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 additional difficulties. Many of the issues unique to LGBTQ incarcerated people have not been litigated extensively in court. Additionally, some legal decisions of significance to LGBTQ incarcerated people are unreported, meaning they do not appear in the reporters available in prison law libraries. In the *JLM*, unreported cases have citations like "U.S. App. LEXIS 12345 (*unpublished*)."[1]

Many of the issues related to LGBTQ people 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 role that prejudice against LGBTQ individuals can play a role in judge and jury decision-making—means that LGBTQ incarcerated people may 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 newer legal 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 people.

Throughout this Chapter, the term "transgender" is used to describe people whose gender identity is different from their assigned sex at birth. Gender identity expresses the gender a person identifies as, regardless of whether that gender is the same as the one they were assigned at birth. Gender identity is often a person's internal sense of their own gender. Male pronouns (he, him, his) are used throughout this Chapter and the *JLM*. 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 biggest concerns for 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 come up while you are 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 like 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** discusses important Supreme Court cases and how they may affect past and future prison regulations more generally.

The Appendices at the end of this Chapter provide additional information. **Appendix A** has a list of legal organizations that provide support and legal assistance to LGBTQ incarcerated people.

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[1] Make sure you read *JLM*, Chapter 2, "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, e.g.*, Bostock v. Clayton Cnty., 590 U.S. 644, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020); Obergefell v. Hodges, 576 U.S. 640, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).

[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 and other resources appears in Appendix A ("LGBTQ Legal Organization Resources") at the end of this Chapter.

Appendix B provides online resources you can use to find relevant state law and policy. **Appendix C** provides a short glossary of the different terms used in this Chapter to describe LGBTQ people.

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 government, violates either your federal statutory rights or your constitutional rights.[4] This includes your right to be free from cruel and unusual punishment under the Eighth Amendment or your right to equal protection under the Fourteenth Amendment.

If you are a federal incarcerated person, you can file a *Bivens* action or a Federal Tort Claim if you are looking for monetary damages.[5] If you are held in state or municipal custody, Section 1983 may also apply to you. However, if you are a state or municipal incarcerated person, 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 *JLM*, Chapter 16, "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 of the Prisoner Litigation Reform Act ("PLRA"). Please read *JLM*, Chapter 14, "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.[6] 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.[7] In other words, the prison rule or policy that is leading to you being treated differently must have a common-sense connection to a valid goal or concern of the prison. For a more thorough discussion of equal protection claims, see *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law."

When LGBTQ incarcerated people claim 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. For instance, two cases in the Sixth Circuit involved LGBTQ incarcerated people who, after being denied the opportunity to participate in religious services while in prison, brought a lawsuit under Section 1983 for a violation of their First Amendment rights. In both cases, the prison claimed that because the LGBTQ incarcerated person was vulnerable to attack, participation in the services

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[4] To challenge the conduct of an official or employee of the federal government, you must bring a *Bivens* action or claim under the Federal Torts Claim Act. *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). For more information on how to do this, see *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law," Part E ("Special Concerns for People Incarcerated in Federal Prisons").

[5] A *Bivens* action refers to a lawsuit for damages when a government officer who is acting on behalf of government authority allegedly violates the U.S. Constitution. A Federal Tort Claim allows private parties to sue the United States in federal court for torts committed by people acting on behalf of the U.S, or its government. For more information on *Bivens* actions and Federal Tort Claims, see *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law," Part E ("Special Concerns for People Incarcerated in Federal Prisons").

[6] 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).

[7] *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439–440, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313, 320 (1985).

posed a security risk. The court ultimately agreed with the prison's argument that the restriction on the incarcerated person's First Amendment rights served the valid penological interest of prison security and was, therefore, justified.[8]

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 plaintiff 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.[9] The court did not decide whether the equal protection guarantee of the Constitution was violated because the plaintiff, appearing without a lawyer, did not present enough information for the court to reach that decision.[10] However, the court was clearly sympathetic to the incarcerated plaintiff's claim, and the opinion has 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.[11]

2. Sex Discrimination

While your chances of prevailing on an equal protection claim may have increased after *United States v. Windsor* (where the Supreme Court held that denying federal recognition of same-sex marriages was unconstitutional), you might also have a chance of winning a case if you state your grievance in terms of *sex* discrimination.[12] Title VII of the Civil Rights Act of 1964 creates a federal cause of action (opportunity for a legal claim) where "sex . . . was a motivating factor"[13] for discrimination, and this law has been held to prohibit sex discrimination against both men and women.[14] However, whether or not courts will determine that Title VII of the Civil Rights Act of 1964

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[8] 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).

[9] Holmes v. Artuz, No. 95 Civ. 2309, 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).

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

[11] Holmes v. Artuz, No. 95 Civ. 2309 (SS), 1995 U.S. Dist. LEXIS 15926, at *4 (S.D.N.Y. Oct. 26, 1995) (*unpublished*) ("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." (citations omitted)); 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 prison's food service manager to challenge his removal from his job as bakery worker, might have a valid equal protection claim). *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).

[12] *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).

[13] 42 U.S.C. § 2000e-2(m). Numerous state statutes also prohibit sex discrimination.

[14] *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).

applies to prisons depends on the state and court that you are in.[15] Recently, in *Bostock v. Clayton County*, the Supreme Court also held that an employer violates Title VII (which makes it unlawful to discriminate against an individual "because of" a person's sex) by firing an individual for being homosexual or transgender.[16] Sex discrimination is discrimination that occurs based on your sex (for example, whether you are a woman).

LGBTQ people have also used a "sex-stereotyping" theory to argue legally that they suffered from sex discrimination. Sex-stereotyping claims can include claims that you were discriminated against for not conforming to the expected behavior or appearance of your sex (not acting or looking like people think your sex is "supposed" to act or look). Sex discrimination claims may also arise if you are discriminated against for expressing your gender identity or for being pregnant. 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.

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.[17] 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. However, several cases have held that *Price Waterhouse* protects transgender people and overrules previous decisions like *Ulane v. Eastern Airlines, Inc.*,[18] which denied transgender people protection under Title VII and similar sex discrimination laws.[19]

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] Appendix B ("State Law Resources") at the end of this Chapter includes information about varying state laws that provide additional protection to LGBTQ people. However, you should still research your state's laws to find out if you could have a stronger 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

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[15] *See* Neal v. Dept. of Corr., 232 Mich. App. 730, 741, 592 N.W.2d 370, 375–376 (1998) (holding that prisons operated by Michigan Department of Corrections are public, but that different treatment of prisoners based on gender is allowed if it passes constitutional requirements and serves an important governmental interest). It is difficult to predict 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. For more information about the Prison Litigation Reform Act, see *JLM*, Chapter 14, "The Prison Litigation Reform Act."

[16] Bostock v. Clayton Cnty., 590 U.S. 644, 683, 140 S. Ct. 1731, 1754, 207 L. Ed. 2d 218, 249 (2020). Even before *Bostock*, the EEOC had found instances of discrimination based on sexual orientation or gender identity to constitute discrimination on the basis of sex. *See* Macy v. Dept. of Just., EEOC Appeal No. 0120120821 at *11 (Apr. 20, 2012); Baldwin v. Dept. of Transp., EEOC Appeal No. 0120133080 at *10 (July 15, 2015). While *Bostock* and these EEOC decisions did not occur in the prison context, looking at them may help you to develop an argument for your claim.

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

[18] Bostock v. Clayton Cnty., 590 U.S. 644, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020) (holding that sex discrimination, as used in Title VII, extends to Gay and Transgender individuals).

[19] *See* 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."); 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").

[20] MINN. CONST. art. I, § 2.

[21] Unruh Civil Rights Act, CAL. CIV. CODE § 51 (West 2020).

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 state law in deciding whether a prison policy violates the federal Equal Protection Clause of the Fourteenth Amendment.[22]

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

Transgender, nonbinary, and gender-nonconforming people often encounter difficulties in how they are allowed to express 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 confirmation surgery (sometimes known as "sex reassignment surgery"). For general information about your right to adequate medical care while in prison, see *JLM*, Chapter 23, "Your Right to Adequate Medical Care."

(a) Serious Medical Need, Deliberate Indifference, and Access to Hormonal Treatment

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 (federal appellate courts) have regularly found that "gender dysphoria" is a "serious medical need" that meets the *Estelle* standard.[24] "Gender dysphoria" (GD) is a form of psychological distress that you may experience when your gender identity does not match your sex assigned at birth.[25] Many federal courts have held that transgender incarcerated people are constitutionally entitled to *some* type of medical treatment for their condition.[26] However, most federal courts have held that transgender incarcerated people do not have a constitutional right to any *specific* type of

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[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).

[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 *JLM*, Chapter 23, "Your Right to Adequate Medical Care."

[24] *See, e.g.*, Cuoco v. Moritsugu, 222 F.3d 99, 106 (2d Cir. 2000) (treating "transsexualism" as 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* Praylor v. Tex. Dept. of Crim. Just., 430 F.3d 1208, 1209 (5th Cir. 2005) (*per curiam*) (holding that denial of an inmate's request for hormone therapy did not constitute deliberate indifference to a serious medical need).

[25] *See Gender Dysphoria*, AM. PSYCHIATRIC ASSOC., *available at* https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria (last visited March 24, 2024). Note that 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 may help you argue for gender-affirming medical care.

[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. *See Injunction*, BLACK'S LAW DICTIONARY (11th ed. 2019). If you are trying to get "damages" (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 *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law," Section C(3) ("Defenses That May Be Raised Against Your Claim"), for an explanation of qualified immunity and other defenses to Section 1983 suits.

treatment, so long as they receive some kind of treatment, such as psychological counseling for example.[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 he requests.[28] In some successful cases, incarcerated people who claimed a broader right to medical care prevented prison officials from avoiding responsibility by claiming qualified immunity.[29] This would allow an incarcerated person to possibly get damages (money). One example is a Ninth Circuit case, where prison officials were sued by an incarcerated person whose hormonal therapy they had terminated.[30] The officials argued that they were entitled to qualified immunity because incarcerated people suffering from gender dysphoria (GD) have no clearly established right to hormone therapy.[31] The Ninth Circuit rejected the officials' claim and held that "with respect to prisoner medical claims, the right at issue should be defined as an incarcerated person's Eighth Amendment right 'to officials who are not deliberately indifferent to serious medical needs,'" and not as a right to something more specific.

In general, most courts that have considered the question have denied transgender incarcerated people's requests for hormonal treatment while still upholding their right to medical care.[32] However, in *Maggert v. Hanks*, the court recognized what many other courts have not: hormone therapy is necessary to "cure" some people's 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 Eighth Amendment to provide an incarcerated person with medical care, it

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[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* White v. Farrier, 849 F.2d 322, 327–328 (8th Cir. 1988) (holding that 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); Kosilek v. Maloney, 221 F. Supp. 2d 156, 162 (D. Mass. 2002) (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); 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). These are all cases where the incarcerated person sought injunctive relief, trying to get the prison to give some kind of medical treatment.

[29] Qualified Immunity is the doctrine that government officials (such as police officers, prison guards, and the city) are immune from a lawsuit if the state actors are 1.) acting in good faith and 2.) the conduct was objectively reasonable. *See* Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). For conduct to be unreasonable, the court needs to analyze whether the conduct was clearly in violation of the constitutional right and whether the constitutional right was established at the time of the violation. *See* Saucier v. Katz, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). For more information, see *JLM*, Chapter 16, "Using 42 U.S.C. §1983 to Obtain Relief from Violations of Federal Law," Section C(3) ("Defenses That May Be Raised Against Your Claim").

[30] South v. Gomez, 211 F.3d 1275 (9th Cir. 2000), *reported in full at* No. 99-15976, 2000 U.S. App. LEXIS 3200 (9th Cir. Feb. 25, 2000) (*unpublished*).

[31] South v. Gomez, 211 F.3d 1275 (9th Cir. 2000), *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 *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law," for an explanation of qualified immunity and other defenses to § 1983 suits.

[32] 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)); *see also* Fields v. Smith, 653 F.3d 550 (7th Cir. 2011) (finding that a ban of hormone therapy for people with gender dysphoria constituted deliberate indifference to incarcerated people's serious medical needs).

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.[33]

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.[34] 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 measurably worse, making the cruel and unusual determination much easier.[35]

Despite these encouraging developments in a few federal courts, courts in many other jurisdictions continue to deny claims by transgender incarcerated people for hormonal treatment.[36] Prisoners who are unable to demonstrate that they previously received hormone treatment before incarceration may face an uphill battle, despite recent changes to the federal Bureau of Prisons policy.[37] Courts are more likely to give more weight to the original decision made by prison medical personnel rather than prior treatment history.[38]

The federal Bureau of Prisons' medical policy has recently been changed to allow incarcerated people to be provided with hormone therapy even if they did not have hormone therapy prior to incarceration.[39] 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

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[33] Maggert v. Hanks, 131 F.3d 670, 671–672 (7th Cir. 1997); *see also* Praylor v. Tex. Dept. of Crim. Just., 430 F.3d 1208, 1209 (5th Cir. 2005) (*per curiam*) (assuming that, because "transsexualism" presents a "serious medical need," denial 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 hormones, and the disruption to the all-male prison).

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

[35] 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, 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").

[36] *See*, *e.g.*, Praylor v. Tex. Dept. of Crim. Just., 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); 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).

[37] *See* Fed. Bureau of Prisons, U.S. Dept. of Just., Program Statement 6031.04, Patient Care 41–42 (June 3, 2014), *available at* https://www.bop.gov/policy/progstat/6031_004.pdf (last visited March 24, 2024) (stating that if an incarcerated person is diagnosed with gender dysphoria, a treatment plan may include hormone therapy).

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

[39] *See* Fed. Bureau of Prisons, U.S. Dept. of Just., Program Statement 6031.04, Patient Care 41–42 (June 3, 2014), *available at* https://www.bop.gov/policy/progstat/6031_004.pdf (last visited March 24, 2024) (stating that if an incarcerated person is diagnosed with gender dysphoria, a treatment plan may include hormone therapy).

necessarily exceed the costs of other routine medical treatments administered to the general prison population.[40]

If you were undergoing hormone therapy before you were incarcerated, 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. Especially in recent years, several courts have required prisons to provide transgender incarcerated people with hormonal treatment.[41]

In addition, the Constitution offers some protections for quality of care. Decisions about treatment *must* be based on medical considerations rather than financial, political, or other factors.[42] You can't be denied treatment based on generalized claims that it might make you a target of harassment or other violence. Some courts reject arguments like this,[43] but other courts state that security concerns do not necessarily mean particular treatments should be denied completely.[44]

(b) Access to Gender Confirmation 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.[45] If you are diagnosed with 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.[46] However, it may be difficult to get staff to diagnose you with gender dysphoria.[47] Many courts generally recognize the World Professional Association of Transgender Health (WPATH) Standards of Care as the prevailing standard for the treatment of

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[40] *See* Kristy A. Clark, Jaclyn M. White Hughto & John E. Pachankis, *"What's the Right Thing to Do?" Correctional Healthcare Providers' Knowledge, Attitudes and Experiences Caring for Transgender Inmates.*, 193 SOC. SCI. & MED. 80 (2017) (identifying prison officials lack of willingness to provide gender affirming care to transgender incarcerated persons despite the low costs of treatment compared to other medical needs).

[41] *See, e.g.*, Mitchell v. Kallas, 895 F.3d 492 (7th Cir. 2018) (gender dysphoria must be treated in a way that adequately handles medical needs of the patient, and therapy is not enough to treat gender dysphoria); Edmo v. Corizon, Inc., 935 F.3d 757 (9th Cir. 2019) (requiring full range of treatment options for gender dysphoria, including gender affirming surgery).

[42] *See, e.g.,* Harris v. Thigpen, 941 F.2d 1495, 1509 (11th Cir. 1991) (treatments cannot be denied merely because they are expensive); Barrett v. Coplan, 292 F. Supp. 2d 281, 285 (D.N.H. 2003) (treatment must be "based on medical considerations"); Kosilek v. Maloney, 221 F. Supp. 2d 156, 182 (D. Mass. 2002) (treatments cannot be denied merely because they are controversial).

[43] *See* Fields v. Smith, 653 F.3d 550, 557 (7th Cir. 2011) (rejecting prison security argument because "transgender inmates may be targets for violence even without hormones" and defendants' expert "testified that it would be 'an incredible stretch' to conclude that banning the use of hormones could prevent sexual assaults").

[44] Tates v. Blanas, No. S-00-2539, 2003 WL 23864868, *29 (E.D. Cal. 2003) (*unpublished*) (officials must balance security risks of providing transgender prisoner with bra against her medical needs).

[45] 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 incarcerated 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), *report and recommendation adopted*, No. 9:00-CV-1433 (GLS/DEP), 2006 U.S. Dist. LEXIS 21422 (N.D.N.Y. Apr. 20, 2006) (*unpublished*).

[46] *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).

[47] A diagnosis of gender dysphoria in adolescents and adults is a marked difference between one's expressed gender and their assigned gender. Diagnosis requires manifestation of multiple feelings or behaviors, including "a strong desire to be treated as the other gender," "a strong desire to be of the other gender," and "a strong conviction that one has the typical feelings and reactions of the other gender." *What is Gender Dysphoria?*, AM. PSYCHIATRIC ASSOC., *available at* https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria (last visited March 24, 2024).

gender dysphoria.[48] Under these standards, a person with experience treating GD should evaluate you, and you should be provided with care that is appropriate for you (this might include access to commissary items, hormone therapy, and possibly surgery).[49] Prison staff cannot ignore the WPATH standards because a person with GD is in prison.[50]

Treatment decisions are unfortunately up to the prison healthcare staff.[51] If the treatment options given to you for your gender dysphoria are 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.[52] Unless a doctor is willing to say that the chosen option would not address the "serious medical need," prison health care providers have the freedom to choose your treatment. Therefore, there is a chance that even if gender reassignment surgery is an option, the prison might not choose it.[53]

Finally, if you experience complications as a result of a prior gender-related surgery, the government may need to provide you with the medical care necessary to treat those complications.[54]

2. Access to Personal Items Associated with Gender Identity

Clothing, cosmetics, jewelry, hair, 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, but most facilities have very strict policies about clothing and grooming.[55]

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[48] *See* Fields v. Smith, 653 F.3d 550, 553–554 (7th Cir. 2011) (characterizing the WPATH standards as the "accepted standards of care"); *see also* WORLD PRO. ASSOC. FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSGENDER AND GENDER DIVERSE PEOPLE, VERSION 8 (2022), *available at* https://www.tandfonline.com/doi/pdf/10.1080/26895269.2022.2100644 (last visited March 24, 2024).

[49] WORLD PRO. ASSOC. FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSGENDER AND GENDER DIVERSE PEOPLE, VERSION 8, at S22–23, S31–33 (2022), *available at* https://www.tandfonline.com/doi/pdf/10.1080/26895269.2022.2100644 (last visited March 24, 2024) (listing the recommended minimum credentials for health care professionals who work with adults presenting with gender dysphoria and explaining that, because individual treatment needs vary, treatment must be individualized to include one or more of psychotherapy, change of gender expression or role, hormone therapy, and surgery).

[50] WORLD PRO. ASSOC. FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSGENDER AND GENDER DIVERSE PEOPLE, VERSION 8, at S104 (2022), *available at* https://www.tandfonline.com/doi/pdf/10.1080/26895269.2022.2100644 (last visited March 24, 2024) ("People should have access to these medically necessary treatments irrespective of their housing situation within an institution").

[51] *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.").

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

[53] *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).

[54] *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.")

[55] *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 the incarcerated person is transgender or is housed in a men's ward; the possibility that the bra could be misused as a weapon or noose must be balanced against any medical or psychological harm resulting from denial of a bra); Lucrecia v. Samples, No. C-93-3651-VRW, 1995 U.S. Dist. LEXIS 15607, at *1–2, *15–16 (N.D. Cal. Oct. 16, 1995) (*unpublished*) (noting that transgender incarcerated person was permitted access to "female clothing and

Incarcerated people have used Section 1983 to challenge 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.[56] 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 for prison officials' decisions about how to oversee daily life in prison.[57]

Claims under the First Amendment generally fail when they come up against arguments by prisons that restrictions on dress, jewelry, and make-up are justified by legitimate penological interests.[58] "Penological interests" include any interest that relates to the treatment of people convicted of crimes (i.e., prison management). Several courts have noted that such deprivations are simply not of a constitutional nature.[59] Additionally, courts have held that different grooming regulations for male and female incarcerated people do not trigger an incarcerated person's equal protection rights.[60]

However, certain clothing and grooming restrictions can make gender dysphoria much worse when applied to transgender, gender-nonconforming, and other LGBTQ people. Prisons might violate the Eight Amendment if they don't let you have gender-appropriate clothing or grooming supplies (make-up and hair tools) or if they deny your request to present with your gender identity.[61]

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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).

[56] *See JLM*, Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law."

[57] *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), *superseded in part by statute*, 42 U.S.C. § 2000cc-1(a).

[58] *See*, *e.g.*, Star v. Gramley, 815 F. Supp. 276, 278–279 (C.D. Ill. 1993) (holding that restrictions on the clothing incarcerated people can wear are reasonably related to a legitimate penological interest and hence do not violate the 1st Amendment, and allowing the prison to prevent an incarcerated person from wearing women's makeup and apparel because the individual would be more vulnerable to attack if he dressed that way); 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 supposedly discouraged sexual assaults).

[59] 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))).

[60] *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).

[61] *See* Konitzer v. Frank, 711 F. Supp. 2d 874, 908–911 (E.D. Wis. 2010) (prison officials' denial of plaintiff's requests for makeup, women's undergarments, and facial hair remover might give rise to an 8th Amendment violation); Soneeya v. Spencer, 851 F. Supp. 2d 228, 246 (D. Mass. 2012) (prison officials' delay in providing female canteen items and clothing necessary for plaintiff's GID treatment constituted deliberate indifference). Other legal arguments for the right to gender expression in prisons have not been successful. *See, e.g.*, Lopez v. City of New York, No. 05 Civ. 10321, 2009 WL 229956, at *13 (S.D.N.Y. Jan. 30, 2009) (*unpublished*) (prison officials' refusal to allow plaintiff to wear women's clothing did not violate the equal protection clause of the 14th Amendment). *See also* ACLU, PRISON RAPE ELIMINATION ACT (PREA) TOOLKIT: END THE ABUSE - PROTECTING LGBTI PRISONERS FROM SEXUAL ASSAULT (Jan. 28, 2014), *available at* www.aclu.org/documents/prison-rape-elimination-act-prea-toolkit-end-abuse-protecting-lgbti-prisoners-sexual-assault (last visited Mar. 29, 2024).

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

If you are an LGBTQ incarcerated person, you may not have shared your sexual orientation or gender identity (if transgender, nonbinary, or gender-nonconforming) with 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."[62] 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 that the officer had violated his Eighth Amendment rights, and the officer filed a motion to dismiss the complaint.[63]

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, meaning that the case could go to trial.[64] The court held that the alleged behavior of the officer, the "physical harm" that the plaintiff was threatened with, and the psychological suffering that this abuse allegedly caused was enough harm for the plaintiff to make a claim of excessive force under the Eighth Amendment.[65]

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, a correctional officer harassing an incarcerated person and telling others the incarcerated person was a homosexual might be enough to show that the officer showed deliberate indifference to the incarcerated person's safety under the Eighth Amendment, especially if the prison officials did not take action to guarantee the incarcerated person's safety.[66]

(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

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[62] 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).

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

[64] 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).

[65] 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).

[66] *See* Flores v. Wall, No. CA 11-69 M, 2012 U.S. Dist. LEXIS 136668, at *41–42 (D.R.I. Aug. 31, 2012) (*unpublished*), (allowing a claim to go forward based on a corrections officer having spread rumors that the incarcerated person was gay and a snitch), *report and recommendation adopted*, 2012 U.S. Dist. LEXIS 139972 (D.R.I. Sept. 25, 2012).

immigration detention.[67] In 2012, the U.S. Department of Justice created guidelines to implement PREA, known as the PREA Standards.[68] While the PREA Standards do not allow an incarcerated person to sue if the standards are violated,[69] they do create a baseline to help show that your constitutional rights have been violated otherwise.

The PREA Standards provide some specific protections to gay, lesbian, bisexual, transgender, intersex, or gender-nonconforming 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.[70] This screening must consider whether the incarcerated person is (or could be thought to be) LGBTQ or gender-nonconforming, and prison facilities must consider this screening information to make individualized housing and program placements for all transgender and intersex individuals.[71] This process includes the assignment of transgender and intersex individuals to male or female facilities.[72]

Furthermore, if you do not plan to disclose your gender identity while in prison, the PREA Standards can help maintain privacy for incarcerated people. The PREA regulations do not allow any search that is done for the sole purpose of determining an individual's genital status. In addition, the PREA Standards require that transgender incarcerated people get access to a private shower if they ask for it. If this is not available, you can ask to either shower at a different time or in a more private area.[73] Many courts have also held that prison staff must do strip searches in a respectful, professional way—meaning that strip searches done in front of other incarcerated people may violate privacy rights.[74] There are also strict regulations on the use of protective custody. Protective custody refers to the separation of an incarcerated person from others for protection purposes.[75]

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 (sharing) of certain personal information.[76] Many other courts

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

[68] 28 C.F.R. §§ 115.5–115.501 (2023).

[69] 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 that 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.").

[70] 28 C.F.R. § 115.41(b) (2023); 28 C.F.R. § 115.241(b) (2023); 28 C.F.R. § 115.341(a) (2023).

[71] 28 C.F.R. § 115.41(b) (2023); 28 C.F.R. § 115.42 (2023).

[72] 28 C.F.R. § 115.42(c) (2023) ("In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems.")

[73] 28 C.F.R. § 115.42(f) (2023) ("Transgender and intersex inmates shall be given the opportunity to shower separately from other inmates.").

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

[75] 28 C.F.R. §115.43(a) (2023).

[76] *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

have also found that a constitutional right of privacy protects against disclosure of some kinds of personal information.[77] If a prison official shares private information about you, you could be subject to harassment or abuse by other officials or other 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 unjustified disclosure of other personal information (such as sexual orientation or gender identity).

(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 by disclosing their gender identity to others when that disclosure is not "reasonably related to legitimate penological interests."[78] 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 violated her constitutional right to privacy when the officer told another corrections officer, with other prison staff and incarcerated people around, that she had gender confirmation surgery (or gender reassignment surgery). The Second Circuit held that the corrections officer's "gratuitous disclosure" (unjustified sharing) 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.[79] 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 the court in *Powell* viewed the incarcerated person's transgender status as a medical condition, and did not focus on the sexual orientation of the incarcerated person.[80]

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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).

[77] *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 the 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 their 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 that people identified "must be afforded at least some protection against the non-consensual disclosure of their diagnosis").

[78] Powell v. Schriver, 175 F. 3d 107, 112 (2d Cir. 1999); *see also* Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987) (holding, in a case unrelated to gender identity, that a regulation that violates incarcerated people's constitutional rights is only valid if it is "reasonably related to legitimate penological interests").

[79] Powell v. Schriver, 175 F. 3d 107, 112 (2d Cir. 1999). Despite this finding, the *Powell* court ultimately decided in favor of the corrections officer because that officer was protected by qualified immunity. Qualified immunity shields government officials from liability for money damages because they perform 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)). 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 F. App'x 34, 35 (2d Cir. 2005) (*unpublished*) (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 someone 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 *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law."

[80] Powell v. Schriver, 175 F. 3d 107, 112 (2d Cir. 1999); *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.").

(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.[81] There is also at least one case containing a privacy claim brought by an incarcerated person specifically related to sexual orientation.[82] Cases like *Lawrence v. Texas* (where the Supreme Court held that sexual activity between people of the same sex was protected by the constitutional right to privacy)[83] have found a valid privacy claim for the disclosure of sexual orientation. However, most of these cases are decided outside of the prison context. And there are many limits to constitutional rights for incarcerated people, including limitations on privacy rights.[84]

3. Potential Obstacles to Suit

The Prison Litigation Reform Act ("PLRA") prohibits incarcerated people from making claims for emotional distress without related physical injury.[85] Therefore, a prison official's violation of your right to confidentiality would have to create a risk of serious harm to allow legal action 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.[86] For more information, review *JLM*, Chapter 14, "The Prison Litigation Reform Act," on the PLRA.

E. Assault and Harassment

1. Assault[87]

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 fellow incarcerated people, guards, or other prison staff. If you have experienced such assault, you

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

[82] *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).

[83] Lawrence v. Texas, 539 U.S. 558, 578, 123 S. Ct. 2472, 2484, 156 L. Ed. 2d 508, 525–526 (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).

[84] *See* Overton v. Bazzetta, 539 U.S. 126, 135–137, 123 S. Ct. 2162, 2169–2170, 156 L. Ed. 2d 162, 172–173 (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).

[85] 42 U.S.C. § 1997e(e).

[86] 28 C.F.R. § 115.72 (2023) (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 a jury verdict that found intentional infliction of emotional distress when an 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].").

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

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.[88]

You should read *JLM*, 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 by Prison Guards and Other Incarcerated People" 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.[89] Courts have hesitated to find constitutional violations when prison officials use force to maintain or restore security within the prison.[90] However, if there is no known reason for the force and it is simply meant to harm you, 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" (with intent to do harm), and (2) you suffered some physical injury.[91] This standard was explained by the Supreme Court in *Hudson v. McMillian* and is known as the "*Hudson* standard."[92]

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

(1) The extent of the injury suffered;[93]
(2) The need for the official to have used force under the circumstances;
(3) The comparison 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 reduce the severity of a serious use of force.[94]

Under the *Hudson* standard, you do not need to show you suffered a 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

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[88] 42 U.S.C. § 1983; *see also* ACLU, PRISON RAPE ELIMINATION ACT (PREA) TOOLKIT: END THE ABUSE - PROTECTING LGBTI PRISONERS FROM SEXUAL ASSAULT (Jan. 28, 2014), *available at* www.aclu.org/documents/prison-rape-elimination-act-prea-toolkit-end-abuse-protecting-lgbti-prisoners-sexual-assault.

[89] U.S. CONST. amend. VIII.

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

[91] 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.").

[92] 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. *See* Kingsley v. Hendrickson, 576 U.S. 389, 395–398, 135 S. Ct. 2466, 2472–2473, 192 L. Ed. 2d 416, 425–428 (2015).

[93] 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)).

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

unusual punishment. Also, the Prison Litigation Reform Act (PLRA)[95] does not allow legal action for emotional distress without some physical injury. In addition, the PREA Standards 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.[96] 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 legal claim you are bringing. That said, again, you cannot sue for this violation alone.[97]

(b) Assault by Other Incarcerated People

If you have been attacked or feel at risk of attack by fellow incarcerated people, you may bring suit under Section 1983. You may claim that prison officials who failed to protect you violated your Eighth Amendment right to be free from cruel and unusual punishment.[98]

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 showed "deliberate indifference" to your health or safety by ignoring an excessive risk to you; and (2) the injury you suffered was severe.[99]

Deliberate indifference is a standard that is harder to meet than *negligence*, but not as difficult as the standard of "malicious and sadistic intent."[100] "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.[101] In this case, the Supreme Court defined "deliberate indifference" as the failure of prison officials to act when they know of a "substantial risk of serious harm."[102] The Court went on to say that an "inference from circumstantial evidence" could be used to show that prison officials had knowledge of a risk.[103] "Circumstantial evidence" is evidence that indirectly supports 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

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[95] 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 *JLM*, Chapter 14, "The Prison Litigation Reform Act," for more information on the PLRA and its requirements.

[96] 28 C.F.R. § 115.72 (2022).

[97] *See* De'Lonta v. Clarke, No. 7:11-cv-00483, 2013 U.S. Dist. LEXIS 5354, at *7–8 (W.D. Va. Jan. 14, 2013) (*unpublished*) (collecting cases stating that PREA does not "create a private right of action for inmates to sue prison officials for noncompliance with [PREA]").

[98] *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).

[99] *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 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 be aware of facts that could help draw the inference that a substantial risk of serious harm exists, and the official must also draw that inference).

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

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

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

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

complaints from the incarcerated person) that shows this risk. Circumstantial evidence should show that the official *actually knew* of something that he denies knowing.[104]

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 (taken away) your rights under the Eighth Amendment. Your status as gay, lesbian, bisexual, transgender, intersex, or gender-nonconforming 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.[105] 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.[106] 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.[107]

Although it may be easier to prove you are at risk if you are an LGBTQ incarcerated person, if you are comfortable doing so, 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 by prison officials.[108] Reporting any threats can help show that there is a substantial risk.

If you've suffered sexual assault, you don't need to file a grievance within the normal time limits. But because other legal time limits might apply, it's best to file an appeal through every level so you can protect your ability to bring a lawsuit. If you file a complaint in court, 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 moved 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 know that, under the PLRA, any temporary injunction that a court grants you is likely to expire before your case is resolved. You may also file a temporary restraining order asking for safe housing. If you are a transgender woman, you can ask to be housed in a woman's facility.[109] The Prison

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[104] 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 known of your risk. Farmer v. Brennan, 511 U.S. 825, 842, 114 S. Ct. 1970, 1981, 128 L. Ed. 2d 811, 828 (1994) ("[I]t is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm."). 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."

[105] As a reminder, prison officials are required to screen individuals within seventy-two hours of intake to determine their risk of sexual victimization, or abuse, including whether an individual is likely LGBTQ+. *See, e.g.*, 28 C.F.R. § 115.41(b) (2023); 28 C.F.R. § 115.241(b) (2023); 28 C.F.R. § 115.341(a) (2023).

[106] 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.

[107] 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.

[108] *See* Purvis v. Ponte, 929 F. 2d 822, 825–826 (1st Cir. 1991) (*per curiam*) (stating there was no 8th Amendment violation 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 that threat of violence was likely and officials tried six different cellmates).

[109] *See* 28 C.F.R. § 115.42(c) (2023) (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").

Rape Elimination Act (PREA) Standards not only require prisons to make individualized housing and program placement decisions, but also require prison staff to look at housing and program assignments at least twice a year to review them for safety threats and to consider an incarcerated person's own view of their own safety.[110]

Because the PLRA also prevents incarcerated people from suing for emotional or mental distress if they do not also have a 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 *JLM*, Chapter 14, "The Prison Litigation Reform Act," and *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law" to do so.

2. Sexual Abuse

Sexual abuse includes rape and unwanted physical contact of a sexual nature, such as fondling (touching) someone else's breasts and/or genitals.[111] Generally, bringing a Section 1983 suit for sexual abuse in prison requires analyzing whether an Eighth Amendment violation occurred.[112] For example, if a prison official sexually abuses you, you must show that the prison official acted maliciously (with the intent to do harm) and that you suffered harm.[113] Under PREA, the "harm" element is interpreted broadly—meaning many results could qualify as "harm."[114] Even though PREA interprets "harm" broadly, neither PREA nor the PREA Standards allow an incarcerated person to sue for such a violation under their regulations.[115] While violations of the PREA Standards are not directly enforceable, showing a PREA "harm" occurred may support another claim that you bring.

You can show sexual abuse by proving that the degree of assault violates "contemporary standards of decency," meaning the modern acceptable way of behaving.[116] With sexual assault cases, the contemporary standards of decency are often judged based on what the state law might say about sexual contact between incarcerated people and prison employees, and whether psychological harm

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[110] *See* 28 C.F.R. § 115.42(d)–(e) (2023).

[111] *See* 28 C.F.R. § 115.6 (2023).

[112] *See, e.g.*, 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. *See* N.Y. PENAL LAW § 130.05(3)(e)–(f). This means that in New York, if you bring a claim against a prison official alleging that he engaged in sexual activity with you, the official cannot defend himself by claiming that you consented.

[113] *See* Hudson v. McMillian, 503 U.S. 1, 9, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992) ("When prison officials maliciously . . . use force to cause harm, contemporary standards of decency always are violated."). *But see* Freitas v. Ault, 109 F.3d 1335, 1339 (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").

[114] *See* 28 C.F.R. § 115.6(4) (2023) ("Sexual abuse includes . . . [a]ny 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).

[115] *See* Peterson v. Burris, No. 14-CV-13000, 2016 U.S. Dist. LEXIS 853, at *4 (E.D. Mich. Jan. 6, 2016) (*unpublished*) (compiling a list of courts which have found that "PREA does not provide incarcerated people with a private right of action").

[116] *See* Hudson v. McMillian, 503 U.S. 1, 8, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992) (stating that the objective component of the 8th Amendment analysis, which determines whether the alleged wrongdoing is objectively harmful enough to violate the Constitution, is based on "contemporary standards of decency," regardless of whether significant injury is evident); 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").

was intentionally inflicted, or whether the assault was "offensive to human dignity."[117] See Appendix B of this Chapter for more information on state laws and LGBTQ incarcerated people.

Physical assault is easier to prove because you can show that the prison official acted maliciously and sadistically, so you have automatically proven that it violates contemporary standards of decency.[118] Courts have different ways of thinking about the subjective prong (a test that focuses on a specific prison guard's state of mind during the assault) and analyzing whether a prison guard acted maliciously. If another incarcerated person assaulted you, you need to show that prison officials acted with deliberate indifference in your protection, knowing and disregarding your safety, and that you suffered harm.[119]

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.[120] Additionally, under the 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.[121] Any sexual contact between incarcerated people without consent is sexual abuse.[122] 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.[123] In addition to these federal laws, many states also have laws criminalizing sexual contact between prison officials and incarcerated people.[124] See *JLM*, Chapter 24, "Your Right to Be Free from Assault by Prison Guards and Other Incarcerated People," 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.[125] Federal courts have recognized that

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[117] *See, e.g.*, Rodriguez v. McClenning, 399 F. Supp. 2d 228, 237 (S.D.N.Y. 2005) ("Developments in states' laws . . . indicate that contemporary standards of decency have evolved to condemn the sexual assault of prison inmates by prison employees."); Turner v. Huibregtse, 421 F. Supp. 2d 1149, 1151 (D. Wis. 2006) (stating that an incarcerated person must show that sexual contact was "conducted in a harassing manner intended to humiliate and inflict psychological pain" (quoting Calhoun v. DeTella, 319 F.3d 936, 939 (7th Cir. 2003))); Schwenk v. Hartford, 204 F.3d 1187, 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.").

[118] *See* Wilkins v. Gaddy, 559 U.S. 34, 37, 130 S. Ct. 1175, 1178, 175 L. Ed. 2d 995 (2010) ("When prison officials maliciously and sadistically use force to cause harm . . . contemporary standards of decency always are violated . . . ." (quoting Hudson v. McMillian, 503 U.S. 1, 9, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992))).

[119] *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).

[120] 18 U.S.C. § 2243(b)–(c).

[121] *See* 28 C.F.R. § 115.6 (2023).

[122] 28 C.F.R. § 115.6 (2023).

[123] 18 U.S.C. § 2241.

[124] 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. For more information, see Section C(6) ("State Law") of *JLM*, Chapter 24, "Your Right to be Free from Assault by Prison Guards and Other Incarcerated People."

[125] *See* Allen J. Beck, Marcus Berzofsky, Rachel Caspar & Christopher Krebs, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12*, DEPT. OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT. 18–19 (2013) *available at* https://bjs.ojp.gov/content/pub/pdf/svpjri1112.pdf (last visited Mar. 23, 2024).

sexual harassment of incarcerated people by prison staff can be a constitutional "tort"[126] violating incarcerated people's Eighth Amendment right to be free from cruel and unusual punishment.[127] An incarcerated person can state an Eighth Amendment claim for sexual harassment only if the alleged harassment is so harmful that it could be as violating "the evolving standards of decency," of society and only if the defendant acted with intent to harm the incarcerated person.[128] As explained below in Subsection E(3)(b) ("Verbal Harassment"), 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 physical safety.[129]

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 or the commission of a sexual act."[130] Many courts have interpreted this to mean that you cannot receive money damages for sexual harassment unless the harasser physically hurt you or sexually assaulted you.[131] But other sorts of relief, like "injunctions" (where the court orders someone to stop or start some action other

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[126] A "tort" is a wrongful act or omission that the victim of which can go to civil court for, like if someone physically hurts you or doesn't protect you when they have a legal duty to do so. Someone harmed by a tort can sue the government or individual who committed the tort, usually for money.

[127] *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, 1206 (9th Cir. 2000) (holding that a transgender incarcerated woman's 8th Amendment rights were violated by a guard's attempted rape, which constituted sexual assault offensive to human dignity); 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). *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 generally* 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).

[128] Thomas v. District of Columbia, 887 F. Supp. 1, 3–4 (D.D.C. 1995) (citing Hudson v. McMillian, 503 U.S. 1, 8, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992)).

[129] 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 presumption is 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, 1206 (9th Cir. 2000) (holding that a transgender incarcerated woman's 8th Amendment rights were violated by a guard's attempted rape, which constituted sexual assault offensive to human dignity); Berry v. Oswalt, 143 F.3d 1127, 1131, 1133 (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 nonroutine patdowns on her, had propositioned her for sex, had intruded upon her while she was not fully dressed, and had subjected her to sexual comments").

[130] 42 U.S.C. § 1997e(e); *see also* 18 U.S.C. § 2246 (defining a "sexual act" for the purpose of the rule).

[131] 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); 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).

than the payment of money damages), may be available to you.[132] For this reason it is important to learn about the PLRA, especially its physical injury requirement, before you file a suit.[133]

Nevertheless, for administrative investigations (investigations done by prison officials) evidence of physical injury is not required to show sexual harassment.[134]

(b) Verbal Harassment

Incarcerated people who try to sue based on only verbal harassment (harassment with words) face two difficulties: (1) an interpretation of the Eighth Amendment's prohibition of cruel and unusual punishment that does not allow 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.[135] So, claims by incarcerated people against prison staff for harassment that only involved words generally do not succeed.[136]

Even where incarcerated people have alleged valid Eighth Amendment violations, courts have often determined that the PLRA blocks the lawsuits if there is not a physical injury.[137] For instance, harassment by prison staff has been found to violate the Eighth Amendment when it includes threats of attack with a lethal weapon.[138] However, where there is no physical injury, some courts have determined that these cases are blocked by the PLRA's physical injury requirement.[139] Also, some

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[132] Multiple courts 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).

[133] *See JLM*, Chapter 14, "The Prison Litigation Reform Act."

[134] *See* 28 C.F.R. §§ 115.71, 115.72 (2023) (governing federal investigations). State administrative investigations may vary, and some may require evidence of a physical injury.

[135] *See, e.g.*, Adkins v. Rodriguez, 59 F.3d 1034, 1037 (10th Cir. 1995) (holding that a jail deputy who had made comments to a female 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.").

[136] *See* DeWalt v. Carter, 224 F.3d 607, 612 (7th Cir. 2000) (finding that a guard's use of sexually explicit and 1997racially 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"). *But see* 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 incarcerated people, the likelihood of subsequent sexual assault and psychological damage increased); *JLM*, Chapter 24, "Your Right to be Free from Assault by Prison Guards and Other Incarcerated People," Subsection B(4)(b) ("Verbal Harassment with Physical Threats") (citing cases holding that incarcerated people may get certain types of money damages for psychological injury inflicted by prison staff).

[137] *See, e.g.*, Brooks v. Warden, 800 F.3d 1295, 1298 (11th Cir. 2015) ("Because Brooks has not alleged any physical injury resulting from his hospital stay, under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(e), he cannot recover compensatory or punitive damages."); DeMoss v. Crain, 636 F.3d 145, 151 (5th Cir. 2011) (stating compensatory damages for religious deprivation claim are "barred by 42 U.S.C. § 1997e(e) because [plaintiff] has not alleged any physical injury stemming from the cell restriction policy"); Brazil v. Rice, 308 F. App'x 186, 187 (9th Cir. 2009) (*unpublished*) ("The district court properly dismissed the Eighth Amendment claim because the amended complaint does not allege that Brazil suffered any physical injury."); Harden-Bey v. Rutter, 524 F.3d 789, 795–796 (6th Cir. 2008) ("Even if we read his complaint to allege emotional or mental injuries, Harden-Bey cannot bring an Eighth Amendment claim for such injuries because he did not allege a physical injury. See 42 U.S.C. § 1997e(e). . . ."); Allah v. Al-Hafeez, 226 F.3d 247, 250 (3d Cir. 2000) ("Under § 1997e(e), however, in order to bring a claim for mental or emotional injury suffered while in custody, a prisoner must allege physical injury. . . ."); Robinson v. Page, 170 F.3d 747, 748–749 (7th Cir. 1999) (holding that actions or claims asserting mental or emotional injury should be dismissed if physical injury is not pled).

[138] *See, e.g.*, Northington v. Jackson, 973 F.2d 1518, 1524–1525 (10th Cir. 1992) (finding some forms of verbal threats can inflict cruel and unusual punishment when they involve brandishing a lethal weapon).

[139] *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).

courts have held the PLRA blocks the recovery of money damages even in cases where harassing language or threats also include groping or abusive touching.[140]

F. Housing and Protective Custody

1. Housing Issues for Transgender Incarcerated People[141]

Like most other institutions, prisons are built around the incorrect 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 cause difficulties for transgender, nonbinary, intersex, and gender-nonconforming incarcerated people, as the overwhelming majority of prisons recognize only two genders and segregate male from female incarcerated people.

The PREA Standards require housing decisions to be made on an individual basis, taking into consideration the health and safety of the incarcerated person, as well as any management and security concerns.[142] Furthermore, prison staff cannot make housing decisions based only on an incarcerated person's LGBTQ status.[143] If you experience a violation of these policies, the prison is required to allow you to report the incident to the agency involved and to a public or private third-party agency.[144]

There have been some cases where transgender and gender-nonconforming people have been able to challenge the policy of housing incarcerated people based on their gender assigned at birth. In *Shaw v. District of Columbia*, a transgender woman who was housed with male incarcerated people filed a lawsuit. The suit resulted in a settlement requiring the Washington, D.C. Police Department to change its classification policy for detainees so that transgender people will be classified based on the gender listed on their ID.[145] However, the Supreme Court has directly held that incarcerated people do not have a constitutional right to choose their place of confinement.[146] 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.[147]

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[140] *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).

[141] 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 women. This, of course, does not mean that female-to-male (FTM) transgender men do not face challenges while incarcerated. If you are a transgender man who is incarcerated 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.

[142] 28 C.F.R. § 115.42(c) (2023).

[143] *See* 28 C.F.R. § 115.42(g) (2023) ("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."); 28 C.F.R. § 115.342(c) (2023) ("Lesbian, gay, bisexual, transgender, or intersex residents shall not be placed in particular housing, bed, or other assignments solely on the basis of such identification or status, nor shall agencies consider lesbian, gay, bisexual, transgender, or intersex identification or status as an indicator of likelihood of being sexually abusive.").

[144] *See* 28 C.F.R. § 115.51 (2023) (information on reporting sexual abuse or harassment, including housing-related violations).

[145] Shaw v. District of Columbia, 944 F. Supp. 2d 43 (D.D.C. 2013). For a concise discussion of this case, see *Shaw v. District of Columbia*, ACLU DIST. OF COLUMBIA, *available at* https://www.acludc.org/en/cases/shaw-v-district-columbia (last visited Mar. 23, 2024).

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

[147] *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

2. Segregation and Protective Custody

State prisons may not segregate LGBTQ incarcerated people from the general prison population unless an incarcerated person asks for this or a court order requires such separation.[148] 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 are often horrible.

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.[149]

(a) Getting Into Protective Custody

If you have been placed in general population and have experienced an attack or threat of attack there, you can request to be transferred into protective custody through administrative channels.[150] 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.[151]

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 IGNORED that risk by not taking reasonable action to stop it.[152] 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.

Not many Section 1983 suits about the failure to house an incarcerated person in protective custody have been brought by LGBTQ incarcerated people. However, several courts have recognized

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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] 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 *JLM*, Chapter 31, "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.

[148] 28 C.F.R. § 115.42(g) (2023).

[149] The New York City prison system, for example, provides separate housing for gay incarcerated people. Darren Rosenblum, *"Trapped" in Sing Sing: Transgender Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 524 (2000); *see also* Falls v. Nesbitt, 966 F.2d 375, 376 (8th Cir. 1992) (describing a "special section of the prison reserved for those prisoners who are slight of build, physically weaker than the typical inmate, preyed upon, or, in many cases, homosexuals").

[150] See *JLM*, Chapter 31, "Security Classification and Gang Validation," for more information on requesting protective custody. *See also* State of New York, Department of Corrections and Community Supervision, New York City Department of Correction Inmate Handbook 9 (2007), *available at* https://www.nyc.gov/assets/doc/downloads/pdf/inmate_hand_book_english.pdf (last visited Feb. 4, 2024).

[151] 28 C.F.R. § 115.43(b) (2023).

[152] Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994). See *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law," for more information about Section 1983 and the deliberate indifference standard.

the vulnerability of incarcerated people who do not fit within traditional gender norms.[153] The *Farmer* Court's extensive discussion of the meaning of "deliberate indifference," however, may make it easier to win your claim.[154] In the past, 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, thus strengthening the deliberate indifference argument of LGBTQ incarcerated people,[155] although such a practice is now far less common. Still, 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 *JLM*, Chapter 16, "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 can be worse than those in general population.[156] If segregation makes you ineligible for certain work details 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.[157]

If you have been placed in segregation and wish to be housed among the general population, you may request a transfer through administrative channels.[158] The PREA Standards state that you cannot be segregated involuntarily for more than 30 days, and prison officials may involuntarily segregate only until an alternative arrangement, away from your abuser, can be found.[159] If your request is 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).

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[153] *See, e.g.*, 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); 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"). For more information, see *JLM*, Chapter 24, "Your Right To Be Free from Assault by Prison Guards and Other Incarcerated Persons," and Section E(1) ("Assault") of this Chapter.

[154] *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).

[155] The U.S. Sentencing Guidelines are advisory guidelines that help judges' decisions in sentencing for federal crimes. Before 2005, the Guidelines were mandatory. Even during that time, federal courts sometimes reduced sentences when sentencing defendants known to be LGBTQ or who might be perceived to be LGBTQ, in order to protect these defendants from prison abuse. *See* 18 U.S.C. app. § 5H1.4 (permitting downward departure from the sentencing guidelines when prison would pose a serious threat to an individual because of their physical condition or appearance); United States v. Gonzalez, 945 F.2d 525, 525–526 (2d Cir. 1991); *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).

[156] Davis v. Ayala, 576 U.S. 257, 286–290, 135 S. Ct. 2187, 2208–2210, 192 L. Ed. 2d 323, 344–347 (2015) (Kennedy, J., concurring) (emphasizing the terrible conditions of solitary confinement).

[157] If you are in protective custody and believe you are being denied proper medical treatment, read *JLM*, Chapter 23, "Your Right to Adequate Medical Care." 28 C.F.R. § 115.43(b)(1)–(3) (2023).

[158] The specifics of requesting a transfer likely depend on your state and facility. Section B(8) of *JLM*, Chapter 31, "Security Classification and Gang Validation," provides a brief explanation of administrative options in a different context.

[159] 28 C.F.R. § 115.43(c) (2023).

Courts have held involuntary segregation—even for non-punishment reasons—does not infringe on a liberty interest except in certain circumstances.[160] For example, in a Seventh Circuit case, the court noted that, while it sympathized with the incarcerated person's desire not to be segregated, it had to take into account the lack of available alternatives to keep the incarcerated person safe.[161] However, given the attention around the Supreme Court case *Davis v. Ayala*, the conditions of solitary confinement are being re-examined.[162]

(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 protective 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).[163]

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. Many of these policies define "family" narrowly, so LGBTQ incarcerated people whose partners or other non-biological family members wish to visit them in prison may face special difficulties. Unfortunately, incarcerated people do not have an absolute right to visitation.[164] If the prison has a legitimate goal rationally related to the functioning of the prison, it can place limitations on visitation or exclude visitation altogether. Legitimate goals include the rehabilitation of incarcerated people and, most importantly, prison security.[165] But, a prison official cannot simply state that limitations on your visitation privileges serve security or rehabilitation purposes; the officials must show that the visitation policies *actually* help accomplish

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[160] *See, e.g.*, Sandin v. Conner, 515 U.S. 472, 501, 115 S. Ct. 2293, 2309, 132 L. Ed. 2d 418, 441 (1995) (finding that "discipline in segregated confinement did not present" an "atypical, significant deprivation" such that it would sustain a constitutional claim); Martin v. Scott, 156 F.3d 578, 580 (5th Cir. 1998) (holding that, "absent extraordinary circumstances, administrative segregation as such, being an incident to the ordinary life of a 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)); *see also JLM*, Chapter 18, "Your Rights at Prison Disciplinary Hearings."

[161] 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.").

[162] *See* Davis v. Ayala, 576 U.S. 257, 135 S. Ct. 2187, 192 L. Ed. 2d 323 (2015).

[163] *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) ("Serious Medical Need, Deliberate Indifference, and Access to Hormonal Treatment") of this Chapter. *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).

[164] *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"). See Part B(1) ("Equal Protection") of this Chapter for an explanation of the way *Turner* has courts evaluate whether a constitutional right should be upheld in prison.

[165] Overton v. Bazzetta, 539 U.S. 126, 132, 123 S. Ct. 2162, 2167, 156 L. Ed. 2d 162 (2003) (finding that prison administrators decide the "legitimate goals of a corrections system and [so] determin[e] the most appropriate means to accomplish them").

the goals they claim and that incarcerated people are given adequate procedural safeguards.[166] For example, *Thompson* shows that a prison visitation regulation must be written in such a way that makes 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.[167] 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.[168] Although visitation policies vary across states and state policies are different from the policies in federal prisons, the justifications for visitation policies are similar everywhere.

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.[169] 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) other types of approved visitors (friends/associates, religious group members, sponsors, and attorneys).

Members of your immediate family include your parents (including step-parents and foster parents), your spouse, your siblings, 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" justifying the exclusion.[170] The prison must have a specific reason for excluding a relative who is not a member of your immediate family (including aunts, uncles, in-laws, grandparents, and cousins).[171] 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."[172]

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 decisions in *Windsor* and *Obergefell* make clear that government policies that refuse to recognize the marriages of same-sex couples are unconstitutional.[173] This means your spouse should be qualified as an immediate family member.

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.[174]

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. In the past, prison officials have generally given two reasons for strict visitation policies for LGBTQ

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[166] *See* Ky. 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).

[167] Ky. Dept. of Corr. v. Thompson, 490 U.S. 454, 465, 109 S. Ct. 1904, 1911, 104 L. Ed. 2d 506, 518 (1989).

[168] Overton v. Bazzetta, 539 U.S. 126, 132, 123 S. Ct. 2162, 2168, 156 L. Ed. 2d 162, 170 (2003) (finding that, 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).

[169] 28 C.F.R. § 540.44 (2023); Fed. Bureau of Prisons, Program Statement 540.44, Visiting Regulations (Dec. 10, 2015), *available at* https://www.bop.gov/policy/progstat/5267_09.pdf (last visited Mar. 24, 2024) (stating that if an incarcerated person wants to receive regular visitors, he must submit a list of proposed visitors to the staff).

[170] 28 C.F.R. § 540.44(a) (2023).

[171] 28 C.F.R. § 540.44(b) (2023).

[172] 28 C.F.R. § 540.44(c) (2023).

[173] United States v. Windsor, 570 U.S. 744, 775, 133 S. Ct. 2675, 2695–2696, 186 L. Ed. 2d 808, 830 (2013); *see* Obergefell v. Hodges, 576 U.S. 644, 681, 135 S. Ct. 2584, 2607–2608, 192 L. Ed. 2d. 609, 635 (2015) (legalizing same-sex marriages in the United States).

[174] 28 C.F.R. § 540.44 (2023).

incarcerated people. The first reason was rehabilitation. Since sex between same-sex partners 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 no longer acceptable.[175] *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 LGBTQ incarcerated people's visitation is 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 LGBTQ incarcerated person up to possible violence and retribution.[176] While this justification has worked in other contexts (with the right to receive LGBTQ literature—see Part H of this Chapter), courts have often sided less with 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.[177] 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."[178] The court found that the prison policy was not reasonably related to security concerns, which meant 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.[179] 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 self-labeled as gay—or was at least willing to be so labeled.[180] 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.

2. New York Visitation Policies

While this section focuses on New York visitation policies, see Appendix B for an overview of other state laws related to LGBTQ incarcerated people and Appendix A for a list of legal resources that might help with state-specific issues. New York State's visitation policies are very similar to those of the federal government, but include some key 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

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[175] Lawrence v. Texas, 539 U.S. 558, 578, 123 S. Ct. 2472, 2483, 156 L. Ed. 2d 508, 525 (2003).

[176] *But 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).

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

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

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

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

is reason to believe that "such action is necessary to maintain the safety, security, and good order of the facility."[181] During the COVID-19 pandemic, this meant that visitors were required to wear masks, show proof of vaccination, and complete a temperature screening and questionnaire, and no physical contact was allowed.[182] This policy might be constantly changing, and we recommend that you check the citation link for the most up-to-date information regarding the COVID-19 pandemic.

Also, like federal prisons, New York prisons require that the incarcerated person agree to the visit of a first-time visitor.[183] These visitors will be admitted if you agree to their visits, unless prison officials can show some legitimate security reason for excluding them.[184] 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 for prison officials to stop the visit.[185]

New York prisons generally allow physical contact between incarcerated people and visitors.[186] This contact can involve a small amount of kissing, hugging, and handholding (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.[187] 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, especially given recent updates in law such as *Obergefell* and *Lawrence v. Texas*.[188]

(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.[189] The program applies to close relatives (children, parents or step-parents, guardians, and grandparents) and spouses who are in legal marriages, including marriages to same-sex partners.[190]

(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.[191] This not only means that your domestic partner can visit you under the same rules as married couples but also that

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[181] N.Y. COMP. CODES R. & REGS. tit. 7, § 201.4(a) (2023).

[182] Kate Lisa, HudsonValley360, DOCCS mandates COVID tests, vaccination for prison visitors (Dec. 23, 2021), *available at* https://www.hudsonvalley360.com/news/nystate/doccs-mandates-covid-tests-vaccination-for-prison-visitors/article_6edab884-19b6-567d-b642-496892c34084.html (last visited Mar. 24, 2024). *See* State of New York, Department of Corrections and Community Supervision, COVID-19 Report, *available at* https://doccs.ny.gov/doccs-covid-19-report (last visited Mar. 24, 2024), for the most recent regulations.

[183] N.Y. COMP. CODES R. & REGS. tit. 7, § 201.2(a)(1) (2023).

[184] N.Y. COMP. CODES R. & REGS. tit. 7, § 201.4(a) (2023).

[185] *See* Doe v. Sparks, 733 F. Supp. 227, 234 (W.D. Pa. 1990) (striking down prison policy against visits by incarcerated people's 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).

[186] N.Y. COMP. CODES R. & REGS. tit. 7, § 201.3(i) (2023).

[187] N.Y. COMP. CODES R. & REGS. tit. 7, § 201.3(i) (2023).

[188] N.Y. COMP. CODES R. & REGS. tit. 7, § 201.3(i) (2023). *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).

[189] N.Y. COMP. CODES R. & REGS. tit. 7, § 220.1 (2023).

[190] N.Y. COMP. CODES R. & REGS. tit. 7, § 220.5(a) (2023).

[191] Admin. Code of the City of N.Y. 3-240 (2015).

domestic partners may visit other family members (which includes your parents, spouse, and children) in the same way that spouses may.

Very little case law involving the Domestic Partnership Law exists. This may be because 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.[192]

H. Right to Receive LGBTQ Literature[193]

Under *Thornburgh v. Abbott*, prisons may restrict your right to receive publications that may cause a threat to the daily operation of the prison.[194] 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.[195] 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."[196] After *Thornburgh*, 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. 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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[192] *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).

[193] 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."

[194] 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.

[195] 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 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.

[196] 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); Willson v. Buss, 370 F. Supp. 2d 782, 784–787 (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, 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 challenging this conduct on equal protection grounds.[197] 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. 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.[198]

The Bureau of Prison Program Statement on incoming publications does not single out same-sex materials in the list of types of sexually explicit material the warden may reject.[199] 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.[200] 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.[201] The New Hampshire Department of Corrections Policy and Procedure Directive has since updated its policy, removing the prohibition against "representations of homosexual acts."[202] See Appendix B for additional information on state law and censorship in prisons.

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:

> Sexually 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

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[197] *See, e.g.*, 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"); 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).

[198] *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).

[199] *See* Fed. Bureau of Prisons, U.S. Dept of Just., Program Statement 5266.11, Incoming Publications (2011), *available at* https://www.bop.gov/policy/progstat/5266_011.pdf (last visited Mar. 24, 2024).

[200] *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).

[201] 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).

[202] N.H. CODE ADMIN. R. ANN. Cor 301.05(j) (2016).

> admitted unless they are otherwise a threat to legitimate institution interests.[203]

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 by federal prisons is not allowed and can be challenged. It is worth mentioning that publishers also have First Amendment rights that protect subscribers' ability to receive publications in prison. Unlike incarcerated people, publishers are not subject to the Prison Litigation Reform Act and its exhaustion procedures and fee caps. Thus, they can 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 people.

(b) State Prisons

Your right to receive non-sexually explicit LGBTQ publications in state prisons is less clear and possibly weaker than the right in the federal context.[204] 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.[205]

I. Important Cases

This Part is designed to give you a sense of the most significant cases that courts look to when deciding cases about LGBTQ incarcerated people's rights.

1. United States v. Windsor

In June 2013, the U.S. Supreme Court ruled that the federal government cannot discriminate against married LGBTQ couples for purposes of giving government benefits and protections. As a result, all same-sex couples could get official recognition of their marriages by the government and additional benefits of marriage that are part of the law. Studies showed that more LGBTQ people married after *Windsor* than before.[206]

Windsor might not have an obvious impact on you if incarcerated, but this case had a major impact on LGBTQ people. Perhaps most significantly, government benefits and protections cannot be refused to you if you are in a same-sex marriage or partnership.

2. Obergefell v. Hodges

Obergefell v. Hodges is an important civil rights case in which the Supreme Court ruled that the fundamental right to marry is guaranteed to same-sex couples by the U.S. Constitution. *Obergefell* requires all states to issue marriage licenses to same-sex couples and recognize same-sex marriages performed in other states or locations.

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[203] Fed. Bureau of Prisons, U.S. Dept of Just., Program Statement 5266.11, Incoming Publications 2 (2011), *available at* https://www.bop.gov/policy/progstat/5266_011.pdf (last visited Mar. 24, 2024).

[204] *See, e.g.*, 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).

[205] 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 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").

[206] M.V. Lee Badgett & Christy Mallory, *The Windsor Effect on Marriage by Same Sex Couples*, UCLA SCH. L. WILLIAMS INST. (Dec. 2014), *available at* https://williamsinstitute.law.ucla.edu/publications/windsor-effect-marriage-ss-couples/ (last accessed on Mar. 24, 2024).

Obergefell fully legalized marriage equality in 13 states, while LGBTQ marriage was previously legal in the other 37 states. Same-sex spouses have the same rights and benefits as other couples, including emergency medical decision-making power, access to spouse benefits, and spousal testimonial privilege. If you have questions about what the *Obergefell* ruling means for you while incarcerated, or you believe your rights are being violated because you are LGBTQ, see the list of legal resources in Appendix A to assist you in those matters.

3. Bostock v. Clayton County

In the June 2020 case *Bostock v. Clayton County*, the U.S. Supreme Court recognized that sex discrimination includes discrimination based on sexual orientation or transgender status.[207] The Court found that an employer violates the Civil Rights Act of 1964 when it intentionally fires an employee based in part, on sex.[208] A person's sexuality or gender identity requires an employer to intentionally treat employees differently based on their sex. Therefore, the Court ruled that firing an employee for being gay or transgender violates Title VII of the Civil Rights Act.[209]

While the decision may not have an immediate practical impact on you or your conditions of confinement, the *Bostock* decision has already had major consequences. For example, Bostock has already impacted education and healthcare. Additionally, forty-nine out of fifty states have anti-discrimination laws that cover either "sex" or "gender" and *Bostock* has significantly impacted the enforcement of those laws.[210] Many state laws offer stronger anti-discrimination protection than federal law under Title VII. Eventually, *Bostock* might become applicable to state prison conditions and other conditions of confinement.

J. Conclusion

Being lesbian, gay, bisexual, transgender, nonbinary, gender-nonconforming, or intersex can make the experience of incarceration especially hard, and the lack of consistent case law involving incarcerated people who are LGBTQ may make you cautious in bringing a claim due to uncertainty about how a court will rule on it. Contact the legal organizations in Appendix A 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.

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[207] Bostock v. Clayton County, 590 U.S. 644, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020).

[208] Bostock v. Clayton County, 590 U.S. 644, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020)

[209] Bostock v. Clayton County, 590 U.S. 644, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020)

[210] Tarrant Cnty. Coll. Dist. v. Sims, 621 S.W.3d 323, 329 (Tex. App. 2021) ("In order to reconcile and conform the TCHRA with federal anti-discrimination and retaliation laws under Title VII, we conclude we must follow *Bostock* and read the TCHRA's prohibition on discrimination 'because of. . .sex' as prohibiting discrimination based on an individual's status as a homosexual or transgender person.").

Appendix A

ORGANIZATIONS SERVING LGBTQ+ INCARCERATED PEOPLE

These organizations are dedicated to supporting LGBT people. Most are available to help you nationwide and some are specific to certain locations. If the organization is not nationwide, the state served is in parentheses.

ACLU Lesbian, Gay, Bisexual, Transgender Project
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
https://www.aclu.org/issues/lgbtq-rights

Gay & Lesbian Advocates & Defenders
18 Tremont, Suite 950
Boston, MA 02108
Phone: (617) 426-1350
Hotline: 1-800-455-GLAD (1-800-455-4523)
https://www.glad.org/

Gay Men's Health Crisis (NY)
For HIV-positive people
307 West 38th Street
New York, NY 10018
Phone: (212) 367-1000
Hotline: 1-800-AIDS-NYC (1-800-243-7692)
Legal Services and Advocacy: (212) 367-1326
https://www.gmhc.org/

Immigration Equality (NY)
For LGBTQ and HIV-positive immigrants
40 Exchange Place, Suite 1300
New York, NY 10005
(212) 714-2904
https://immigrationequality.org/

Lambda Legal Defense & Education Fund
https://www.lambdalegal.org/

National Headquarters
120 Wall Street, 19th Floor
New York, NY 10005
Phone: (212) 809-8585

Western Regional Office
800 South Figueroa Street, Suite 1260
Los Angeles, CA 90017
Phone: (213) 382-7600

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

Southern Regional Office
1 West Court Square, Suite 105
Decatur, GA 30030
Phone: (404) 897-1880

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

Washington, D.C. Office
111 K Street NE, 7th Floor
Washington, DC 20002
Phone: (202) 804-6245

National Center for Lesbian Rights
870 Market Street, Suite 370
San Francisco, CA 94102
Phone: (415) 392-6257
https://www.nclrights.org/

National LGBTQ Task Force
1050 Connecticut Avenue NW, Suite 65500
Washington, DC 20035
Phone: (202) 393-5177
https://www.thetaskforce.org/

Sylvia Rivera Law Project (NY)
Takes incarcerated LGBTQ+ clients
147 W 24th Street, 5th Floor
New York, NY 10011
Phone: (212) 337-8550
Legal Support Email: DST@srlp.org
https://srlp.org/

Black and Pink
614 Columbia Road
Dorchester, MA 02125
Phone: (617) 519-4387
www.blackandpink.org/

Just Detention International
For people who experienced sexual abuse while incarcerated
3325 Wilshire Boulevard, Suite 340
Los Angeles, CA 90010
Phone: (213) 384-1400
www.justdetention.org/

East Coast Office
1900 L Street NW, Suite 601
Washington, DC 20036
Phone: (202) 506-3333

Legal Mail (For Incarcerated People):
Cynthia Totten, Attorney at Law
CA Attorney Reg. #199266
3250 Wilshire Blvd., Suite 1630
Los Angeles, CA 90010

National Center for Lesbian Rights
870 Market Street, Suite 370
San Francisco, CA 94102
Legal Helpline: 1-800-528-6257
www.nclrights.org/

National Center for Transgender Equality
1325 Massachusetts Avenue NW, Suite 700
Washington, DC 20005
Phone: (202) 903-0112
www.transequality.org/

Transgender Legal Defense and Education Fund
520 8th Avenue, Suite 2204
New York, NY 10018
(646) 862-9396
https://transgenderlegal.org/

Transgender Law Center
P.O. Box 70976
Oakland, CA 94612-0976
Phone: (510) 380-8229
https://transgenderlawcenter.org/

Transgender Gender Variant and Intersex Justice Project
370 Turk Street, #370
San Francisco, CA 94102
Phone: (415) 554-8491
http://www.tgijp.org/

TRANScending Barriers Atlanta (GA)
1755 The Exchange, Suite 160
Atlanta, Georgia 30339
Email:
transcendingbarriersatlanta@gmail.com

Appendix B

ONLINE RESOURCES FOR STATE LAWS

Project on Addressing Prison Rape, Transgender Housing Policies State-by-State:
https://www.wcl.american.edu/impact/initiatives-programs/endsilence/state-by-state-transgender-housing-policies/

This map provides information on transgender housing policies in prisons and jails in all fifty states.

Transgender Law Center, State Prison Policies
https://tlcenter.app.box.com/s/szt8awqsh9dnjqgu0n0hgfjxac6fzy9m

A spreadsheet that tracks state prison policies like placement, access to transition-related healthcare and gender-affirming clothing and property, sexual violence prevention and response, and grievance procedures. Access to these policies can be critical in holding prisons accountable for the ways in which they regularly abuse and neglect the trans or gender-nonconforming people in their custody. This spreadsheet is organized so that each state is a row and each type of policy is a column. To find a particular policy, simply locate the cell for the state and type of policy you are interested in and click the link to view and download the policy. Most of the policies are listed by their policy number, but in some cases, we have multiple policies from a state that fall under one policy type: in these cases, click "Folder," and you will be able to access all the relevant policies in one folder. Please note that these policies are accurate to the best of our knowledge. If you have access to additional resources that you think would be helpful to add to this spreadsheet, please email Ian Anderson, TLC's Legal Services Project Manager, at ian@transgenderlawcenter.org.

ACLU Tracker of Current Anti-LGBTQ Bills in Every State:
https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2024

In recent years, states have been targeting LGBTQ people through legislation. This tracker looks at pending anti-LGBT bills (proposed laws that have not yet passed) across all fifty states.

Appendix C

Definitions

- ***Gender-nonconforming*** means a person whose appearance or manner does not conform to traditional societal gender expectations.
- ***Intersex*** means a person whose sexual or reproductive anatomy or chromosomal pattern does not seem to fit typical definitions of male or female. Intersex medical conditions are sometimes referred to as disorders of sex development.
- ***Transgender*** means a person whose gender identity (i.e., internal sense of feeling male or female) is different from the person's assigned sex at birth.
- ***Gender Expression*** means the manner in which a person expresses his or her gender identity to others.
- ***Gender Identity*** means a person's internal, deeply felt sense of being male or female, or in between, regardless of the person's sex at birth.
- ***Questioning*** means a person, often a younger person, who is exploring or unsure about their sexual orientation, gender identity and/or gender expression.
- ***Sexual orientation*** means the internal experience that determines one's physical, emotional or other attraction to men, women, both or neither (asexual). Everyone has a sexual orientation.