed he was removed from his food service prison job may have stated a claim under Section 1983 for violation of his equal protection rights.[8] The court did not decide whether the equal protection guarantee of the Constitution had been violated because the plaintiff, appearing without counsel, did not present enough information for the court to reach that decision.[9] However, the court was clearly sympathetic to the incarcerated person's claim, and the opinion contains strong language saying that the prison would have to show, rather than just say, that its decision was rationally related to the state's interest in maintaining security.[10]

2. Sex Discrimination

Although your chances of prevailing on an equal protection claim may have increased after *United States v. Windsor*, you might also have a chance of winning a case if you state your grievance in terms

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7. Brown v. Johnson, 743 F.2d 408, 412—413 (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 (6th Cir. 1992) (holding that a genuine issue of material fact existed as to whether a gay incarcerated person 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 (9th Cir. 1989) (affirming summary judgment for defendant prison because allowing plaintiff incarcerated person to receive mailings from North American Man/Boy Love Association would make him a likely victim of incarcerated person violence); Star v. Gramley, 815 F. Supp. 276, 278—279 (C.D. Ill. 1993) (granting summary judgment to prison that refused to allow an incarcerated person 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).

8. Holmes v. Artuz, No. 95 Civ. 2309 (SS), 1995 U.S. Dist. LEXIS 15926, at *3 (S.D.N.Y. Oct. 27, 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).

9. 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*).

10. 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, No. 88-7729, 1988 U.S. App. LEXIS 20071, at *2 (4th Cir. Oct. 31, 1988) (*unpublished*) (vacating lower court's summary judgment dismissal of an equal protection claim brought by a gay incarcerated person 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—164 (W.D. Mo. 1991) (denying defendant's motion to dismiss on the ground that a gay incarcerated person, 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 (S.D.N.Y. 1983) (stating, that a gay incarcerated person who claimed he was punished because he was gay would have a claim under § 1983 if he 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 (N.D. Tex. 1995) (finding that mistaken rumors that a gay incarcerated person was HIV-positive were enough to raise a legitimate safety concern that justified firing him from food handling job).

of *sex* discrimination.[11] Title VII of the Civil Rights Act of 1964 creates a federal cause of action where "sex … was a motivating factor"[12] for discrimination, and this law has been held to prohibit sex discrimination against both men and women.[13] Sex discrimination is discrimination that occurs based on whether you are a man or a woman. It is also sex discrimination when you suffer discrimination based on stereotypes about how men or women should behave or look. LGBTQ people have used this "sex-stereotyping" theory to argue they have suffered from sex discrimination. This is useful because courts look at laws and policies that treat people differently according to their sex with "intermediate scrutiny."[14] Intermediate scrutiny is a higher level of scrutiny than "rational basis scrutiny." Intermediate scrutiny requires the prison to show a *substantial* relationship between a prison rule and a legitimate goal of the prison to justify a sex-based classification.[15] For an explanation on the different levels of scrutiny that the court uses, see Part I(2) of this Chapter "Romer v. Evans and the Equal Protection Clause."

Sex-stereotyping claims include claims of discrimination against people for not conforming to the expected behavior of their sex (not acting like people think their sex is "supposed to" act). The Supreme Court recognized this cause of action in *Price Waterhouse v. Hopkins*, finding sex discrimination existed 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.[16] This case is particularly useful for transgender incarcerated people who suffer from discrimination in prison. For many years, courts were 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.*,[17] which denied transgender people protection under Title VII and similar sex discrimination laws.[18]

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11. *See* Schwenk v. Hartford, 204 F.3d 1187, 1200—1202 (9th Cir. 2000) (finding that the evidence showed the attack by a prison guard was at least in part motivated by sex discrimination, as the guard was not interested in the incarcerated person sexually until his discovery of her "true" sex). *But see* Neal v. Dept. of Corr., 583 N.W.2d 249, 254, 230 Mich. App. 202, 214—215, (Mich. Ct. App. 1998) ("Prisoners simply are not protected against [sex] discrimination by the [Civil Rights Act] (which is by no means to say that they are entirely unprotected; whatever restraints exist, however, are found outside the four corners of the act)."). 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."

12. 42 U.S.C. § 2000e-2(m). Numerous state statutes also prohibit sex discrimination. The Equal Employment Opportunity Commission ("EEOC") has also held that discrimination against an individual because that person is transgender is discrimination because of sex and is therefore prohibited under Title VII. *See* Macy v. Dept. of Justice, EEOC Appeal No. 0120120821 at *11(April 20, 2012). Furthermore, the EEOC held that discrimination against an individual because of that person's sexual orientation is discrimination because of sex and prohibited under Title VII. *See* David Baldwin v. Dept. of Transportation, EEOC Appeal No. 0120133080 at *10 (July 15, 2015). While the EEOC cases described did not occur in the prison context, looking at them may help you to develop an argument for you claim.

13. *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).

14. Different constitutional challenges receive different levels of scrutiny (review). There are three levels of scrutiny: strict scrutiny, intermediate scrutiny, and rational basis. For a more detailed explanation of levels of scrutiny, you can look at Part I(2) of this Chapter.

15. *See JLM*, Chapter 16.

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

17. Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1084—1085 (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").

18. *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, 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

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 were discriminated against based on sex or sex stereotypes. For instance, you are a *man* who desires male sexual partners and therefore you were fired, but male incarcerated people who desired female sexual partners would not have been fired.[19] By framing the argument in this way, you can perhaps get the court to be more careful in its review of the prison officials' actions by applying the "intermediate scrutiny" standard.

3. State Laws

Many state laws (and state constitutions) provide greater protection to LGBTQ people than the federal Constitution does. Examples are the Minnesota State Constitution[20] and California's Unruh Civil Rights Act.[21] You should research your state's laws to find out if you could have a stronger statutory claim under those laws than the federal constitutional claims (discussed in the above two sections). If you are in a state with LGBTQ-friendly statutes, you can bring a claim under a state statute as a "pendent claim" (an additional claim to your Section 1983 claim) in federal court, or you can bring the state claim alone in state court. Also, sometimes federal courts have analyzed whether a state law violates the federal Equal Protection Clause of the Fourteenth Amendment.[22]

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

Transgender incarcerated people 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 items like clothes and cosmetics.

1. Access to Gender-Related Medical Care

Many transgender incarcerated people seek access to gender-related medical care while in prison. The most common requests are for hormone treatments and gender reassignment surgery. For general

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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. 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) (*unpublished*) ("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.").

19. *See* Rosa v. Park West Bank & Trust Co., 214 F.3d 213, 214–216 (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); Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011) ("Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender.").

20. Minn. Const. art. I, § 2.

21. Unruh Civil Rights Act, Cal. Civ. Code § 51 (West 2007).

22. *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).

information about your right to adequate medical care while in prison, see Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care."

(a) Serious Medical Need and Deliberate Indifference

The Supreme Court established in *Estelle v. Gamble* that "deliberate indifference" to an incarcerated person's "serious medical needs" violates that incarcerated person's Eighth Amendment right to be free from cruel and unusual punishment.[23]

Circuit courts (appellate courts) have regularly found that "gender dysphoria"[24] is a "serious medical need" that meets the *Estelle* standard.[25] Many federal courts have held that transgender incarcerated people are therefore constitutionally entitled to *some* type of medical treatment for their condition.[26] Nevertheless, most of these courts have held that transgender incarcerated people 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.[27] Under these rulings, prison officials do not violate the Eighth Amendment when, based on their professional judgment, they refuse to provide an incarcerated person with the particular treatment or he requests.[28] As a result, most courts that have considered

23. 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*.

24. Gender dysphoria ("GD") is distress because your gender identity does not match your biological sex. Gender Dysphoria, American Psychiatric Association, *available at* https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria (last visited November 6, 2020); *see also* Maggert v. Hanks, 131 F.3d 670, 671 (7th Cir. 1997). Many older cases will not use the term "gender dysphoria," but will state that "transsexualism" or "gender identity disorder" are "serious medical needs." *See*, *e.g.*, Cuoco v. Moritsugu, 222 F.3d 99, 106 (2d Cir. 2000) (treating "transsexualism" as a "serious medical need"). Even though these cases do not use up to date language, they can help you argue for trans-affirming medical care.

25. *See*, *e.g.*, Cuoco v. Moritsugu, 222 F.3d 99, 106 (2d Cir. 2000) (treating "transsexualism" as a "serious medical need"); 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 that "transsexualism" may present a "serious medical need," which constitutionally entitles incarcerated person to at least some type of medical care); 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 the court's holding in *White* that "transsexualism" 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)).

26. Injunctive relief is where you ask the court to make a prison do something or stop doing something. For instance, if you are trying to get a medical treatment which the prison has previously refused, you are seeking injunctive relief. If you are trying to get "damages" (usually money) from a prison official, you will have to show that the prison official is not entitled to "qualified immunity." If you are trying to get damages, see Chapter 16 of the *JLM* for an explanation of qualified immunity and other defenses to § 1983 suits.

27. *See*, *e.g.*, Meriwether v. Faulkner, 821 F.2d 408, 413 (7th Cir. 1987) (holding that a transgender incarcerated person is entitled to medical treatment but has no constitutional right to any one particular type of treatment).

28. *See* Long v. Nix, 86 F.3d 761, 765–766 (8th Cir. 1996) (holding a prison official was not deliberately indifferent for choosing a different course of treatment than the tranquilizers recommended by the incarcerated person's expert, where the prison medical staff tried to evaluate the incarcerated person's psychological condition and the incarcerated person failed to cooperate); White v. Farrier, 849 F.2d 322, 327–328 (8th Cir. 1988) (holding a different diagnosis by prison medical staff than by incarcerated person's experts does not establish deliberate indifference on its own, since doctors are entitled to exercise their medical judgment and an incarcerated person 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 incarcerated person 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 transgender people, because it is one of a variety of treatment options and there is no medical consensus that it is the best option; therefore a transgender person 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)

the question have denied transgender incarcerated people' requests for hormonal treatment while still upholding their right to medical care.[29]

Several more recent federal court decisions, however, suggest that courts are beginning to recognize circumstances in which prisons are required to provide hormone therapy. In *Phillips v. Michigan Department of Corrections*, for example, a Michigan federal court granted a preliminary injunction directing prison officials to provide estrogen therapy. The incarcerated person had been taking estrogen since she was a teenager but was prevented from doing so in prison. As a result, she started experiencing a physical transformation and severe depression.[30] The *Phillips* court held that denying hormonal treatment in this case caused "irreparable harm" and violated the Eighth Amendment:

> 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

(holding that a prison could deny transgender incarcerated person hormones or sex reassignment surgery if security concerns made such treatment impossible but was required to provide some kind of treatment, including, at a minimum, 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 resulted from an informed medical opinion, and therefore plaintiff did not have a legal claim of deliberate indifference); Lamb v. Maschner, 633 F. Supp. 351, 353 (D. Kan. 1986) ("[T]he key question in this case is whether defendants have provided plaintiff with some type of treatment, regardless of whether it is what plaintiff desires."). These are all cases where the incarcerated person sought injunctive relief, trying to get the prison to give some kind of medical treatment. The courts' refusal to recognize a specific right to hormone therapy, and the recognition instead of a broader right to medical care, has at least once prevented prison officials from avoiding liability by claiming qualified immunity (which would allow an incarcerated person to possibly get damages). In a Ninth Circuit case, prison officials sued by an incarcerated person whose hormonal therapy they had terminated argued that they were entitled to qualified immunity because incarcerated people suffering from gender dysphoria have no clearly established right to female hormone therapy. The Ninth Circuit rejected the officials' claim, holding that "with respect to prisoner medical claims, the right at issue should be defined as an incarcerated person'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, 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*) (quoting Kelley v. Borg, 60 F.3d 664, 667 (9th Cir. 1995)). See Chapter 16 of the *JLM* for an explanation of qualified immunity and other defenses to § 1983 suits.

29. In Maggert v. Hanks, 131 F.3d 670, 671–672 (7th Cir. 1997), a court recognized what many other courts have not: hormone therapy is necessary to "cure" gender dysphoria. Nevertheless, the *Maggert* court held that prisons should not be required to provide hormonal therapy—not because other treatments would work, but because such therapy goes beyond the minimal treatment that prisons are required to provide. Though a prison is required by the 8th Amendment to provide an incarcerated person with medical care, it need not provide care as good as the person would receive if he were a free person; incarcerated people are entitled only to minimum care. Maggert v. Hanks, 131 F.3d 670, 671–672 (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 incarcerated people even if they were not in prison. "[M]aking the treatment a constitutional duty of prisons would give incarcerated people a degree of medical care that they could not obtain if they obeyed the law," which may 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, because "transsexualism" presents a "serious medical need," den of hormone therapy was not deliberate indifference based on the plaintiff's term length, the prison's inability to perform gender confirmation surgeries, the lack of medical necessity for the hormone, and the disruption to all-male prison).

30. Phillips v. Mich. Dept. of Corr., 731 F. Supp. 792, 794 (W.D. Mich. 1990).

> measurably worse, making the cruel and unusual determination much easier.[31]

Despite these encouraging developments in a few federal courts, courts in many other jurisdictions have continued to deny claims by transgender incarcerated people for hormonal treatment.[32] Prisoners who are unable to demonstrate that they previously received hormone treatment before incarceration may still face an uphill battle, despite recent changes to the federal Bureau of Prisons policy.[33] Courts will give more weight to the original decision made by prison medical personnel rather than prior treatment history.[34]

(b) Access to Gender Reassignment Surgery

Courts generally do not require a prison to pay for or conduct any surgery related to an incarcerated person's gender identity or transition.[35] If you are diagnosed with gender dysphoria (GD) by prison medical staff, then the prison may be required to give you treatment to comply with due process under the Eighth Amendment "deliberate indifference" test.[36] However, it may be difficult to get staff to diagnose you with gender dysphoria. If you are successfully diagnosed with GD, you will not have a choice in what treatment you receive because treatment decisions are left to prison health care staff.[37] If the "choice" of treatment is unacceptable to you, you can always refuse. If you feel that your medical need for gender reassignment surgery is not being addressed, you can try to show an Eighth Amendment violation. To do this, you must show (1) proof of a "serious medical need," and (2) a prison's deliberate indifference to that need.[38] Unless a doctor is willing to

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31. 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, 635 (4th Cir. 2003) (holding that termination of a transgender incarcerated person'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, 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*) (holding when an incarcerated person 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").

32. *See*, *e.g.*, Praylor v. Tex. Dept. of Criminal Justice, 430 F.3d 1208, 1209 (5th Cir. 2005) (*per curiam*) (holding that denial of hormone therapy and gender confirmation surgery 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 gender confirmation surgery); Farmer v. Moritsugu, 163 F.3d 610, 615 (D.C. Cir. 1998) (denying incarcerated person's claim against the medical director of the Bureau of Prisons because the director 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 to justify the cost).

33. *See* FED. BUREAU OF PRISONS, U.S. DEPT. OF JUSTICE, PROGRAM STATEMENT 6031.04, PATIENT CARE 41–42 (June 3, 2014), *available at* https://www.bop.gov/policy/progstat/6031_004.pdf (last visited Sept. 29, 2019) (stating that if an incarcerated person is diagnosed with gender dysphoria, a treatment plan may include hormone therapy).

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

35. 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 incarcerated person's request for gender reassignment and cosmetic surgery and refer her back to medical personnel for other appropriate treatment).

36. *See* Cuoco v. Moritsugu, 222 F.3d 99, 106–107 (2d Cir. 2000) (assuming transgender individuals have a "serious medical need" within the meaning of the 8th Amendment deliberate indifference test).

37. *See* Sires v. Berman, 834 F.2d 9, 13 (1st Cir. 1987) ("Where the dispute concerns not the absence of help, but the choice of a certain course of treatment, or evidences mere disagreement with considered medical judgment, we will not second guess the doctors.").

38. *See* Kosilek v. Spencer, 774 F.3d 63, 82 (1st Cir. 2014) (*en banc*) ("Therefore, to prove an Eighth

say that the chosen option would not address the "serious medical need," prison health care providers have freedom to choose your treatment. Therefore, there is a chance that even if gender reassignment surgery is an option, it may not be chosen by the prison.[39]

Finally, if you experience health complications as a result of a prior gender-related surgery, the government is obligated to provide you the medical care necessary to treat those complications.[40]

(c) Access to Hormonal Treatment

The federal Bureau of Prisons' medical policy has recently changed to allow incarcerated people to be provided with hormone therapy even if they did not have hormone therapy prior to incarceration.[41] Nevertheless, many federal and state prisons have refused to provide hormone treatment to transgender incarcerated people, even though the cost of hormone treatment does not necessarily exceed the costs of other routine medical treatments administered to the general prison population.[42]

If you were undergoing hormone therapy before you went to jail, or if you need hormones now but prison officials deny you access to the treatment, you can sue those officials for violations 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 looked at a lot by the courts. In recent years in particular, several courts have required prisons to provide transgender incarcerated people with hormonal treatment.[43]

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 incarcerated people to access the clothing of their choice and other personal items.[44] Prisoners have used Section 1983 to challenge

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Amendment violation, a prisoner must satisfy both of two prongs: (1) an objective prong that requires proof of a serious medical need, and (2) a subjective prong that mandates a showing of prison administrators' deliberate indifference to that need."). *But see* Norsworthy v. Beard, 802 F.3d 1090, 1092 (9th Cir. 2014) (*per curiam*) (holding Norsworthy's case moot, meaning the court did not need to decide the issue anymore, because even though the district court required the California prison system to perform sex reassignment surgery, she was released from prison on parole).

39. *See* Kosilek v. Spencer, 774 F.3d 63, 89–90 (1st Cir. 2014) (*en banc*) (finding that when the Department of Corrections chose to provide hormonal treatment, facial hair removal, feminine clothing, antidepressants, and psychotherapy instead of gender reassignment surgery, it was not the court's place to second-guess prison medical professionals' judgment and so no 8th Amendment violation was found).

40. *See* Estelle v. Gamble, 429 U.S. 97, 103–104, 97 S. Ct. 285, 290–291, 50 L. Ed. 2d 251, 259–260 (1976) ("These elementary principles [per the Eighth Amendment] establish the government's obligation to provide medical care to those whom it is punishing by incarceration.")

41. *See* FED. BUREAU OF PRISONS, U.S. DEPT. OF JUSTICE, PROGRAM STATEMENT 6031.04, PATIENT CARE 41 (June 3, 2014), *available at* https://www.bop.gov/policy/progstat/6031_004.pdf (last visited Sept. 29, 2019) ("If a diagnosis of GID [GD] is reached, a proposed treatment plan will be developed ... The treatment plan may include elements or services that were, or were not, provided prior to incarceration, including, but not limited to: those elements of the real-life experience consistent with the prison environment, hormone therapy, and counseling.").

42. *See* Darren Rosenblum, "Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism, 6 MICH. J. GENDER & L. 499, 545–546 (2000).

43. *See* Phillips v. Mich. Dept. of Corr., 731 F. Supp. 792, 800–801 (W.D. Mich. 1990) (granting transgender incarcerated person'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, at *43–44 (D. Idaho July 27, 2007) (*unpublished*) (granting incarcerated person'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 incarcerated people who do not have a previous doctor's prescription, incarcerated people who had been getting hormones through informal means may have an additional challenge in bringing suit.

44. *See*, *e.g.*, Tates v. Blanas, No. CIV S-00-2539 OMP P, 2003 U.S. Dist. LEXIS 26029, at *31 (E.D. Cal. Mar. 11, 2003) (*unpublished*) (rejecting a categorical rule that denies an incarcerated person 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,

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. In both situations, incarcerated people claim that the prison policies and refusals violate their constitutional rights. These challenges have been mostly unsuccessful, however, because courts show significant respect to prison officials' decisions about how to oversee daily life in prison.[45]

Claims under the First Amendment generally fail when they come up against arguments by prisons that restrictions on dress, jewelry, and makeup are justified by legitimate penological interests.[46] Several courts have noted that such deprivations are simply not of a constitutional nature.[47]

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." Cosmetic products are not among the minimal civilized measure of life's necessities.[48]

Additionally, courts have held that different grooming regulations for male and female incarcerated people do not trigger an incarcerated person's equal protection rights.[49]

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 incarcerated person 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).

45. *See* Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987) (holding a prison regulation intruding on an incarcerated person's constitutional right will be upheld if the regulation is reasonably related to a legitimate prison interest).

46. *See*, *e.g.*, Star v. Gramley, 815 F. Supp. 276, 278–279 (C.D. Ill. 1993) (holding that restrictions on clothing incarcerated people can wear are reasonably related to a legitimate penological interest and hence do not violate the 1st Amendment and allowing prison to prevent an incarcerated person from wearing women's makeup and apparel on the ground that the individual 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 incarcerated person 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 *25–26 (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 cross-dressing the policy discouraged sexual assaults).

47. Remember that in order to bring a successful § 1983 claim, you must allege a violation of a federal constitutional or statutory right. *See* 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*) (*per curiam*) (holding that denial of access to hair and skin products that transgender incarcerated person claimed were necessary for her to maintain a feminine appearance did not state a constitutional claim); 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 incarcerated person's earrings by prison officials did not violate the individual'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))).

48. 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*) (*per curiam*) (citation omitted) (quoting Hudson v. McMillian, 503 U.S. 1, 9, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992)).

49. *See*, *e.g.*, Hill v. Estelle, 537 F.2d 214, 215–216 (5th Cir. 1976) (holding that difference in application of state prison regulations, in failing to enforce hair length regulations against female incarcerated people, 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 Clause, even though it does restrict female hair length or style).

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

If you are an LGBTQ incarcerated person, you may not have disclosed your sexual orientation or transgender status to fellow incarcerated people. 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 incarcerated people. 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 an incarcerated person's Eighth Amendment right to be free from disclosure of his sexual orientation. *Thomas v. District of Columbia* involved a corrections officer at the Maximum Security Facility in Lorton, Virginia, who allegedly sexually harassed an incarcerated person and spread rumors that the incarcerated person was gay and a "snitch."[50] As a result of these rumors, the incarcerated person claimed he suffered emotional distress and feared for his safety when confronted and threatened with bodily harm by other incarcerated people. The incarcerated person sued the corrections officer under Section 1983, claiming the officer had violated his Eighth Amendment rights, and the officer filed a motion to dismiss the complaint.[51]

The U.S. District Court for the District of Columbia found that the incarcerated person had stated a valid Eighth Amendment claim against the officer.[52] The court held that the officer's "alleged conduct, the physical harm with which [the incarcerated person] 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."[53]

The rumors about the incarcerated person's sexuality were just one part of the abuse the officer allegedly inflicted on the incarcerated person, and it is impossible to know whether the case would have been decided the same way if the case was only about the incarcerated person's sexuality. However, there is language in *Thomas* that could be useful to incarcerated people bringing suits against prison officials who have revealed their sexual orientation or gender identity to other incarcerated people.

(b) Gender Identity

In 2003, Congress passed the Prison Rape Elimination Act ("PREA") to deal with the high levels of sexual assault and harassment in prisons, jails, police lock-ups, community corrections, and immigration detention.[54] In 2012, the U.S. Department of Justice created guidelines to implement PREA, known as the PREA Standards.[55] While the PREA Standards do not allow an incarcerated

50. Thomas v. District of Columbia, 887 F. Supp. 1, 3 (D.D.C. 1995); *see also* Montero v. Crusie, 153 F. Supp. 2d 368, 376–377 (S.D.N.Y. 2001) (denying summary judgment for correctional officers who spread rumor that incarcerated person was gay and tried to incite fight between him and other incarcerated people).

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

52. 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).

53. Thomas v. District of Columbia, 887 F. Supp. 1, 4 (D.D.C. 1995). *But see* Davis-Hussung v. Lewis, No. 14-14964, 2015 U.S. Dist. LEXIS 126964, at *1–2 (E.D. Mich. Aug. 31, 2015) (*unpublished*) (finding no constitutional right violated when prison officials spread inflammatory rumors about incarcerated person's sexuality, despite fact that remarks led to one incarcerated person being harmed by other others).

54. Prison Rape Elimination Act of 2003, Pub. L. No. 108–79, 117 Stat. 972 (codified at 34 U.S.C. §§ 30301–30309 (2012)).

55. 28 C.F.R. pt. 115 (2018).

person to sue if the standards are violated,[56] they do create a baseline to help show that your constitutional rights have been violated otherwise. The PREA Standards provide specific protections to transgender individuals. For example, the Standards require prisons to screen incarcerated people within seventy-two hours of intake to figure out the incarcerated person's risk for sexual victimization or abuse.[57] This screening must consider whether the incarcerated person is (or may be thought to be) LGBTQ or gender nonconforming and prison facilities must consider this screening information in making housing and program assignments.[58]

Furthermore, if you do not plan to disclose your gender identity while in prison, the PREA Standards help to maintain privacy for incarcerated people. The PREA Standards require that transgender incarcerated people get access to a private shower if requested. If this is not available, you can ask to either shower at a different time or in a more private area.[59] Many courts have also held that prison staff must do strip searches in a respectful, professional way—meaning that strip searches performed in full view of other incarcerated people may violate privacy rights.[60]

2. Disclosure of Sexual Orientation or Gender Identity as a 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.[61] These holdings come out of a Supreme Court tradition of finding a general right to privacy in the Constitution that protects certain intimate matters.[62] Further, many other courts have also found that a constitutional right of privacy protects against disclosure of some kinds of personal information.[63] If a prison official discloses private

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56. States that have adopted PREA use the Standards as a guideline for how to treat incarcerated people humanely. The Standards are purely advisory, meaning it is not mandatory for a prison who adopts PREA to follow the Standards. Courts have found that incarcerated people cannot sue prisons or prison officials for violating the PREA Standards. *See, e.g.*, De'Lonta v. Clarke, No. 7:11-cv-00483, 2013 U.S. Dist. LEXIS 5354, at *7 (W.D. Va. Jan. 14, 2013) (*unpublished*) ("[T]here is no basis in law for a private cause of action under § 1983 to enforce a PREA violation."); Chinnici v. Edwards, No. 1:07-CV-229, 2008 U.S. Dist. LEXIS 119933, at *7 (D. Vt. July 23, 2008) (*unpublished*) ("PREA confers no private right of action ... The statute does not grant incarcerated people any specific rights.").

57. 28 C.F.R. § 115.41(b) (2018); 28 C.F.R. § 115.241(b) (2018); 28 C.F.R. § 115.341(a) (2018).

58. 28 C.F.R. § 115.41(b) (2018); 28 C.F.R. § 115.42(a) (2018).

59. 28 C.F.R. § 115.42(F) (2018) ("Transgender and intersex inmates shall be given the opportunity to shower separately from other inmates.").

60. *See* Farmer v. Perril, 288 F.3d 1254, 1260 (10th Cir. 2002) (finding transgender incarcerated person has right not to be humiliated and strip searched in full view of other incarcerated people unless reasonably related to legitimate penological interest); Meriwether v. Faulkner, 821 F.2d 408, 418 (7th Cir. 1987) (finding there may be violation of 8th Amendment's prohibition against cruel and unusual punishment where public bodily searches are wholly unrelated to a penological justification).

61. *See*, *e.g.*, Whalen v. Roe, 429 U.S. 589, 599–600, 97 S. Ct. 869, 876–877, 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).

62. *See, e.g.*, 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); Griswold v. Connecticut, 381 U.S. 479, 485–486, 85 S. Ct. 1678, 1682, 14 L. Ed. 2d 510, 515–516 (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).

63. *See*, *e.g.*, Powell v. Schriver, 175 F.3d 107, 110–113 (2d Cir. 1999) (finding the disclosure of an incarcerated person's confidential medical information regarding transgender status as humor or gossip is not reasonably related to a legitimate penological interest and therefore violates individual's constitutional right to privacy); Nolley v. County of Erie, 776 F. Supp. 715, 728–736 (W.D.N.Y. 1991) (finding that red stickers disclosing plaintiff's HIV status to non-medical staff and automatic segregation of HIV-positive incarcerated people violated constitutional and statutory rights to privacy); Doe v. Coughlin, 697 F. Supp. 1234, 1238–1241 (N.D.N.Y. 1988) (holding that the identification of incarcerated people with HIV and/or AIDS violated their right to privacy and

information about you, you could be subject to harassment or abuse by other officials or fellow incarcerated people. 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 the 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 an incarcerated person's right to privacy through disclosure of gender identity when that disclosure is not "reasonably related to legitimate penological interests."[64] 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 incarcerated person, 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 incarcerated person 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 incarcerated people, that she had undergone gender reassignment surgery. The Second Circuit held that the corrections officer's "gratuitous disclosure" of the incarcerated person's "confidential medical information as humor or gossip ... [was] *not* reasonably related to a legitimate penological interest" and therefore violated her right to privacy.[65] Because there was no legitimate reason for the sharing of personal information, it was a violation of the incarcerated person's constitutional right to privacy. Keep in mind, however, that *Powell* focused on the incarcerated person's transgender status as a medical condition, and not on the sexual orientation of the incarcerated person.[66]

(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.[67] There is also at least one case containing a

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that "the incarcerated people subject to this program must be afforded at least some protection against the non-consensual disclosure of their diagnosis").

64. 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, 55 U.S.L.W. 4719 (1987) (holding that a regulation that violates incarcerated peoples' constitutional rights is only valid if it is "reasonably related to legitimate penological interests").

65. Powell v. Schriver, 175 F.3d 107, 112 (2d Cir. 1999). Despite this finding, the *Powell* court ultimately found for the corrections officer because that officer was protected by qualified immunity. Qualified immunity shields government officials from liability for money 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 Rodriguez v. Phillips, 66 F.3d 470, 475 (2d Cir. 1995)). The *Powell* court found that the right of an incarcerated person 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 in the Second Circuit would likely find that the right to privacy about one's gender identity is "clearly established." *See also* Hunnicutt v. Armstrong, 152 Fed. Appx. 34, 35 (2d Cir. 2005) (holding that the plaintiff adequately alleged a right to privacy claim based on the public discussion of his mental health issues). Also note injunctive relief (where you can make an actor carry out a court's orders) may still be available, even if the prison official has qualified immunity. For more information on qualified immunity and injunctive relief, 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."

66. Powell v. Schriver, 175 F.3d 107, 112 (2d Cir. 1999). The unnecessary disclosure of an incarcerated person's medical information is generally recognized as a constitutional violation of privacy. *See* Doe v. Delie, 257 F.3d 309, 317 (3d Cir. 2001) ("[T]he constitutional right to privacy in one's medical information exists in prison.").

67. *See* Sterling v. Borough of Minersville, 232 F.3d 190, 196 (3d Cir. 2000) (holding that the disclosure—or even threat of disclosure—of an arrestee's sexual orientation by a police officer constituted a violation of the

privacy claim brought by an incarcerated person specifically related to sexual orientation.[68] However, it is important to recognize that the novelty (or "newness") of your claim makes it somewhat unlikely to succeed. While cases like *Lawrence v. Texas* (where the Supreme Court held that sexual activity between people of the same sex was within the zone of privacy protected by the Constitution)[69] have found a valid privacy claim for the disclosure of sexual orientation, most of these cases are decided outside of the prison context. Again, there are many limits to constitutional rights for incarcerated people (including limitations on privacy rights).[70]

3. Potential Obstacles to Suit

The Prison Litigation Reform Act ("PLRA") prohibits requests for emotional distress without related physical injury (that rises above a "de minimis", or minimal, level).[71] 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. Yet, the evidence standard is lower if you are alleging sexual abuse and/or sexual harassment because you do not need to show a physical injury.[72] For more information, review *JLM*, Chapter 14, "The Prison Litigation Reform Act," 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. A tort is an action, usually for money damages that you can bring against a government or individual defendants if they violate your privacy. If the state in which you are incarcerated recognizes this tort, and has *waived* Eleventh Amendment sovereign immunity (which is a legal concept that prevents you from bring a lawsuit against a state), you can sue for disclosure of your sexual orientation or gender identity under state law.[73] Be aware, though, that you may have to file a tort claim or other kind of administrative

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arrestee's constitutional right to privacy because sexual orientation is an "intimate aspect of [one's] personality entitled to privacy protection" and "[i]t 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").

68. *See* Johnson v. Riggs, No. 03-C-219, 2005 U.S. Dist. LEXIS 44428, at *36–39 (E.D. Wis. Sept. 15, 2005) (*unpublished*) (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 incarcerated person's consent but finding for the defendant on grounds of qualified immunity).

69. Lawrence v. Texas, 539 U.S. 558, 578, 123 S. Ct. 2472, 2484, 156 L. Ed. 2d 508, 525–526, 71 U.S.L.W. 4574, 2003 Cal. Daily Op. Service 5559, 2003 Daily Journal DAR 7036, 16 Fla. L. Weekly Fed. S 427 (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).

70. *See* Overton v. Bazzetta, 539 U.S. 126, 135–137, 123 S. Ct. 2162, 2169–2170, 156 L. Ed. 2d 162, 172–173, 71 U.S.L.W. 4445, 6 A.L.R.6th 731, 16 Fla. L. Weekly Fed. S 354 (2003) (finding no substantive due process violation where various prison regulations restricted incarcerated peoples' rights to receive visits from family members, noting limited privacy rights in prison).

71. 42 U.S.C. § 1997e(e).

72. 28 C.F.R. § 115.72 (2018) (explaining that to bring a substantiated allegation, prisons only require "preponderance of the evidence," meaning it is more likely than not that you were sexually abused or harassed). Several courts have also allowed emotional distress claims under state laws for incarcerated peoples' allegations of sexual abuse/harassment. *See, e.g.*, Chao v. Ballista, 806 F. Supp. 2d 358, 381 (D. Mass. 2011) (affirming jury verdict that found intentional infliction of emotional distress when incarcerated person was sexually abused by prison guards); Heckenlaible v. Va. Peninsula Reg'l Jail Auth., 491 F. Supp. 2d 544, 553 (E.D. Va. 2007) ("[T]estimony that she was the victim of a sexual assault is sufficient to avoid summary judgment on her intentional infliction of emotional distress claim. She need not come forward with objectively verifiable evidence of severe distress, if the jury believes her testimony about the effects of an intentional sexual assault on her by [prison guard].").

73. For more information on state tort actions, see Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions." Note such 11th Amendment waivers are almost always triggered by a state statute that requires filing a notice of claim within a short period of time. If you are thinking about filing such a tort claim under state law, you should be aware of the short filing period and look at Chapter 17 as soon as possible.

claim with the state before you can sue state officials for money damages. This is another reason you should consult with an attorney as soon as possible to make sure you do not miss important deadlines that might apply to any potential case.

E. Assault and Harassment

1. Assault[74]

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

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

(a) Assault by Prison Employees

The Eighth Amendment protects you from punishment that is cruel or unusual.[75] Courts have been reluctant to find constitutional violations when prison officials use force to maintain or restore security within the prison.[76] However, if the force has no identifiable purpose and is simply meant to harm the incarcerated person, a prison 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.[77] This standard was explained by the Supreme Court in *Hudson v. McMillian*, and is known as "the *Hudson* standard."[78]

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

(1) The extent of the injury suffered;[79]
(2) The need for the official to have used force under the circumstances;

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74. See Chapter 24 of the *JLM*, "Your Right to Be Free from Assault by Prison Guards and Other Incarcerated People," for information on assault in prisons generally.

75. U.S. Const. amend. VIII.

76. U.S. Const. amend. VIII. Hudson v. McMillian, 503 U.S. 1, 6–7, 112 S. Ct. 995, 998–999, 117 L. Ed. 2d 156, 165–166 (1992) (stating that "application of the deliberate indifference standard is inappropriate when authorities use force to put down a prison disturbance.").

77. Hudson v. McMillian, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992). *See also* Wilkins v. Gaddy, 559 U.S. 34, 36, 130 S. Ct. 1175, 175 L. Ed. 2d 995 (2010) ("When prison officials maliciously and sadistically use force to cause harm ... contemporary standards of decency always are violated ... whether or not significant injury is evident.").

78. The *Hudson* standard applies to excessive force used against convicted incarcerated people. The standard to determine whether excessive force was used against a pretrial detainee is different. For a pretrial detainee to bring a claim against a prison official, he must show a violation of the 14th Amendment Due Process Clause. To do this, he must show that the force was purposeful (not accidental or negligent) and that the deliberate use of force was objectively unreasonable. Kingsley v. Hendrickson, 135 S. Ct. 2466, 2472–73, 192 L. Ed. 2d 416 (2015). As this is a new case, it is unclear whether the *Kingsley* objective standard for looking at excessive force claims by pretrial detainees under the 14th Amendment goes against the *Hudson* prior finding that a subjective standard is required to assess excessive force claims brought by convicted incarcerated people under the 8th Amendment.

79. 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, 261–262 (1986)).

(3) The relationship between the need to use force and the amount of force that was actually used;
(4) The seriousness of the threat from the point of view of a reasonable person; and
(5) Efforts made by prison guards to lessen the severity of a serious use of force.[80]

Under the *Hudson* standard, you do not need to show you suffered serious injury, but you must show that you did suffer *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 Prison Litigation Reform Act (PLRA)[81] prohibits actions for emotional distress without some physical injury.[82]

(b) Assault by Other Prisoners

If you have been attacked or feel at risk of attack by fellow incarcerated people, 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.[83]

To show that a prison official violated the Eighth Amendment by failing to protect you from assault by other incarcerated people, you must prove that: (1) the prison official exhibited "deliberate indifference" to your health or safety by ignoring an excessive risk to you; and (2) the injury you suffered was severe.[84]

Deliberate indifference is a standard that is harder to meet than *negligence*, but not as difficult as the standard of "malicious and sadistic intent."[85] 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 somewhere in between those two standards; generally, it means that the prison officials were aware of a substantial risk to your safety but ignored it.

The leading case for Section 1983 claims involving assault and deliberate indifference is *Farmer v. Brennan*, in which a transgender incarcerated person brought a Section 1983 suit based on prison officials' failure to protect her from other incarcerated people because of her feminine appearance.[86] The Supreme Court defined "deliberate indifference" as the failure of prison officials to act when they know of a "substantial risk of serious harm."[87] The Court went on to say that an "inference from

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

81. The physical injury requirement of The Prison Litigation Reform Act (PLRA) may also be important if you are thinking of bringing a sexual abuse claim, which is explained further in subsection 3(b) of Part E. The 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.

82. The PREA Standards have a have a lower standard of evidence ("preponderance of the evidence" meaning more than a 50% chance) if you are alleging sexual abuse or sexual harassment. 28 C.F.R. § 115.72 (2016). Although PREA and the PREA Standards do not create a private right of action for incarcerated people (meaning you cannot sue on the basis of a PREA Standard violation), showing that a prison official violated a standard can help to show the seriousness of another claim you are bringing, but again, you cannot sue on this violation alone. *See* De'lonta v. Clarke, 7:11-CV-00483, 2013 U.S. Dist. LEXIS 5354, at *7–8 (W.D. Va. Jan. 14, 2013) (collecting cases stating that PREA does not "create a private right of action for inmates to sue prison officials for noncompliance with [PREA]").

83. *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 incarcerated people from harm caused by other incarcerated people).

84. 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 an incarcerated person humane confinement conditions unless the official knows of and disregards an excessive risk to individual'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).

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

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

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

circumstantial evidence" could be used to demonstrate that prison officials had knowledge of a risk.[88] "Circumstantial evidence" is evidence that tends to support that something is true. This means that an incarcerated person 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 incarcerated person) 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 that he denies knowing.[89]

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.[90] The court held that a vulnerable (e.g. gay or transgender) incarcerated person could prove prison officials knew of a substantial risk to his safety by showing the officials knew of the incarcerated person's vulnerable status, and of the general risk to his safety from other incarcerated people, even if they did not know of any specific danger.[91] Although it may be easier to prove you are at risk if you are a vulnerable incarcerated person, 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.[92]

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 you a temporary injunction, you will have to show that you are likely to win 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. You may

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

89. To be clear, under *Farmer*, to survive a motion to dismiss the complaint must allege that defendants knew or must have known of a substantial risk of serious harm. You are more likely to bring a successful claim if you can point to concrete facts that show that the defendants knew or must have know of your risk. Farmer v. Brennan, 511 U.S. 825, 842, 114 S. Ct. 1970, 1981, 128 L. Ed. 2d 811, 828 (1994). The exhaustion requirements under the PLRA can actually be helpful here because if the procedures require multiple levels of review and you have used up all administrative remedies, there will often be signatures by the supervisors that can be used to argue they "knew" of the risk. For more information on the PLRA, see *JLM*, Chapter 14, "The Prison Litigation Reform Act."

90. 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 incarcerated person.

91. 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 incarcerated person 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 incarcerated person presented a substantial risk to a large class of incarcerated people without segregation or other protective measures.

92. *See* Purvis v. Ponte, 929 F.2d 822, 825–826 (1st Cir. 1991) (*per curiam*) (stating the 8th Amendment was not violated when the incarcerated person had a general fear of "gay bashing" and suspected that homophobic cellmates threatened his physical safety, since he did not show a likelihood that violence would occur and officials had tried six different cellmates).

also file a temporary restraining order asking for safe housing, including in a woman's facility if you are a transgender woman.[93]

Because the PLRA also bars incarcerated people from suing for emotional or mental distress without an accompanying physical injury, and punishes incarcerated people 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*, "The Prison Litigation Reform Act," and Chapter 16 of the *JLM*, "Using 42 U.S.C. 1983 to Obtain Relief From Violations of Federal Law."

2. Sexual Abuse

Sexual abuse includes rape and unwanted physical contact of a sexual nature, such as fondling someone else's breasts and/or genitals.[94] Generally, bringing a Section 1983 suit for sexual abuse in prison requires analyzing whether an Eighth Amendment violation occurred.[95] For example, if a prison official sexually abuses you, you must show that the prison official acted maliciously, and that you suffered harm.[96] Under PREA, the "harm" element is broadly interpreted.[97] Further, you can show sexual abuse by proving that the degree of assault violates "contemporary standards of decency."[98] Physical assault is easier to prove because you can show that the prison official acted maliciously and sadistically, you have automatically proven that it violates contemporary standards of decency.[99] With sexual assault cases, the contemporary standards of decency are often evaluated based on what the state law might say about sexual contact between incarcerated people and prison employees, and whether psychological harm was intentionally inflicted, or whether the assault was "offensive to

93. The PREA Standards require prisons to make individualized housing and program placement. 28 C.F.R. § 115.42(c) (2016) (evaluating transgender or intersex incarcerated person assignments by considering "whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems"). The Standards also require prison staff to look at housing and program assignments at least twice a year to review for threats and must consider an incarcerated person's own view of his or her own safety. *See* 28 C.F.R. § 115.42(d)-(e) (2016).

94. 28 C.F.R. § 115.6 (2016).

95. *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))). However, some jurisdictions, including New York State, have a zero-tolerance approach to sexual abuse. That means, if you are incarcerated, you are presumed incapable of consent. N.Y. PENAL L. § 130.05. This means that in New York, you can bring a claim against a prison official if you can prove that you were the victim of sexual abuse. N.Y. PENAL L. § 130.52.

96. *See* Hudson v. McMillian, 503 U.S. 1, 9, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156 (1992); *but see* Freitas v. Ault, 109 F.3d 1335, 1338 (8th Cir. 1997) (showing high bar to meet 8th Amendment violation in a "consensual" situation because "welcome and voluntary sexual encounters, no matter how inappropriate, cannot as a matter of law constitute 'pain' as contemplated by the Eighth Amendment").

97. *See* 28 C.F.R. § 115.6 (2016) ("Sexual abuse [includes] ... any other intentional contact, either directly or through the clothing, of or with the genitalia, anus, groin, breast, inner thigh, or the buttocks, that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire."); Crawford v. Cuomo, 796 F.3d 252, 260 (2d Cir. 2015) (finding sexual abuse of incarcerated people is broadly understood in light of PREA). While under PREA "harm" is broadly interpreted, neither PREA nor the PREA Standards allow an incarcerated person to sue for such a violation under those regulations. *See* Peterson v. Burris, No. 14-CV-13000, 2016 U.S. Dist. LEXIS 853, at *4 (E.D. Mich. Jan. 6, 2016) (compiling a list of courts which have found that "PREA does not provide incarcerated people with a private right of action"). While violations of the PREA Standards are not directly enforceable, showing a PREA "harm" occurred may support another claim that you bring.

98. Hudson v. McMillian, 503 U.S. 1, 9, 112 S. Ct. 995, 1000, 117 L.Ed.2d 156 (1992). *See* Crawford v. Cuomo, 796 F.3d 252, 260 (2d Cir. 2015) (applying spirit of PREA to explain that "contemporary standards of decency" changed so that "sexual abuse of incarcerated people, once overlooked as distasteful ... [now] offends our most basic principles of just punishment").

99. Wilkins v. Gaddy, 559 U.S. 34, 37, 130 S. Ct. 1175, 1178, 175 L. Ed. 2d 995 (2010).

human dignity."[100] Courts have different ways of thinking about the subjective prong (which is a test that focuses on a specific prison guard's state of mind) and analyzing whether a prison guard acted maliciously. Generally, courts assume that if you can show that the sexual contact did not serve a legitimate penological interest, the contact had malicious intent.[101] If another incarcerated person assaulted you, you need to show that prison officials acted with deliberate indifference and that you suffered harm.[102]

In addition, Title 18 of the United States Code, Section 2243, criminalizes sexual intercourse or any type of sexual contact between people with "custodial, supervisory or disciplinary" authority (meaning, prison employees) and incarcerated people in federal correctional facilities.[103] Moreover, Section 2241 of U.S. Code Title 18 makes it a felony for a prison official to use or threaten force to engage in sexual intercourse in a federal prison.[104] Many states also have laws criminalizing sexual contact between prison officials and incarcerated people.[105] See Chapter 24 of the *JLM*, "Your Right To Be Free from Assault by Prison Guards and Other Prisoners," for more information about assaults.

3. Harassment

(a) Sexual Harassment

Sexual harassment is common in prisons, and LGBTQ incarcerated people are often even more vulnerable to such harassment than other incarcerated people.[106] Federal courts have recognized that sexual harassment of incarcerated people by prison staff can be a constitutional "tort" (an action, usually for money damages that you can bring against a government or individual defendants if they violate your constitutional rights), violating incarcerated people' Eighth Amendment right to be free from cruel and unusual punishment.[107] A incarcerated person can state an Eighth Amendment claim

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100. *See, e.g.*, Rodriguez v. McClenning, 399 F. Supp. 2d 228, 237–238 (S.D.N.Y. 2005); Turner v. Huibregtse, 421 F. Supp. 2d 1149, 1151 (D. Wis. 2006); Schwenk v. Hartford, 204 F.3d 1187, 1196–1197 (9th Cir. 2000) ("A sexual assault on an inmate by a guard—regardless of the gender of the guard or of the prisoner—is deeply offensive to human dignity.").

101. *See* Wood v. Beauclair, 692 F.3d 1041, 1050 (9th Cir. 2012) ("Where there is no legitimate penological purpose for a prison official's conduct, courts have 'presum[ed] malicious and sadistic intent.'") (citing Giron v. Corr. Corp. of Am., 191 F.3d 1281, 1290 (10th Cir. 1999)); Boddie v. Schnieder, 105 F.3d 857, 861 (2d Cir. 1997); Graham v. Sheriff of Logan County, 741 F.3d 1118, 1123 (10th Cir. 2013) ("Thus, when a prisoner alleges rape by a prison guard, the prisoner need prove only that the guard forced sex in order to show an Eighth Amendment violation.").

102. *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 incarcerated person 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 incarcerated person and fails to take reasonable steps to protect against such abuse may be found to have acted with deliberate indifference).

103. 18 U.S.C. § 2243. Also, under PREA, whether or not you give your consent, any kind of sexual contact between an incarcerated person and a prison official qualifies as sexual abuse. 28 C.F.R. § 115.6 (2016). Any sexual contact between incarcerated people, without consent, is sexual abuse. 28 C.F.R. § 115.6 (2016).

104. 18 U.S.C. § 2241.

105. While PREA and the standards make some distinctions about "consent" within prison, many states have statutes that criminalize sex between incarcerated people and guards regardless of consent, assuming that consent is not possible given the control dynamics of prisons.

106. National Prison Rape Elimination Commission Report (June 2009), *available at* https://www.ncjrs.gov/pdffiles1/226680.pdf (last visited Mar. 19, 2017) (compiling key findings on the prevalence of rape and sexual harassment in prisons, findings which helped to create the PREA Standards to counteract some of these issues in a more standardized way).

107. *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 incarcerated people, including forced stripteases); Schwenk v. Hartford, 204 F.3d 1187, 1197 (9th Cir. 2000) (holding that a pre-operative male-to-female transgender incarcerated person's 8th Amendment rights were violated by a guard's attempted rape, which constituted sexual assault offensive to human dignity); Boddie

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 incarcerated person.[108] As explained below, incarcerated people generally do not succeed in claims against prison staff for sexual harassment involving words alone. However, incarcerated people have succeeded in claims against prison staff for sexual harassment that *did* involve repeated physical touching or assault, or that threatened the incarcerated person's safety.[109]

The 1996 passage of the PLRA made it much harder for an incarcerated person to succeed in a sexual harassment claim against prison staff. Again, while the PLRA does not explicitly state that incarcerated people cannot sue for sexual harassment, it does say they cannot receive money damages "for mental or emotional injury ... without a prior showing of physical injury."[110] Many courts have interpreted this to mean that you cannot receive money damages for sexual harassment unless the harasser physically hurt you.[111] But other sorts of relief, like "injunctions" (where the court orders someone to stop or start some action other than the payment of money damages), may be available to

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v. Schnieder, 105 F.3d 857, 861–862 (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 incarcerated person 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"). *But see* 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).

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

109. Wood v. Beauclair, 692 F.3d 1041, 1049 (9th Cir. 2012) (holding that if an incarcerated person brings a claim of sexual harassment against a prison official, the individual enjoys the presumption that the sexual contact was nonconsensual); Calhoun v. DeTella, 319 F.3d 936, 939–940 (7th Cir. 2003) (finding that the strip search was conducted "in a manner designed to demean and humiliate" the incarcerated person and was therefore a sufficient 8th Amendment claim); Schwenk v. Hartford, 204 F.3d 1187, 1197 (9th Cir. 2000) (holding that a pre-operative male-to-female transgender incarcerated person's 8th Amendment rights were violated by a guard's attempted rape, which constituted sexual assault offensive to human dignity); Watson v. Jones, 980 F.2d 1165, 1165–1166 (8th Cir. 1992) (finding a valid 8th amendment claim where correctional officer sexually harassed two incarcerated people on an almost daily basis for two months by conducting deliberate examination of their genitalia and anuses); Berry v. Oswalt, 143 F.3d 1127, 1131 (8th Cir. 1998) (upholding a jury's finding that the incarcerated person's 8th Amendment rights had been violated when a guard "had attempted to perform non-routine pat-downs on her, had propositioned her for sex, had intruded upon her while she was not fully dressed, and had subjected her to sexual comments"); 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 incarcerated person'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 incarcerated person and spread rumors that he was gay, thereby endangering him).

110. 42 U.S.C. § 1997e(e).

111. 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 incarcerated person's penis); Ashann-Ra v. Virginia, 112 F. Supp. 2d 563, 565–566 (W.D. Va. 2000) (finding PLRA's physical injury requirement not met when correctional officers viewed incarcerated person naked and encouraged him to masturbate). *But see* Kemner v. Hemphill, 199 F. Supp. 2d 1264, 1270 (N.D. Fla. 2002) (finding that incarcerated person who was forced to perform oral sex on fellow incarcerated person suffered physical injury sufficient to satisfy PLRA's physical injury requirement).

you.[112] For this reason it is important to learn about the PLRA, particularly its physical injury requirement, before you file a suit.[113]

Nevertheless, for administrative investigations (investigations done by prison officials) evidence of physical injury is not required to show sexual harassment.[114]

(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 that prohibits verbal harassment lawsuits and (2) the PLRA's physical injury requirement. Courts often find that words alone, no matter how abusive, do not violate the Eighth Amendment.[115] So, claims by incarcerated people against prison staff for harassment consisting only of words generally do not succeed.[116]

Additionally, even where incarcerated people have alleged valid Eighth Amendment violations, courts have often determined that the PLRA blocks the suits if there is not a physical injury.[117] For instance, harassment by prison staff has been found to violate the Eighth Amendment when it includes threats of attack with a lethal weapon.[118] But where there is no physical injury, some courts have

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112. Multiple circuits have found that the PLRA does not bar an incarcerated person from injunctive relief. *See* Thompson v. Carter, 284 F.3d 411, 418 (2d Cir. 2002); Herman v. Holiday, 238 F.3d 660, 665 (5th Cir. 2001); Harris v. Garner, 190 F.3d 1279, 1288 (11th Cir. 1999); Perkins v. Kansas Dept. of Corr., 165 F.3d 803, 808 (10th Cir. 1999); Davis v. District of Columbia, 158 F.3d 1342, 1346 (D.C. Cir. 1998); Zehner v. Trigg, 133 F.3d 459, 462–463 (7th Cir. 1997).

113. *See JLM*, Chapter 14.

114. *See* 28 C.F.R. §§ 115.71, 115.72 (2020) (governing federal investigations). State administrative investigations may vary and some may require evidence of a physical injury.

115. *See, e.g.*, Adkins v. incarcerated person Rodriguez, 59 F.3d 1034, 1037 (10th Cir. 1995) (holding that a jail deputy who had made comments to a female incarcerated person 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, 328–329 (D. Me. 1995) (holding that a correctional officer allegedly tapping or spanking an incarcerated person'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 incarcerated person has a particular vulnerability to assault).

116. *See, e.g.*, Austin v. Terhune, 367 F.3d 1167, 1171–1172 (9th Cir. 2004) (holding that a guard who exposed genitalia to an incarcerated person from a glass-walled control booth for a 30–40 second "isolated incident" was not serious enough to constitute an 8th Amendment violation, and noting generally that "[a]lthough incarcerated people have a right to be free from sexual abuse, whether at the hands of fellow inmates or prison guards, the 8th 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, were insufficient to state an 8th Amendment cause of action); Blueford v. Prunty, 108 F.3d 251, 254–255 (9th Cir. 1997) (holding that prison guard engaging in "vulgar same-sex trash talk" with incarcerated people incarcerated people was entitled to qualified immunity because an incarcerated person's right to be free from such behavior was not clearly established at the time the behavior took place); *compare* Beal v. Foster, 803 F.3d 356, 359 (7th Cir. 2015) (finding verbal harassment actionable because, when prison guard called plaintiff "punk, faggot, sissy and queer" in front of other inmates, the likelihood of subsequent sexual assault and psychological damage increased). *But see* Chapter 24 of the *JLM* which cites cases holding that incarcerated people may get money damages for psychological injury inflicted by prison staff.

117. *See JLM*, Chapter 14.

118. *See, e.g.*, Northington v. Jackson, 973 F.2d 1518, 1524–1525 (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, 397–398 (D.N.J. 1988).

determined that these cases are blocked by the PLRA's physical injury requirement.[119] 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.[120]

F. Housing and Protective Custody

1. Housing Issues for Transgender Incarcerated People[121]

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 gender-nonconforming incarcerated people, as the overwhelming majority of prisons recognize only two genders and segregate male from female incarcerated people.

Transgender incarcerated people are generally housed either according to the gender they were assigned at birth or by their genitalia.[122] However, the PREA Standards require housing decisions to be made on an individual basis, taking into consideration the health and safety of the inmate.[123] Furthermore, prison staff cannot make housing decisions based only on an incarcerated person's LGBTQ status.[124]

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119. *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 incarcerated person's penis); Ashann-Ra v. Virginia, 112 F. Supp. 2d 563, 565–566 (W.D. Va. 2000) (finding PLRA's physical injury requirement was not met when female corrections officers viewed male incarcerated person naked and encouraged him to masturbate); Boxer X v. Harris, 437 F.3d 1107, 1111 (11th Cir. 2006) (finding no 8th Amendment violation when a female prison guard made a male incarcerated person masturbate in front of her under a threat of retaliation, because the case did not present more than a *de minimus* (minimal) injury); Moton v. Walker, 545 F. App'x 856, 860 (11th Cir. 2013) (finding no 8th Amendment violation when officer, with sadistic smile, conducted a visual body cavity search because the incarcerated person only suffered a *de minimus* injury).

120. *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 incarcerated person and held electric stun gun to his head).

121. All known transgender incarcerated people 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 incarcerated people do not face challenges while incarcerated. If you are an FTM incarcerated person 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, "LGBTQ Resources," for information on these organizations.

122. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 829–830, 114 S. Ct. 1970, 1975, 128 L. Ed. 2d 811, 820 (1994) (noting that a pre-operative male-to-female transgender incarcerated person 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, 669–670 (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 incarcerated person's female cellmate, who alleged it was a violation of her right to privacy); Farmer v. Haas, 990 F.2d 319, 320 (7th Cir. 1993) ("the practice of the federal prison authorities . . . is to incarcerate people who have completed sexual reassignment with incarcerated people of the transsexual's new gender.").

123. 28 C.F.R. § 115.42(c) (2020).

124. *See* 28 C.F.R. § 115.42(g) (2020) ("The agency shall not place lesbian, gay, bisexual, transgender, or intersex inmates in dedicated facilities, units, or wings solely on the basis of such identification or status, unless such placement is in a dedicated facility, unit, or wing established in connection with a consent decree, legal settlement, or legal judgment for the purpose of protecting such inmates."). Should you experience a violation of these policies, the agency is required to allow you to report the incident to the agency involved and to a public or private third-party agency. *See* 28 C.F.R. § 115.51 (2020).

To date, no one has successfully challenged the gendered housing policies of prisons that places transgender incarcerated people in housing for genders with which they do not identify.[125] The Supreme Court has explicitly held that incarcerated people do not have a constitutional right to choose their place of confinement.[126] Moreover, courts generally respect prison officials' choices about how to manage their institutions, and classification within prisons has not been found to violate a liberty interest.[127] Thus, it is unlikely that you will be able to successfully challenge your housing classification in court.

2. Segregation and Protective Custody

State prisons may not segregate LGBTQ incarcerated people from the general prison population unless either an incarcerated people asks for this or a court order requires such separation.[128] If being housed with the general population is difficult or harmful for you, you can request to be placed in segregation or protective custody. While LGBTQ incarcerated people deserve protection, the conditions of protective custody often are horrible.[129]

Segregation means different things in different prisons. Some prisons have so many LGBTQ incarcerated people that they have a wing for people identifying themselves as LGBTQ; other prisons can offer only single rooms, or certain cells within a larger segregation unit, for the occasional LGBTQ incarcerated person.[130]

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125. *See, e.g.*, Shango v. Jurich, 681 F.2d 1091, 1104 (7th Cir. 1982) (denying transgender incarcerated person's equal protection claim for not being classified as a woman and housed with female incarcerated people on ground that a prison administrative decision may give rise to an equal protection claim only if the plaintiff can "demonstrate intentional or purposeful discrimination to show an equal protection violation."); Lucrecia v. Samples, No. C-93-3651-VRW, 1995 U.S. Dist. LEXIS 15607, at *14–15 (N.D. Cal. Oct. 16, 1995) (*unpublished*) (holding a transgender incarcerated person'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*, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules," for more information on challenging administrative decisions.

126. 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 incarcerated people who sought injunctive and declaratory relief for being transferred to prisons with less desirable conditions following a fire at their previous facility).

127. *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 incarcerated people incarcerated people as they in their broad discretion determine appropriate."); Young v. Wainwright, 449 F.2d 338, 339 (5th Cir. 1971) ("Classification of inmates is a matter of prison administration and management with which federal courts are reluctant to interfere except in extreme circumstances"). For example, incarcerated people who have challenged their classification on other bases, such as security or gang classifications, have also been unsuccessful. See Chapter 31 of the *JLM*, "Security Classification and Gang Validation," for a detailed discussion of legal challenges to security classification decisions and the definition of liberty interests in the prison context.

128. Before the PREA Standards, the separation of LGBTQ-identified incarcerated people was used to punish LGBTQ people or was sometimes based on the false assumption that LGBTQ incarcerated people are sexual predators. 28 C.F.R. § 115.42(g) (2020).

129. Before the PREA Standards, the separation of LGBTQ-identified incarcerated people was used to punish LGBTQ people or was sometimes based on the false assumption that LGBTQ incarcerated people are sexual predators. 28 C.F.R. § 115.42(g) (2020).

130. The New York City prison system, for example, provides separate housing for gay inmates. 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 incarcerated people 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

(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.[131] Be aware, though, that the conditions in protective custody could be the same as or very similar to solitary confinement (also called the "hole," "SHU," or "AdSeg"). However, according to the PREA Standards, incarcerated people in protective custody should receive access to programs, privileges, education and work opportunities to the greatest extent possible.[132]

If your protective custody 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 E 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.[133] 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 are of winning in court.

Few Section 1983 suits about the failure to house a incarcerated person in protective custody have been brought by LGBTQ incarcerated people, but several courts have recognized the vulnerability of incarcerated people who do not fit within traditional gender norms.[134] Before Farmer v. Brennan, the few claims that were filed had very limited success.[135] The *Farmer* Court's extensive discussion of the

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(8th Cir. 1992) (describing a "special section of the prison reserved for those incarcerated people 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," inmates who have histories of institutional violence, and those who are being punished for violating prison rules); Inmates of Milwaukee Cnty. Jail v. Petersen, 353 F. Supp. 1157, 1160–1161 (E.D. Wis. 1973) (describing cell block housing for, among others, gay men and narcotic addicts undergoing treatment or detoxification).

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

132. 28 C.F.R. § 115.43(b) (2020).

133. *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*, "Using 42 U.S.C. 1983 and 28 U.S.C. 1331 to Obtain Relief From Violations of Federal Law," for more information about Section 1983 and the deliberate indifference standard.

134. *But see* Farmer v. Brennan, 511 U.S. 825, 850, 114 S. Ct. 1970, 1985, 128 L. Ed. 2d 811, 833 (1994) (allowing an 8th Amendment claim by a transgender incarcerated person to go forward where she was placed in the general population and subsequently sexually assaulted, even though the incarcerated person did not express safety concerns beforehand). *See, e.g.*, Taylor v. Mich. Dept. of Corr., 69 F.3d 76, 82–84 (6th Cir. 1995) (noting that "small, youthful incarcerated people 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, 526–527 (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*, "Your Right To Be Free from Assault by Prison Guards and Other Incarcerated Persons," and Part E(1) of this Chapter.

135. *See, e.g.*, Purvis v. Ponte, 929 F.2d 822, 825–827 (1st Cir. 1991) (holding that the 8th Amendment rights of a incarcerated person were not violated even after he stated a general fear of "gay bashing" and a suspicion that homophobic cellmates threatened his physical safety, since incarcerated person 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 incarcerated person from a cellmate who ultimately stabbed him was not deliberately indifferent). *But see* Young v. Quinlan, 960 F.2d 351, 362–363 (3d Cir. 1992) (holding that the rights of an incarcerated person described as small, young, and

meaning of "deliberate indifference," however, may make it easier to win.[136] Also211, the fact that courts have acknowledged the heightened vulnerability of incarcerated people known to be LGBTQ, or who might be thought to be LGBTQ, by giving lighter sentences strengthens the deliberate indifference argument of LGBTQ incarcerated people.[137] These cases may make it more difficult for a prison official to prove he did not have the required knowledge that LGBTQ incarcerated people 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*, "Using 42 U.S.C. 1983 to Obtain Relief From Violations of Federal Law."

(b) Getting Out of Protective Custody

Although segregation from the general prison population may afford LGBTQ incarcerated people protection from harassment and assault, the conditions of segregated cells are often worse than those in general population.[138] If segregation makes you ineligible for certain work detail or denies you access to libraries and other facilities, visitation, or proper medical treatment, prison officials must document those limitations, how long the limitation will last and the reason for such limitation.[139]

If you have been placed in segregation and wish to be housed among the general population, you may request a transfer through administrative channels.[140] The PREA Standards state that you cannot be segregated for more than 30 days, and prison officials may involuntarily segregate only until an alternative arrangement, away from your abuser, can be found.[141] If you are 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 (and is also likely to take a lot longer, and trigger a $350 filing fee).

Courts have held involuntary segregation—even for non-punitive (non-punishment) reasons—does not infringe on a liberty interest except in narrow circumstances.[142] For example, in a Seventh Circuit

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effeminate may have been violated when he was subjected to sexual assaults by other incarcerated people after officials in the federal prison where he was housed ignored his requests for protection), *superseded by statute on other grounds*.

136. *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 incarcerated person 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).

137. 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* 18 U.S.C. app. §5H1.4 *see* United States v. Gonzalez, 945 F.2d 525, 525–526 (2d Cir. 1991) (finding downward departure of gay man'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 incarcerated people); *see also* United States v. Wilke, 156 F.3d 749, 754–755 (7th Cir. 1998) (departing from sentencing guidelines because of incarcerated person's sexual orientation and demeanor). Note that the Federal Sentencing Commission has discouraged, but not prohibited, the use of physical appearance alone in determining an incarcerated person's potential for victimization and thus reduction in sentence. *See* Koon v. United States, 518 U.S. 81, 107, 116 S. Ct. 2035, 2050–2051, 135 L. Ed. 2d 392, 418 (1996) (recognizing that use of physical appearance was discouraged by the Commission, but Commission does not prohibit doing so in all cases).

138. Davis v. Ayala, 135 S. Ct. 2187. 2208–2210; 192 L. Ed. 2d 323, 344–347 (2015) (Kennedy, J., concurring) (emphasizing the terrible conditions of solitary confinement).

139. 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."28 C.F.R. § 115.43(b)(1)-(3) (2020).

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

141. 28 C.F.R. § 115.43© (2020).

142. *See, e.g.*, Martin v. Scott, 156 F.3d 578, 580 (5th Cir. 1998) (holding that, "'absent extraordinary

case, the court noted that, while it sympathized with the incarcerated person's desire not to be segregated, it had to take into account that there might not be possible alternatives to keep the incarcerated person's safe outside of the prolonged segregation.[143] Nevertheless, given the media attention around the Supreme Court case Davis v. Ayala, solitary confinement conditions may eventually be re-examined.[144]

(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 unclean, or you are not being provided with food and water often enough); 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).[145]

G. Visitation Rights: Special Issues for LGBTQ Incarcerated People

Most state prisons and all federal prisons have policies that, subject to restrictions, allow incarcerated people to visit with their family members. Unfortunately, because many of these policies define "family" narrowly, LGBTQ incarcerated people whose partners wish to visit them in prison may face special difficulties. Incarcerated people do not have an absolute right to visitation.[146] While prisons may place limitations on visitation, or exclude visitation altogether, those limitations are only allowed if the prison has a legitimate goal rationally related to the functioning of the prison. Courts have accepted justifications such as the rehabilitation of incarcerated people and most importantly, prison security.[147] A prison official cannot simply assert that limitations on your visitation privileges serve

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circumstances, administrative segregation as such, being an incident to the ordinary life of a incarcerated person, 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, 612–613 (5th Cir. 1996)); Sandin v. Conner, 515 U.S. 472, 482, 115 S. Ct. 2293, 2299, 132 L. Ed. 2d 418, 429 (1995) (finding that federal courts should defer to prison officials because prisons are "trying to manage a volatile environment."); *see also* Chapter 18 of the *JLM*, "Your Rights at Prison Disciplinary Hearings."

143. 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.").

144. Davis v. Ayala, 135 S. Ct. 2187, 192 L. Ed. 2d 323 (2015).

145. *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 C(1)(a) of this Chapter. *See, e.g.*, Williams v. Lane, 851 F.2d 867, 881–882 (7th Cir. 1988) (holding state provisions for programming and living conditions for protective custody incarcerated people violated the Equal Protection Clause because they were unequal in comparison with general population incarcerated people, and not justified by security concerns). *But see* Griffin v. Coughlin, 743 F. Supp. 1006, 1009–1016 (N.D.N.Y. 1990) (holding that differences in treatment of protective custody incarcerated people 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 incarcerated people). 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 B(1) of this Chapter.

146. *See* Overton v. Bazzetta, 539 U.S. 126, 133, 123 S. Ct. 2162, 2186, 156 L. Ed. 2d 162, 170 (2003) (upholding prison regulations which prevented family member visits with incarcerated people because regulations had rational relation to a "legitimate penological interest"); Block v. Rutherford, 468 U.S. 576, 585–589, 104 S. Ct. 3227, 3232–3234, 82 L. Ed. 2d 438, 446–449 (1984) (finding that the denial of visitation is appropriate when the denial furthered a legitimate government purposes and was not for the purpose of punishment). See Part B(1) of this Chapter for an explanation of the way *Turner* has courts evaluate whether a constitutional right should be upheld in prison.

147. Prison administrators decide the "legitimate goals of a corrections system and [so] determin[e] the most appropriate means to accomplish them." Overton v. Bazzetta, 539 U.S. 126, 132, 123 S. Ct. 2162, 2167, 156

security or rehabilitation interests; the officials must instead show that the visitation policies actually help accomplish the goals they claim and that incarcerated people are given adequate procedural safeguards.[148] This means that if a prison forbids you to visit with your partner because the relationship somehow poses a security risk to the institution, you can challenge the policy by arguing that denying your visitation does not actually help prison security.[149] Although the visitation policies vary from state to state, and state policies are different from the policies in federal prison, the justifications for those policies are similar everywhere. The rest of this Part will help explain why prisons have denied LGBTQ incarcerated people 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.[150] 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 your immediate family; (2) other relatives; and (3) friends and associates.

Members of your immediate family include your parents, your spouse, and your children. In order for the prison to exclude a member of your immediate family from visitation, prison officials would have to show "strong circumstances" which justify excluding them.[151] 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.[152] To exclude friends and associates, a prison official only needs to show that they "could reasonably create a threat to the security and good order of the institution."[153]

Until recently, federal law prohibited treating a same-sex partner as either a member of the immediate family or as another relative. However, the Supreme Court's recent decisions in *Windsor* and *Obergefell* make clear that government policies that refuse to recognize the marriages of same-sex couples are unconstitutional.[154]

If you are not married, the federal regulations do not explicitly forbid prisons from counting same-sex partners as immediate family members. However, same-sex partners do not appear on the list of who counts as immediate family members, meaning the prison officials can refuse to place them on the immediate family list.[155]

Classification in the third category (friends and associates) means that prison officials only need to reasonably fear that your visitor will harm security or your rehabilitation in order to exclude them.

L. Ed. 2d 162 (2003) (finding that prison regulations which excluded family members, required children to be accompanied by a family member, and that generally banned visits for incarcerated people with two substance-abuse violations furthered the legitimate prison purposes of deterring alcohol and drug use, maintaining security, and protecting child visitors, and so were valid regulations).

148. *See* Kentucky Dept. of Corr. v. Thompson, 490 U.S. 454, 463, 109 S. Ct. 1904, 1910, 104 L. Ed. 2d 506, 516 (1989) (finding that prison regulations, including prison visitation regulations, must include "specific directives to the decision-maker that if the regulations' [conditions] are present, a particular outcome must follow, in order to create a liberty interest" for the incarcerated person whose right is being affected). For example, *Thompson* shows that a prison visitation regulation must be written in such a way that make clear the conditions that would trigger the denial of a visit, so that an incarcerated person could reasonably expect to enforce a regulation if a condition was not met. Kentucky Dept. of Corr. v. Thompson, 490 U.S. 454, 465, 109 S. Ct. 1904, 1911, 104 L. Ed. 2d 506, 518 (1989).

149. If an incarcerated person wants to claim that a visitation regulation is improper because it does not further a legitimate prison purpose, the incarcerated person carries the burden of disproving that a regulation is a valid one. *See* Overton v. Bazzetta, 539 U.S. 126, 132, 123 S. Ct. 2162, 2168, 156 L. Ed. 2d 162, 170 (2003).

150. 28 C.F.R. § 540.44 (2020); Fed. Bureau of Prisons, Program Statement 540.44, Visiting Regulations (Dec. 10, 2015) (stating that if an incarcerated person wants to receive regular visitors, he must submit a list of proposed visitors to the staff).

151. 28 C.F.R. § 540.44(a) (2020).

152. 28 C.F.R. § 540.44(b) (2020).

153. 28 C.F.R. § 540.44(c) (2020).

154. United States v. Windsor, 570 U.S. 744, 808, 133 S. Ct. 2675, 2715, 186 L. Ed. 2d 808, 851 (2013); *see* Obergefell v. Hodges, 135 S. Ct. 2584, 2608, 192 L. Ed. 2d. 609, 635 (2015).

155. 28 C.F.R. § 540.44 (202016).

In the past, prison officials have generally given two reasons for strict visitation policies for LGBTQ incarcerated people. The first reason was rehabilitation. Since sex between men or women was illegal in several states and could be outlawed by the federal government, it was possible for prison officials to claim that allowing incarcerated people visitation with same-sex partners harmed their rehabilitation. After Lawrence v. Texas, this reason is inadequate.[156] *Lawrence* said that a state cannot outlaw sex between two men or two women. So, it is difficult to imagine how a state could have a rehabilitative interest in preventing constitutionally-protected sexual activity in today's society. The more recent decisions in *Windsor* and *Obergefell* also make clear that same-sex couples have a right to marry and to have their marriages recognized.

The other more common justification given for restricting a LGBTQ incarcerated people' visitation was security. Prison officials have sometimes claimed that allowing a same-sex partner to visit or allowing the couple to show affection during visitation would open the gay incarcerated person up to possible violence and retribution.[157] While this justification has worked in other contexts (with the right to receive LGBTQ literature—see Part H of this Chapter), courts have often been harsh on prison officials who try to restrict visitation policies. In Doe v. Sparks, prison officials had a policy that allowed opposite-sex partners to visit incarcerated people, but did not allow same-sex partners to visit.[158] The prison officials claimed that the policy furthered the purpose of promoting the internal security of the prison. Although this case challenged a state prison policy, the case was decided under federal constitutional equal protection standards found in the Fourteenth Amendment. 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 incarcerated people and the visitors announced in any way. The court said that there was no way for other incarcerated people to know of the same-sex relationship between the incarcerated person and the visitor, and therefore any threat to the security of the prison was "so remote as to be arbitrary."[159] The court found that the prison policy was not reasonably related to security concerns, and therefore it violated the federal equal protection standards in the Fourteenth Amendment.

A similar outcome was reached in a case where prison officials denied a gay incarcerated person the ability to kiss and hug his visiting partner. In Whitmire v. Arizona, prison policy allowed incarcerated people to kiss and hug family members and opposite-sex partners briefly at the beginning and end of visits.[160] The prison claimed that allowing a male incarcerated person to hug and kiss his male partner would cause other incarcerated people to label him as gay and therefore open him up to attack from other incarcerated people. In *Whitmire*, the incarcerated person was openly gay—he told other incarcerated people about his sexuality and the court also felt that it was implied since he had no problem showing affection for his partner. The court held the prison policy lacked "a common-sense connection" to security since the incarcerated person was already labeled as gay—or was at least willing to be so labeled.[161] The court thus determined that the prison was potentially in violation of the incarcerated person's First, Third, Fifth, and Fourteenth Amendment rights.

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

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

157. *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 an incarcerated person is openly gay).

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

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

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

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

2. New York Visitation Policies

New York State's visitation policies are very similar to those of the federal government, with some notable differences. New York prison regulations hold that the staff of a prison may deny, limit, or suspend the visitation privileges of any incarcerated person if there is reason to believe that "such action is necessary to maintain the safety, security, and good order of the facility."[162]

Also, like federal prisons, New York prisons require that the inmate agree to the visit of a first-time visitor.[163] These visitors will be admitted unless prison officials can show some legitimate security reason for excluding them.[164] 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. So, only stating that your same-sex partner would cause a security concern is likely not enough.[165]

New York prisons generally allow physical contact between incarcerated people and visitors.[166] This contact can involve a small amount of kissing, hugging, and hand-holding (as long as hands remain in plain view of the staff). 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 incarcerated people or visitors.[167] If prison officials try to prevent you from engaging in the same physical contact with your partner that heterosexual incarcerated people are allowed to engage in, you may have a valid claim under both federal and state law.[168]

(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 incarcerated people.[169] The program applies to close relatives and spouses who are in legal marriages.[170] Since New York allows same-sex couples to marry, you should qualify to participate in this program if you are married to a same-sex partner.

(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 incarcerated people the same visitation rights as those granted to married couples.[171] This not only means that your domestic partner can visit you under the same rules as married couples but also that domestic partners may visit other family members (which includes your parents, spouse, and children) in the same way that heterosexual spouses may.

Very little case law involving the Domestic Partnership Law exists. This may be because that prisons are treating domestic partners in the same manner as heterosexual spouses. At the very least, the law has been upheld under challenges from various opposition groups.[172]

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162. N.Y. COMP. CODES R. & REGS. tit. 7, § 201.4(a) (2016).
163. N.Y. COMP. CODES R. & REGS. tit. 7, § 201.2(a)(1) (2016).
164. N.Y. COMP. CODES R. & REGS. tit. 7, § 201.4(a) (2016).
165. *See* Doe v. Sparks, 733 F. Supp. 227, 234 (W.D. Pa. 1990) (striking down prison policy against visits by incarcerated people' same-sex partners on grounds that the connection between the policy and the supposed security concerns the policy is supposed to address is too remote).
166. N.Y. COMP. CODES R. & REGS. tit. 7, § 201.3(i) (2016).
167. N.Y. COMP. CODES R. & REGS. tit. 7, § 201.3(i) (2016).
168. N.Y. COMP. CODES R. & REGS. tit. 7, § 201.3(i) (2016). *See generally* Whitmire v. Arizona, 298 F.3d 1134, 1135–1136 (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 an incarcerated person is openly gay and similar displays of affection are permitted for heterosexual couples).
169. N.Y. COMP. CODES R. & REGS. tit. 7, § 220.1 (2016).
170. N.Y. COMP. CODES R. & REGS. tit. 7, § 220.3(a) (2016).
171. Admin. Code of the City of N.Y. 3-240 (2015).
172. *See*, *e.g.*, Slattery v. City of New York, 179 Misc. 2d 740, 743, 686 N.Y.S.2d 683, 686 (Sup. Ct. N.Y. County 1999) (holding that New York City had the statutory power to enact the Domestic Partnership Law).

H. Right to Receive LGBTQ Literature[173]

Under Thornburgh v. Abbott, prisons may restrict your right to receive publications that may cause a threat to the daily operation of the prison.[174] 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 created special problems for LGBTQ incarcerated people.

1. Sexually Explicit Material with LGBTQ Content

(a) Federal Prisons

In *Thornburgh*, the Supreme Court found constitutional a federal prison regulation that gave prison officials the power to withhold sexually explicit publications—among other types of mail—from incarcerated people, if the officials reasonably believed that those publications posed a threat to prison order or security.[175] The *Thornburgh* Court also upheld as constitutional a 1985 Bureau of Prisons program statement that specifically listed "homosexual (of the same sex as the institution population) material" as "sexually explicit," and a warden could decide not to allow incarcerated people to receive. The Court justified its decision on two grounds: (1) the material would, once in the prison, circulate and lead to "disruptive conduct"; and (2) if incarcerated people observed a fellow incarcerated person reading such material, they might draw inferences about the incarcerated person's sexual orientation and "cause disorder by acting accordingly."[176] After *Thornburgh*, then, all sexually explicit material can potentially be withheld, but it may be easier and more defensible for a warden to censor sexually explicit material depicting two men or two women.

Note that the holding in *Thornburgh* does not necessarily mean that you may never receive sexually explicit publications while in prison. The *Thornburgh* Court only held that a warden may choose to restrict your access to such material. The decisions of different wardens will result in different regulations in different prisons.

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173. 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-LGBTQ publications, your right to have access to news media, and your access to visitation while in prison, see *JLM*, Chapter 19, "Your Right to Communicate with the Outside World."

174. Thornburgh v. Abbott, 490 U.S. 401, 413 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 473 (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 cases decided under the currently prevailing *Thornburgh* test.

175. Thornburgh v. Abbott, 490 U.S. 401, 413, 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 473 (1989). Also note that since *Thornburg*, the U.S. Supreme Court held that a state prison may deny newspapers, magazines, and photos to incarcerated people who are "the worst of the worst" in terms of security threat and behavior. Beard v. Banks, 548 U.S. 521, 530, 126 S. Ct. 2572, 2579, 165 L. Ed. 2d 697 (2006) (finding prison regulation banning all newspapers, magazines, and photographs allowable because the regulation was reasonably related to the legitimate prison goals to motivate better behavior, to make it easier for guards to detect contraband, and to the lessen the amount of property to be used as potential weapons). Again, *Beard* demonstrates the wide level of discretion provided to prisons as they regulate incarcerated person's and the materials received in prison.

176. Thornburgh v. Abbott, 490 U.S. 401, 412–413, 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 472–473 (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, 357–358 (9th Cir. 1999) (upholding prison regulation that banned sexually explicit materials depicting sexual penetration because such material could lead to sexual harassment of female guards); Mauro v. Arpaio, 188 F.3d 1054, 1057 (9th Cir. 1999) (upholding regulations prohibiting incarcerated people 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 because prison regulations prohibiting certain sexually explicit materials satisfied the reasonable relation standard); Willson v. Buss, 370 F. Supp. 2d 782, 788–791 (N.D. Ind. 2005) (upholding regulations prohibiting incarcerated person from possessing "general interest magazines directed towards issues relevant to homosexual individuals" on grounds that regulation was "reasonably related to legitimate penological interests").

Further, though federal regulations allow the censorship of sexually explicit material and several courts have, since *Thornburgh*, upheld restrictions on such material, if wardens in your prison are exercising their discretion selectively (for example, allowing incarcerated people to receive explicit material about opposite, but not same-sex conduct), you may be able to bring a claim under Section 1983 to challenge this conduct on equal protection grounds. [177] If a warden in a federal prison is censoring only same-sex materials, some of the cases from 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 incarcerated people dislike your sexual orientation.[178] 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 incarcerated people who observe you reading the magazines would make life more difficult for you.[179]

Finally, since the *Thornburgh* decision, the Bureau of Prison Program Statement has been updated.[180] It does not single out same-sex materials in the list of types of sexually explicit material the warden may reject. However, a court could still allow censorship of sexually explicit material if the prison could demonstrate legitimate prison-related justifications for restricting the material.

(b) State Prisons

Regulations governing many state prisons also contain provisions that permit censorship of sexually explicit materials depicting gay men or lesbians. State courts have found state prisons' regulations prohibiting this literature to be constitutional.[181] For example, a court found that the New Hampshire Department of Corrections Policy and Procedure Directive banning "[o]bscene material, including publications containing explicit descriptions, advertisements, or pictorial representations of homosexual acts, bestiality, bondage, sadomasochism, or sex involving children" was constitutional.[182] The New Hampshire Department of Corrections Policy and Procedure Directive has since updated its policy, removing the prohibition against "representations of homosexual acts."[183]

2. Non-Sexually Explicit LGBTQ Publications

(a) Federal Prisons

The 2011 Program Statement on incoming publications, elaborating on the Federal Bureau of Prisons regulations, provides that:

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177. *See, e.g.*, Frost v. Symington, 197 F.3d 348, 358 (9th Cir. 1999) (holding that a prison's restrictions on a incarcerated person's possession of images depicting heterosexual penetration did not violate the incarcerated person's 1st Amendment rights); Mauro v. Arpaio, 188 F.3d 1054, 1060 (9th Cir. 1999) (upholding regulation prohibiting incarcerated people 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 incarcerated people was reasonable means of advancing penological interests); Snelling v. Riveland, 983 F. Supp. 930, 936 (E.D. Wash. 1997) (rejecting incarcerated person'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).

178. *See* Watkins v. U.S. Army, 875 F.2d 699, 711 (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 prevent an individual from reenlisting on the basis of his sexual orientation.).

179. *See* Whitmire v. Arizona, 298 F.3d 1134, 1136–1137 (9th Cir. 2002) (finding prison officials could not justify a discriminatory policy based on protecting incarcerated person from rumors about his sexuality when the incarcerated person was already "out" in prison).

180. *See* Federal Bureau of Prisons, U.S. Department of Justice, Program Statement 5266.11, Incoming Publications (2011), *available at* https://www.bop.gov/policy/progstat/5266_011.pdf (last visited Sept. 30, 2019).

181. *See* Willson v. Buss, 370 F. Supp. 2d 782, 789–791 (N.D. Ind. 2005) (upholding prison supervisor's denial of plaintiff's "blatantly homosexual" literature, claiming a legitimate penological interest in prison security).

182. Lepine v. Brodeur, No. 97-72-M, 1999 U.S. Dist. LEXIS 23743, at *15 (D.N.H. Sept. 30, 1999) (*unpublished*) (finding prison regulations forbidding incarcerated people from receiving pornographic publications depicting sex between two men constitutional).

183. N.H. Code Admin. R. Ann. Cor 301.05(j) (Lexis 2016).

> "[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 activities of gay rights organizations or gay religious groups, for example, should be admitted unless they are otherwise a threat to legitimate institution interests."[184]

This language seems to indicate that you should be allowed to receive a wide variety of LGBTQ publications with political, religious, social, and fictional content while you are in prison. Because prejudice against LGBTQ people often creates the view that everything about sexual orientation is sexual, and anything related to LGBTQ people 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 2011 Program Statement quoted above, such conduct in federal prisons is not allowed and can be challenged.[185]

(b) State Prisons

Your right to receive non-sexually explicit LGBTQ publications in state prisons is less clear and possibly less strong than in the federal context.[186] Most states do not have program statements like the Federal Bureau of Prisons, and the options given to prison officials in Thornburgh v. Abbott may result in many different decisions and regulations even within the same state.[187]

I. Changes in the Law

This Part of the chapter is designed to give you a sense of the recent cases that courts look to when deciding cases about LGBTQ incarcerated person rights. This Part begins by briefly explaining a very important Supreme Court case, Lawrence v. Texas, in which the Court ruled that states cannot criminalize same-sex conduct.[188] This case will be discussed alongside Bowers v. Hardwick, which was overruled by Lawrence v. Texas, Romer v. Evans, and Obergefell v. Hodges, all of which may affect claims brought by LGBTQ incarcerated people.[189] 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 court's reasoning in *Bowers*, keep in mind that the issues may be open to new interpretation because *Lawrence* and *Romer* came after. Please note that while both *Bowers* and *Lawrence* deal specifically with sexual

184. Federal Bureau of Prisons, U.S. Department of Justice, Program Statement 5266.11, Incoming Publications 2 (2011), *available at* https://www.bop.gov/policy/progstat/5266_011.pdf (last visited Sept. 26, 2020).

185. It is worth mentioning that publishers also have First Amendment rights regarding subscribers' ability to receive publications in prison. Unlike incarcerated person, publishers are not subject to the Prison Litigation Reform Act and its exhaustion procedures and fee caps, and so are able to sue the prison more freely. Publishers like Prison Legal News and others have repeatedly sued prisons when they have refused to distribute their materials to incarcerated person.

186. *See*, *e.g.*, Harper v. Wallingford, 877 F.2d 728, 730–731 (9th Cir. 1989) (holding that incarcerated person'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 sexual activity between men had presented security problems at prison in the past and publications that advocate that activity posed a danger to institutional security); Willson v. Buss, 370 F. Supp. 2d 782, 787–91 (N.D. Ind. 2005) (finding incarcerated person 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).

187. 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").

188. Lawrence v. Texas, 539 U.S. 558, 567, 123 S. Ct. 2472, 2478, 156 L. Ed. 2d 508, 518–519 (2003).

189. Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986); Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996); Obergefell v. Hodges, 135 S. Ct. 2584, 192 L. Ed. 2d. 609 (2015).

orientation, they may also affect claims brought by transgender incarcerated people because prison officials may perceive a transgender incarcerated person to be gay, regardless of the incarcerated person's actual sexual orientation.

1. Lawrence v. Texas and Due Process Claims

In the June 2003 case Lawrence v. Texas, the U.S. Supreme Court found a Texas law that criminalized sex between consenting adults who are the same sex to be unconstitutional.[190] While the decision may not have immediate practical impact on you or your conditions of confinement, the *Lawrence* decision may ultimately have major consequences. In the ruling, the Court held that the right to privacy, as guaranteed by the Fourteenth Amendment, includes the right to engage in consensual intimate or sexual activity, including same-sex activity.[191]

Many of the cases in this Chapter were decided before *Lawrence*. Because of this, many cases in this Chapter rely on the reasoning in an earlier Supreme Court case, Bowers v. Hardwick.[192] *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. For an example of how this can change can play out, see section I3 for a practical example.

(a) Bowers v. Hardwick

Bowers v. Hardwick was a Supreme Court case that found the constitutional right to privacy did not extend to sexual acts between consenting adults who are the same sex.[193] Generally, the Fourteenth Amendment of the Constitution prohibits the government from infringing upon fundamental rights unless there is a sufficient justification for the government's interference.[194] 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 because they involve a fundamental right to privacy.[195] In *Bowers*, the Court held that the right to privacy does not protect a man's right to have consensual sex with another man, and that states could prohibit those sexual acts on the basis of views that gay people are immoral.[196]

(b) The End of *Bowers*

When the Supreme Court decided Lawrence v. Texas, it explicitly overruled *Bowers*, which means that *Bowers* is longer an acceptable case to use in court.[197] As a result, many cases that relied on *Bowers* in upholding the unequal treatment of LGBTQ incarcerated people might now be questionable. Several important issues arise after *Lawrence*. Keep these issues in mind if you are thinking about filing a lawsuit about your treatment in prison.

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190. Lawrence v. Texas, 539 U.S. 558, 567, 123 S. Ct. 2472, 2478, 156 L. Ed. 2d 508, 518–519 (2003).

191. Lawrence v. Texas, 539 U.S. 558, 567, 123 S. Ct. 2472, 2478, 156 L. Ed. 2d 508, 518–519 (2003).

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

193. Bowers v. Hardwick, 478 U.S. 186, 191–192, 106 S. Ct. 2841, 2844, 92 L. Ed. 2d 140, 146 (1986).

194. "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.

195. Griswold v. Connecticut, 381 U.S. 479, 485–486, 85 S. Ct. 1678, 1682, 14 L. Ed. 2d 510, 515–516 (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, 177–178 (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).

196. Bowers v. Hardwick, 478 U.S. 186, 196, 106 S. Ct. 2841, 2846–2847, 92 L. Ed. 2d 140, 149 (1986).

197. 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.").

First, *Lawrence* says that under the Constitution, all adults, including LGBTQ individuals, have the right to engage in intimate conduct with another adult in private.[198] This means that private, consensual sex between two men or two women is no longer a crime. This does not mean that you have the right to have sex in prison, but it probably does mean that prison officials cannot treat you differently because you identify as LGBTQ or because others see you as LGBTQ.[199]

Second, one Supreme Court Justice wrote in *Lawrence* that previous Supreme Court cases show that moral disapproval is not a good enough reason to treat people differently.[200] While this statement is not a part of the main decision of the *Lawrence* case, the statement may be useful in court when arguing that your rights have been infringed because of your sexual orientation or gender identity.

Third, *Lawrence* makes all cases that have relied on *Bowers* open to challenge. When you are considering whether or not to bring a legal claim, pay close attention to whether *Bowers* was used in any cases in your jurisdiction. If you think 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.

(c) The Unknown Effect of *Lawrence*

It is hard to predict the effects of *Lawrence*. The case decided that same-sex conduct gets at least some legal protection, so it could influence many other cases involving LGBTQ rights. But courts have hesitated to interpret *Lawrence* as establishing a basis for LGBTQ rights in cases where the facts are different from the facts in *Lawrence*. For instance, sometimes courts will use other previous cases—such as Romer v. Evans, which is discussed below—to avoid the question of whether *Lawrence* protects certain conduct.[201]

At least one case that was decided after *Lawrence* has ruled that *Lawrence* does not give incarcerated people a right to receive publications covering LGBTQ issues. In Willson v. Buss, an incarcerated person sued the superintendent of his prison for the right to receive LGBTQ-related magazines.[202] The court noted that *Lawrence* overruled *Bowers* and recognized a constitutional right to engage in same-sex relationships. However, the court emphasized that this right may not extend fully to the prison context, because prison officials can limit the constitutional rights of incarcerated people for legitimate prison-related reasons.[203]

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198. Lawrence v. Texas, 539 U.S. 558, 567, 123 S. Ct. 2472, 2478, 156 L. Ed. 2d 508, 518–519 (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 people the right to make this choice.").

199. Remember that privacy rights can be limited in prison, because courts often decide that the prison rules that affect incarcerated person privacy are "reasonably related" to a "legitimate prison purpose." Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64 (1987) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.").

200. 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) (alteration and emphasis in original) (quoting Dept. of Agric. v. Moreno, 413 U.S. 528, 534, 93 S. Ct. 2821, 2826, 37 L.Ed.2d 782 (1973)) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare. . .desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.").

201. Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996); *see*, *e.g.*, Johnson v. Johnson, 385 F.3d 503, 532–533 (5th Cir. 2004) (relying on Romer to conclude that the law clearly establishes that disadvantaging an incarcerated person because of his sexuality without any legitimate government purpose violates the Equal Protection Clause).

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

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

2. Romer v. Evans and the Equal Protection Clause

The ruling in Lawrence v. Texas was based on the right to privacy protected by the Due Process Clause of the Fourteenth Amendment, but the Equal Protection Clause of the Fourteenth Amendment can be another basis for protecting LGBTQ incarcerated people' rights.

The Equal Protection Clause prevents the government from treating different "classes" or groups of people differently unless it has a good enough government-related reason.[204] When courts consider equal protection claims, they use different legal standards depending on how the government is classifying people. For example, if the government treats people differently based on their race, it must convince the court that the different treatment is "necessary" to achieve a "compelling government interest." This is the highest standard, called "strict scrutiny," and it is the most difficult standard for the government to satisfy. If the government classifies people based on gender, the classification must be "substantially related" to an "important government objective." This is the "intermediate scrutiny" standard. Other classifications, such as ones based on age, only need to be "rationally related" to a "legitimate government purpose." This is the lowest standard, called "rational basis review," and it is the easiest for the government to satisfy. In general, the higher the standard of review, the more likely it is that the law will be found unconstitutional under the Equal Protection Clause.

Romer v. Evans is the most important case for LGBTQ people bringing equal protection claims.[205] *Romer* involved an amendment to Colorado's constitution that prevented local governments from protecting gay, lesbian, and bisexual people as a class. For example, this amendment prevented cities from passing local laws to prohibit discrimination based on sexual orientation. In hearing the case, the Supreme Court could have decided which of the legal standards described above should be applied to classifications based on sexual orientation. However, the Court avoided deciding that question by deciding that the Colorado amendment could not satisfy *any* of the standards, even the lowest one, rational basis review. The Court explained that there was no legitimate government purpose for the amendment. Instead, the amendment seemed to be based on "animus toward the class [gay men and lesbians] it affects."[206]

Romer v. Evans is important because it says that laws passed to harm a particular group, such as LGBTQ people, cannot survive even the lowest level of constitutional review. That ruling has led to other important victories. In Johnson v. Johnson, for example, the Fifth Circuit relied on *Romer* in discussing claims against prison officials.[207] In *Johnson*, a gay incarcerated person said that officials failed to protect him from violence and rape by other incarcerated people, even after he told officials about the assaults. The Fifth Circuit said: "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 legally protected group]; nevertheless, a state violates the Equal Protection Clause if it disadvantages homosexuals for reasons lacking any rational relationship to legitimate governmental aims."[208] In other words, a prison cannot create policies that unfairly harm LGBTQ incarcerated people because it would violate the Equal Protection Clause.

3. A Practical Example

To help you figure out how Lawrence v. Texas and Romer v. Evans can work together to protect LGBTQ rights in prison, consider whether an earlier case about a lesbian incarcerated person, Doe v. Sparks, would have been decided differently if it had been decided after *Lawrence* and *Romer*.[209]

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

205. Romer v. Evans, 517 U.S. 620, 626–627, 116 S. Ct. 1620, 1624–1625, 134 L. Ed. 2d 855, 862 (1996).

206. Romer v. Evans, 517 U.S. 620, 632, 116 S. Ct. 1620, 1627, 134 L. Ed. 2d 855, 865–866 (1996). Animus can be defined as "hostility or ill feeling." *Animus*, O-XFORD DICTIONARIES, Available at: https://en.oxforddictionaries.com/definition/animus (last visited Sep. 26, 2020).

207. Johnson v. Johnson, 385 F.3d 503, 532 (5th Cir. 2004).

208. Johnson v. Johnson, 385 F.3d 503, 532 (5th Cir. 2004).

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

In Doe v. Sparks, a lesbian incarcerated person was denied a visit from her girlfriend.[210] The prison claimed that allowing the visit could cause anti-gay violence in the prison. The incarcerated person tried to bring an equal protection claim. She argued 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 incarcerated person's claim, acknowledged that "the equal protection clause dictates equal administration of rights and privileges, such as visitation, between similarly situated people."[211]

However, the court decided that denying gay and lesbian incarcerated people visitation rights was not a violation of the Equal Protection Clause. Because of Bowers v. Hardwick, the court said that LGBTQ people should not be 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.[212]

This case might have been decided differently after the *Lawrence* and *Romer* decisions. The *Doe* court argued that the Equal Protection Clause can't protect individuals based on their sexual orientation, because *Bowers* already decided that the Constitution allows states to make it a crime for gay men and lesbians to have sex.[213] Since *Lawrence* overruled *Bowers*, the *Doe* court's argument for denying federal equal protection falls apart. In addition, *Romer* provides a concrete example of the Supreme Court extending federal equal protection to individuals based on sexual orientation. Thus, after those two cases, a court hearing a case identical to *Doe* would analyze the visitation policy under the federal Equal Protection Clause and would likely find that it does not satisfy even rational basis review.[214] Nevertheless, as we saw in *Willson v. Buss*, courts might not give these protections in the prison context, even after *Lawrence*.[215]

Therefore, after *Lawrence* and *Romer*, the incarcerated person in *Doe* might now have a stronger claim that the policy discriminated against her due to her sexual orientation and interfered with her right to privacy.[216]

J. 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.[217] If you suspect that the jury that delivered the guilty verdict against you could not make an impartial decision because some of them had

210. Doe v. Sparks, 733 F. Supp. 227, 228 (W.D. Pa. 1990).

211. Doe v. Sparks, 733 F. Supp. 227, 231 (W.D. Pa. 1990).

212. Doe v. Sparks, 733 F. Supp. 227, 232 (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, the court did decide that the policy violated Pennsylvania state law, and thus struck down the visitation policy. Doe v. Sparks, 733 F. Supp. 227, 232–234 (W.D. Pa. 1990).

213. Technically, the court concluded that the federal Equal Protection Clause does not protect sexual orientation *on its own*. However, the court concluded that, because Pennsylvania law protects homosexual conduct, federal equal protection applied and required that the visitation policy satisfy rational basis review.

214. Ultimately, the *Doe* court actually *did* conclude that the visitation policy failed to satisfy rational basis review, and therefore violated the federal Equal Protection Clause. But after Lawrence and Romer, a court would apply federal equal protection directly, rather than go through state law like the *Doe* court did.

215. Willson v. Buss, 370 F. Supp. 2d 782, 786–791 (N.D. Ind. 2005) (concluding that the prison regulation on LGBTQ publications satisfied the Turner v. Safley test and was therefore constitutional).

216. 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, 173–174 (2004); Kacy Elizabeth Wiggum, Note, *Defining Family in American Prisons*, 30 Women's Rts. L. Rep. 357, 384–404 (2009).

217. *See* Irvin v. Dowd, 366 U.S. 717, 721–722, 81 S. Ct. 1639, 1641–1642, 6 L. Ed. 2d 751, 755–756 (1961). Duncan v. Louisiana, 391 U.S. 145, 149, 88 S. Ct. 1444, 1447, 20 L. Ed. 2d 491, 496 (1968) (holding that the Sixth Amendment's guarantee of a jury trial applies to any criminal case in state court that would have gotten Sixth Amendment protection if it were in federal court).

homophobic or transphobic attitudes—prejudice toward LGBTQ people—you may have grounds to challenge your conviction.[218]

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, potential jurors are asked questions so the judge and the lawyers can learn more about them. Usually the judge asks the questions, but in some jurisdictions the lawyers also ask questions, or 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. If a lawyer believes a potential juror is biased against his client, the lawyer can ask the judge to exclude that person from the jury "for cause" (for a good reason). If the judge decides that there is evidence of bias based on the person's answers, the judge can exclude them. Lawyers can request as many "for cause" removals of potential jurors as they want. The judge also has a separate obligation to exclude any potential juror he believes may be biased.[219]

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 toward gay or transgender people, *and* your sexual orientation or gender identity was discussed at trial;[220]
(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; 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.[221]

A handful of incarcerated people have challenged their convictions by claiming anti-gay jury bias, but with little success. For example, in Owens v. Hanks, a gay incarcerated person whose sexual orientation was discussed during his murder trial argued that he was denied an impartial jury because

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218. There is evidence that some prosecutors attempt to use jurors' homophobia to influence their decision process. *See, e.g.*, Joey L. Mogul, *The Dykier, the Butcher, the Better: The State's Use of Homophobia and Sexism to Execute Women in the United States*, 8 N.Y. City L. Rev. 473, 474 (2005). Lesbians also serve longer sentences than heterosexual women. *See* Robert Leger, *Lesbianism Among Women Prisoners: Participants and Nonparticipants*, 14 Criminal Justice and Behavior 448, 463 (1987). *See* Batson created the standard to show when the prosecutor on a case has shown purposeful discrimination in selecting a jury. Batson v. Kentucky, 476 U.S. 79, 96, 106 S. Ct. 1712, 1723, 90 L. Ed. 2d 69, 87 (1986) ("To establish such a case, the [incarcerated person] first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the [jury] members of the defendant's race.").

219. *See* Rosales-Lopez v. United States, 451 U.S. 182, 189, 101 S. Ct. 1629, 1634, 68 L. Ed. 2d 22, 29 (1981) ("Because the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the voir dire.").

220. In conducting voir dire, the trial court judge is required to permit at least some questioning about any material issue that will or could arise at trial. *See, e.g.*, Aldridge v. United States, 283 U.S. 308, 311–313, 51 S. Ct. 470, 472, 75 L. Ed. 1054, 1056–1057 (1931) (finding voir dire unfair where trial judge "failed to ask any question which could be deemed to cover the subject [of racial prejudice]," in order to uncover a "disqualifying state of mind"). In deciding what questions to ask potential jurors during voir dire, the trial court must exercise its discretion consistently with "the essential demands of fairness." *See* 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 great freedom to determine how best to conduct the voir dire, and failure to ask specific questions will be reversed on appeal only if the judge abuses that discretion. *See* Rosales-Lopez v. United States, 451 U.S. 182, 190–91, 101 S. Ct. 1629, 1635–1636, 68 L. Ed. 2d 22, 29–30 (1981).

221. *See* State v. Johnson, 706 So. 2d 468, 477–478 (La. Ct. App. 1998) (finding that it was proper for the trial judge to dismiss one juror for anti-gay bias but not a second juror, because the second juror was not sincere when he said he would "almost automatically" convict a defendant he knew was gay, but was instead attempting to avoid jury duty). 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."); SmithKline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471, 479 (9th Cir. 2014) (finding lower court erred by not concluding that a juror was impermissibly dismissed on the basis of his sexual orientation because "it is clear that [defendant] ha[d] no further credible reasons" to dismiss juror).

the court chose several jurors who had expressed bias against gay people during jury selection.[222] The court decided that these expressions of bias did not make his trial unfair because *witnesses* for both the prosecution and the defense were gay, so any anti-gay prejudice in the jury would have affected both parties.[223] A claim of juror bias might be more likely to succeed if the bias affects only one party.

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 when potential jurors were questioned individually. At the voir dire, questions were asked about potential jurors' attitudes toward LGBTQ people, and the defendant had directly requested to be present. The trial court, however, did not allow him into the voir dire.[224] The appeals court held that "[s]ince. . .the evidence suggested that defendant was bisexual because he was a frequent patron [customer] 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."[225] Because the defendant was not present when he specifically requested to be, his conviction was reversed. It is important to note that this ruling only guaranteed that the defendant had a right to be present at his case, it did not guarantee a right to trial by a fair jury.

Though there is very little case law, some cases indicate that you might be granted a retrial if LGBTQ people were purposefully excluded from the jury. In People v. Viggiani, a New York state case, the court decided that jurors could not be excluded from a jury "for cause" just because both they and the defendant are gay or lesbian.[226] The California Court of Appeals ruled in People v. Garcia that the prosecution could not use its peremptory challenges (strikes) to exclude all lesbians from a jury. It found that gay men and lesbians constitute a "cognizable class" (meaning that these jurors share a common trait that makes them distinct) and that completely eliminating them from a jury violated the California constitution.[227]

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

K. Conclusion

Being lesbian, gay, bisexual, or transgender can make the experience of incarceration especially hard, and the lack of consistent case law involving incarcerated people who are LGBTQ may make you

222. Owens v. Hanks, No. 96-1124, 1996 U.S. App. LEXIS 15465, at *3 (7th Cir. June 25, 1996) (*unpublished*). For example, one juror stated during voir dire that "she would unwittingly be influenced by a witness' homosexuality because she believe[d] it [was] morally wrong." 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.

223. 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, 457–558 (8th Cir. 1999) (finding the admission of testimony that defendant was gay during the penalty phase of his murder trial was harmless and did not contribute to the jury's decision, because it was brief and the State did not refer to it during closing argument); United States v. Click, 807 F.2d 847, 850 (9th Cir. 1987) (finding that the trial judge did not abuse his discretion by refusing the defendant's request to ask potential jurors a question about "effeminate mannerisms" during the jury selection process, because it would draw attention to the defendant's mannerisms and was not necessary to assess whether the jurors could be impartial); State v. Lambert, 528 A.2d 890, 892 (Me. 1987) (finding that the trial judge did not abuse his discretion by questioning potential jurors as a group or by limiting the questioning related to anti-gay bias, because potential jurors completed a confidential questionnaire where they could privately admit any bias, and because the judge asked the group of jurors directly whether the defendant being gay would prevent them from being impartial").

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

225. State v. Dishon, 687 A.2d 1074, 1082, 297 N.J. Super. 254, 269–270 (N.J. Super. Ct. App. Div. 1997).

226. *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.")

227. People v. Garcia, 92 Cal. Rptr. 2d 339, 343–344, 77 Cal. App. 4th 1269, 1275–1277 (Cal. Ct. App. 2000).

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 LGBTQ activists about the challenges LGBTQ incarcerated people face so that they can better advocate for laws and policies that will improve your situation.

Appendix A

LGBTQ RESOURCES

American Civil Liberties Union Lesbian, Gay, Bisexual, Transgender Project
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

Gay & Lesbian Advocates & Defenders (GLAD)
18 Tremont, Suite 950
Boston, MA 02108
(617) 426-1350
Hotline: 1-800-455-GLAD (1-800-455-4523)
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
307 West 38th Street
New York, NY 10018
(212) 367-1000
Hotline: 1-800-AIDS-NYC (1-800-243-7692)
Legal Services and Advocacy: (212) 367-1326

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
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010
(213) 382-7600

Midwest Regional Office
65 E. Wacker Place, Suite 2000
Chicago, IL 60601
(312) 663-4413

Southern Regional Office

730 Peachtree Street, NE, Suite 640
Atlanta, GA 30308
(404) 897-1880

South Central Regional Office
3500 Oak Lawn Avenue, Suite 500
Dallas, TX 75219
(214) 219-8585

Washington DC Office
1776 K Street, N.W., 8th Floor
Washington, DC 20006
(202) 804-6245
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 national legal organization committed to advancing the civil and human rights of lesbian, gay, bisexual, and transgender people and their families through litigation, legislation, policy, and public education.

National LGBTQ Task Force
National Headquarters
1325 Massachusetts Ave., NW, Suite 600
Washington, DC 20005
(202) 393-5177

New York Office
25 Broadway 12 Floor
New York, NY 10004
(212) 604-9830
National LGBTQ Task Force is a national progressive organization working for the civil rights of gay, lesbian, bisexual and transgender people.

Sylvia Rivera Law Project
147 W. 24th St., 5th Floor
New York, NY 10011
(212) 337-8550
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.