

# LGBTQ PEOPLE BEHIND BARS

A GUIDE TO UNDERSTANDING THE ISSUES FACING  
TRANSGENDER PRISONERS AND THEIR LEGAL RIGHTS



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This is a guide to understanding the experiences of transgender and LGBTQ people in jails and prisons for anyone who wants or needs to learn more, including staff members of correctional facilities and external advocates. This guide also includes an overview of the legal rights of transgender and all LGBTQ prisoners, including Constitutional rights.

For detailed information on what policies jails and prisons should adopt, see

*POLICIES TO INCREASE SAFETY AND RESPECT FOR TRANSGENDER PRISONERS: A guide for agencies and advocates.*

If you are an external advocate (not currently on staff at a correctional facility) trying to work to improve jail or prison conditions, see also:

*ENDING ABUSE OF TRANSGENDER PRISONERS: A guide for advocates on winning policy change*

*LGBTQ CRIMINAL JUSTICE REFORM: Real steps LGBTQ advocates can take to reduce incarceration.*

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## INTRODUCTION

### JAILS AND PRISONS ARE TRAUMATIZING AND OFTEN DANGEROUS

places, especially for lesbian, gay, bisexual, transgender, and queer (LGBTQ) people and anyone who doesn't fit gender stereotypes. In a country that incarcerates more of its people than any other large nation in the world, LGBTQ people are more likely to end up behind bars and more likely to face abuse behind bars than the general population. Being LGBTQ in a U.S. jail or prison often means daily humiliation, physical and sexual abuse, and the fear that it will get worse if you complain. Many LGBTQ people are placed in solitary confinement for months or years just because of who they are.

Fortunately, the movement to end these harmful practices—and combat mass incarceration as a whole—is growing. Grassroots movements challenging mass incarceration and brutal prison conditions are gaining steam, courts are increasingly recognizing legal protections for transgender and LGBTQ prisoners, and the federal government adopted landmark regulations, known as the PREA Standards, that provide critical protections for LGBTQ people and others vulnerable to violence in prisons. More and more corrections agencies are paying attention—and many are now adopting new policies aimed at protecting LGBTQ prisoners. While there is still a huge amount of work to be done to reduce the harms that LGBTQ people and others face behind bars—and to keep them out of prisons and jails in the first place—now is a better time than ever for our communities to press for change.

This overview provides an introduction to the needs and experience of many LGBTQ prisoners, as well as the legal protections they have under the Constitution, the Prison Rape Elimination Act, and other laws and standards.

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# WHY PRISONS ARE AN LGBTQ ISSUE

PRISONS AND JAILS ARE INHERENTLY HARMFUL FOR MANY PEOPLE, LGBTQ or not, but LGBTQ people often face unique risks in these settings. LGBTQ people are overrepresented in prisons, and they are often especially vulnerable to violence and other forms of mistreatment in these settings. This section discusses some of the disproportionate harms LGBTQ people face in the criminal justice system—and why the needs of LGBTQ prisoners must be a central issue for advocates.

## Disproportionate Contact with the Criminal Justice System

LGBTQ people, particularly LGBTQ people of color and low-income LGBTQ people, are disproportionately likely to come into contact with the criminal justice system.<sup>1</sup> A history of bias, abuse, and profiling toward LGBTQ people by law enforcement, along with high rates of poverty, homelessness, and discrimination in schools and the workplace, has contributed to disproportionate contacts with the justice system, leading to higher levels of incarceration.<sup>2</sup> Policies that criminalize poverty, homelessness, and participation in survival economies such as sex work also disproportionately impact LGBTQ people – especially transgender women of color.<sup>3</sup>

The 2015 U.S. Transgender Survey, a study of nearly 28,000 transgender adults, showed patterns of frequent harassment, profiling, and abuse by law enforcement officers and high rates of incarceration.<sup>4</sup> Just in the past year, 2% of respondents had been incarcerated,<sup>5</sup> more than twice the rate in the general population (0.87%).<sup>6</sup> The incarceration rate was several times higher among transgender people of color and low-income respondents. For example, nearly one in ten (9%) Black transgender women were incarcerated in the previous year, approximately ten times the rate in the general population.<sup>7</sup> Similarly, one in six (16%) respondents in the 2008–09 National Transgender Discrimination Survey had been incarcerated at any point during their lives, with the rate skyrocketing to 47% among Black transgender people.<sup>8</sup>

Studies also show that lesbian, gay, and bisexual (LGB) adults are overrepresented in jails and prisons. Federal data suggests that LGB people are three times as likely to be incarcerated as the general population, and over 40% of incarcerated women are lesbian or bisexual.<sup>9</sup> And while an estimated 7% of youth in the U.S. are LGB, between 12% and 20% of youth in juvenile detention facilities identify as LGB, and in one study, 85% of incarcerated LGB youth were people of color.<sup>10</sup> Family rejection, homelessness, hostility in the foster care system and other safety net systems, and the disproportionate impact of the school-to-prison pipeline often serve to funnel LGBTQ youth into the juvenile justice system.<sup>11</sup>

## High Levels of Abuse in Prisons and Jails

The United States incarcerates people at the highest rate of any nation in the world.<sup>12</sup> Nearly 7 million adults are under correctional supervision in the U.S. today, with nearly 2.2 million of them in prisons and jails.<sup>13</sup> In addition, it is estimated that over 50,000 are held in juvenile prisons on any given day,<sup>14</sup> and the Department of Homeland Security placed over 350,000 people in immigration detention in 2016.<sup>15</sup> While conditions in jails and prisons vary, overcrowding, physical and sexual violence, and heavy reliance on solitary confinement are common. The United States Constitution guarantees that people deprived of their liberty must be provided with adequate

food, shelter, safety, and medical care, yet these standards are often not met.

In these settings, LGBTQ people are especially vulnerable to abuse and mistreatment, by both staff and other prisoners. According to federal data, transgender people are nearly ten times more likely to be sexually assaulted than the general prison population, with an estimated 40% of transgender people in state and federal prisons reporting a sexual assault in the previous year.<sup>16</sup> In the same federal survey, prisoners who identified as LGB were approximately three times as likely to report sexual abuse as other prisoners.<sup>17</sup> Just as in any other setting, sexual abuse behind bars can lead to post-traumatic stress disorder, depression, substance abuse, and other consequences that can take a heavy toll on survivors of sexual abuse, their families and communities, and the health and criminal justice systems.

LGBTQ prisoners also face many other forms of mistreatment behind bars. Many face constant humiliation and degradation from staff and prisoners alike. Staff—who often are responsible for perpetuating abuse themselves—may blame LGBTQ prisoners for their own victimization, believing they are “flaunting themselves” and refusing to take grievances or reports of abuse seriously. If their vulnerability is recognized at all, it may be by placing them in indefinite solitary confinement, with little or no activity or human contact—conditions that can cause serious psychological harm and trauma, and which, as medical and human rights experts have found, can amount to torture.<sup>18</sup> In other cases, LGBTQ prisoners’ requests for temporary protective custody are ignored.

Transgender and gender nonconforming people often face additional forms of mistreatment. Though practices are changing, many facilities still house transgender people strictly according to their genital anatomy or the gender they were thought to be at birth—often increasing their vulnerability to abuse. Facilities may deny them access to gender-appropriate clothing or grooming items, and punish them for attempting to express their gender identity. In addition, some facilities still place decisions about the medical needs of transgender people in the hands of administrators rather than health care providers, adopting blanket policies against providing hormone therapy or other transition-related care.

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<sup>1</sup> Center for American Progress & Movement Advancement Project. (2016). *Unjust: How the Broken Criminal Justice System Fails LGBT People of Color*. Washington, DC & Denver, CO. Available at: [www.lgbtmap.org/file/lgbt-criminal-justice-poc.pdf](http://www.lgbtmap.org/file/lgbt-criminal-justice-poc.pdf) [hereinafter *Unjust*].

<sup>2</sup> *Unjust*; Lydon, J. (2015). *Coming out of Concrete Closets: A Report on Black & Pink’s National LGBTQ Survey*. Available at: [www.blackandpink.org/wp-content/uploads/Coming-Out-of-Concrete-Closets.-Black-and-Pink.-October-21-2015..pdf](http://www.blackandpink.org/wp-content/uploads/Coming-Out-of-Concrete-Closets.-Black-and-Pink.-October-21-2015..pdf); Mallory, C., Hasenbush, A., & Sears, B. (2015). *Discrimination and Harassment by Law Enforcement Officers in the LGBT Community*. Los Angeles, CA: Williams Institute. Available at: <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-and-Harassment-in-Law-Enforcement-March-2015.pdf>; Amnesty International. (2005). *Stonewalled: Police Abuse and Misconduct against LGBT People in the U.S.* (2005). Available at: <http://amnesty.org/en/library/info/AMR51/122/2005>.

<sup>3</sup> *Unjust*.

<sup>4</sup> James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). *The Report of the 2015 U.S. Transgender Survey*. (pp. 184–190). Washington, DC: National Center for Transgender Equality. Available at: [www.ustranssurvey.org/report](http://www.ustranssurvey.org/report) [hereinafter *USTS*].

<sup>5</sup> *USTS*, p. 190.

<sup>6</sup> Kaeble, D. & Glaze, L. (2016). *Correctional Populations in the United States, 2015*. Washington, DC: Bureau of Justice Statistics.

<sup>7</sup> *USTS*, p. 190.

<sup>8</sup> Grant, J. M., Mottet, L. A., Tanis, J., Harrison, J., Herman, J. L., & Keisling, M. (2011). *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*. (p. 163). Washington, DC: National Center for Transgender Equality & National Gay and Lesbian Task Force.

<sup>9</sup> Meyer, I. H., Flores, A. R., Stemple, L., Romero, A. P., Wilson, B. D. M., & Herman, J. L. (2017). *American Journal of Public Health* 107(2). Available at: [https://williamsinstitute.law.ucla.edu/wp-content/uploads/Meyer\\_Final\\_Proofs.LGB\\_In\\_.pdf](https://williamsinstitute.law.ucla.edu/wp-content/uploads/Meyer_Final_Proofs.LGB_In_.pdf).

<sup>10</sup> Unjust, pp. 67, 69.

<sup>11</sup> Unjust, pp. 7-25.

<sup>12</sup> Walsmsley, R. (2016). World Prison Population List (11th ed.). London, United Kingdom: Institute for Criminal Policy Research. Available at: [http://www.prisonstudies.org/sites/default/files/resources/downloads/world\\_prison\\_population\\_list\\_11th\\_edition\\_0.pdf](http://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf).

<sup>13</sup> Kaeble, D. & Glaze, L. (2016). Correctional Populations in the United States, 2015. Washington, DC: Bureau of Justice Statistics.

<sup>14</sup> Hockenberry, S., Wachter, A., Sladky, A. (2016). Juvenile Residential Facility Census, 2014: Selected Findings. Washington, DC: Department of Justice, Office of Juvenile Justice and Delinquency Prevention. Available at: <https://www.ojjdp.gov/pubs/250123.pdf>.

<sup>15</sup> Department of Homeland Security. (2016). DHS Immigration Enforcement: 2016. Washington, DC: Office of Immigration Statistics. Available at: <https://www.dhs.gov/sites/default/files/publications/DHS%20Immigration%20Enforcement%202016.pdf>.

<sup>16</sup> Beck, A. J. (2014). Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12: Supplemental Tables: Prevalence of Sexual Victimization Among Transgender Adult Inmates. Washington, DC: Bureau of Justice Statistics, available at [https://www.bjs.gov/content/pub/pdf/svpjri1112\\_st.pdf](https://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf); Beck, A. J., Berzofsky, M., Caspar, R., & Krebs, C. (2013). Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12. Washington, DC: Bureau of Justice Statistics. Available at: <https://www.bjs.gov/content/pub/pdf/svpjri1112.pdf>.

<sup>17</sup> Beck, A. J., Berzofsky, M., Caspar, R., & Krebs, C. (2013). Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12. Washington, DC: Bureau of Justice Statistics. Available at: <https://www.bjs.gov/content/pub/pdf/svpjri1112.pdf>.

<sup>18</sup> For example, in 2011, the United Nations Special Rapporteur of the Human Rights Council published a report finding that in many cases solitary confinement amounted to torture. See <http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf>.

# JAILS, PRISONS, AND OTHER CONFINEMENT FACILITIES: AN OVERVIEW

WHILE THIS RESOURCE IS PRIMARILY FOCUSED ON JAILS AND PRISONS, there are many different kinds of confinement facilities. While the problems LGBTQ people face in these facilities and some of the legal standards many vary from one setting to another, many of the issues this resource discusses can arise in all of these facilities. Confinement facilities include:

- **Jails:** Jails are typically run by cities or counties, and increasingly by private, for-profit contractors. They hold both “pre-trial” detainees who have not been convicted of any crime and are awaiting criminal proceedings, as well as prisoners who are serving a sentence of one year or less. Local jails can range from being very small, holding just a few dozen individuals, to having a population of thousands in urban areas. Jails hold nearly 730,000 people in the U.S. today.<sup>19</sup>
- **Prisons:** Prisons are run by state departments of corrections as well as the Federal Bureau of Prisons, and increasingly by private contractors. They hold prisoners serving sentences of one year or more. Prisons hold approximately 1.5 million people in the US today.<sup>20</sup>
- **Juvenile detention or correction facilities:** These facilities (sometimes called juvenile halls, training schools, or other names) hold minors charged or convicted of crimes, and may be run by state or local agencies or private contractors. The juvenile justice system traditionally expresses a stronger commitment to treatment and rehabilitation. Some facilities are less harsh and restrictive than those for adults, although many are similar to adult prisons and jails. Juvenile facilities hold approximately 48,000 youth in the US today.<sup>21</sup>
- **Police lockups:** Police lockups are short-term holding cells inside police stations and courthouses, used to hold individuals for a matter of hours following arrest or before being transferred to court, jail, or prison.
- **Community confinement:** These are facilities where individuals are required to reside, instead of jail or prison, as a condition of pre-trial release or to complete a sentence. They may also be called halfway houses, restitution centers, re-entry centers, or community treatment centers.
- **Immigration detention:** Immigration detention houses people who are being detained on civil (as opposed to criminal) grounds while the government determines whether or not to deport them. Immigration detention centers are subject to PREA Standards adopted by the Department of Homeland Security.<sup>22</sup> Detainees are housed in a mix of federal facilities, for-profit detention centers, and local jails. Detainees may be held for just a few days or for many months or years. Nearly 400,000 people are held in immigration detention each year.<sup>23</sup> In addition, the Office of Refugee Resettlement holds immigrant minors apprehended without an accompanying adult in a network of facilities that are also subject to PREA standards. For more information about working in immigration detention settings, see the National Immigrant Justice Center ([www.immigrantjustice.org](http://www.immigrantjustice.org)) and



Detention Watch Network ([www.detentionwatchnetwork.org](http://www.detentionwatchnetwork.org)).

- **Psychiatric and civil commitment facilities:** These include a range of types of facilities run by states, private contractors, or non-profit organizations that hold people for involuntary mental health treatment or civil commitment. These facilities are not subject to the PREA Standards, but are subject to constitutional rights of freedom from abuse and other cruel treatment. Some may also be subject to nondiscrimination laws or hospital accreditation standards that prohibit anti-LGBTQ discrimination. This toolkit, together with resources on hospital LGBTQ policies,<sup>24</sup> may be useful in advocating with these types of facilities.

Facilities may vary widely in their size, restrictiveness, and other conditions. The procedures used to classify and house people, the jargon (or specialized language) they use, and the legal standards that apply can also differ from one facility, or type of facilities, to another. LGBTQ people are vulnerable to mistreatment in all confinement settings. LGBTQ advocates can, should, and do engage with all of them to develop more protective policies. Advocates working with juvenile facilities, police lockups, or facilities that hold immigration detainees should consult with allies and experts on how to tailor your advocacy and recommendations for these settings.

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<sup>19</sup> Kaeble, D. & Glaze, L. (2016). *Correctional Populations in the United States, 2015*. (p. 4). Washington, DC: Bureau of Justice Statistics. Available at: <https://www.bjs.gov/content/pub/pdf/cpus15.pdf>.

<sup>20</sup> Kaeble & Glaze, p. 4.

<sup>21</sup> Sickmund, M., Sladky, T.J., Kang, W., & Puzzanchera, C. (2017). *Census of Juveniles in Residential Placement*. Available at: <http://www.ojjdp.gov/ojstatbb/ezacjrp>.

<sup>22</sup> These standards can be found at <https://www.gpo.gov/fdsys/pkg/FR-2014-03-07/pdf/2014-04675.pdf>.

<sup>23</sup> Department of Homeland Security & Office of Immigration Statistics. (December 2016). *DHS Enforcement Priorities: 2016*. Washington, DC: Department of Homeland Security. Available at: <https://www.dhs.gov/sites/default/files/publications/DHS%20Immigration%20Enforcement%202016.pdf>.

<sup>24</sup> See, e.g., Lambda Legal, Human Rights Campaign, Hogan Lovells, & New York City Bar. (2016). *Transgender-Affirming Hospital Policies*. Available at: [https://www.lambdalegal.org/sites/default/files/publications/downloads/fs\\_20160525\\_transgender-affirming-hospital-policies.pdf](https://www.lambdalegal.org/sites/default/files/publications/downloads/fs_20160525_transgender-affirming-hospital-policies.pdf).

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# THE CURRENT STATE OF THE LAW

LGBTQ PEOPLE IN JAILS, PRISONS, AND JUVENILE FACILITIES, LIKE ALL incarcerated people, have specific civil rights under the U.S. Constitution, state and federal statutes, and PREA regulations. This section provides a general overview of the laws that apply to prisons and jails.

## PREA Overview

The PREA Standards are a comprehensive set of federal rules that address all aspects of a facility's operations as they relate to preventing, detecting, and responding to sexual abuse. The **Prison Rape Elimination Act of 2003** required the U.S. Department of Justice to develop these standards. The Department of Justice issued its **PREA Standards** in 2012, and other federal agencies that hold people in detention have since adopted their own standards. Differing versions of the standards apply to different types of facilities, and some facilities that hold people involuntarily (such as psychiatric hospitals or civil commitment facilities) are not covered.

The PREA Standards are legally binding on federal prisons. State prison systems can face penalties on their federal funding if they are found not to be in compliance. Accrediting organizations (such as the American Corrections Association) are also required to adopt the standards in order to retain federal funding. PREA also applies to local facilities, such as jails and police departments, but those facilities don't face direct penalties for noncompliance. However, in some states, local agencies are also required by state law to comply. Local facilities could also lose needed accreditations or contracts to hold state or federal prisoners if they fail to comply with PREA Standards.

The PREA Standards don't give prisoners a right to sue if agencies don't follow those standards. Overall, civil rights litigation by prisoners remains very difficult. But when considering lawsuits alleging abuse, many courts consider whether an agency failed to take steps outlined by the Standards that might have prevented the abuse.

Because of all these incentives to follow PREA, agencies should be paying close attention to these regulations. The PREA regulations include several specific protections for LGBTQ individuals, such as consideration of a person's LGBTQ identity or status in determining risk for sexual victimization, limitations on cross-gender searches, and special considerations for housing placements of transgender and intersex individuals. While PREA is often a useful tool, it is also important to keep in mind that it is not a perfect one: some of its provisions are limited or unclear, and PREA has even been used as an excuse to justify mistreatment of LGBTQ people, such as by penalizing LGBTQ prisoners for consensual physical contact.

For a detailed discussion of key PREA provisions related to LGBTQ prisoners, see *POLICIES TO INCREASE SAFETY AND RESPECT FOR TRANSGENDER PRISONERS: A guide for agencies and advocates* at <https://transequality.org/safetyfortransprisoners>. The full PREA Standards can be found at [PREAResourceCenter.org](https://www.prearesourcecenter.org).

## Overview of LGBTQ Prisoners' Constitutional Rights

While the PREA Standards are not legally binding on all facilities and cannot be directly

enforced in court—indeed, it is often extremely difficult for prisoners to bring any kind of lawsuit to enforce their rights—prisoners do have rights under the U.S. Constitution and state constitutions. Referring to court rulings should not be the only, or first, tool for your advocacy, but it is helpful to know about areas in which there is support from the courts. There is a range of federal constitutional provisions that require facilities to ensure all individuals in their custody are physically safe, are free from cruel and unusual punishment (or for juveniles and pre-trial detainees, are free from unreasonable conditions of confinement), have access to programs and facilities, and have access to necessary medical care. In addition, the Constitution guarantees individuals the right to privacy and freedom of expression and religion. Although these constitutional rights are limited for those who are incarcerated, none are entirely extinguished, and many have special importance and relevance for LGBTQ people.

One of the most important constitutional protections for prisoners is the **Eighth Amendment**, which prohibits cruel and unusual punishment. Courts have found that, in many cases, cruel and unusual punishment can include being exposed to violence or excessive force, being placed in unhealthy or overly restrictive conditions, and being denied medical care. Prisoners may also be protected from discrimination under the **Equal Protection Clause**, which prohibits discriminatory treatment based on gender,<sup>25</sup> including transgender status<sup>26</sup> and nonconformity to gender stereotypes,<sup>27</sup> in many contexts.

## THE PRISON LITIGATION REFORM ACT (PLRA)

If you're thinking about suing a prison, it's important that you become familiar with the PLRA, which is a law that makes it harder for prisoners to sue in federal court. The PLRA requires prisoners to have exhausted all administrative remedies before they sue, meaning that they have to first go through the prison's formal grievance process, including all possible appeals. The law also creates other hurdles, such as by requiring prisoners to demonstrate that they have experienced physical injury in addition to emotional injury to be able to file certain kinds of claims. You can learn more about the PLRA at [https://www.aclu.org/files/assets/kyr\\_plra\\_aug2011\\_1.pdf](https://www.aclu.org/files/assets/kyr_plra_aug2011_1.pdf).

## Additional Laws Protecting LGBTQ Prisoners

In addition to PREA and the Constitution, there are a number of other laws that can provide protections for LGBTQ prisoners.

Some transgender people may be protected under federal disability laws, including Title II of the **Americans with Disabilities Act** and Section 504 of the **Rehabilitation Act**, as well as many state disability laws.<sup>28</sup> These laws prohibit a range of entities<sup>29</sup> from discriminating against people with disabilities, including by denying qualified people with disabilities access to programs or benefits or failing to provide reasonable accommodations that would allow them to access those programs or benefits. Some courts have found that gender dysphoria qualifies as a disability under these laws,<sup>30</sup> and advocates are increasingly using these laws to challenge practices like housing transgender prisoners based on the gender they were assigned at birth, segregating them on the basis of their transgender status, or denying them access to medical treatment for gender dysphoria or clothing and grooming items consistent with their gender.<sup>31</sup>

Other federal civil rights laws apply to certain aspects of prison and jail operations. For example, Title IX of the Education Amendments of 1972 prohibits sex discrimination in federally funded educational programs, including educational programs in many prisons, jails, and juvenile detention centers.<sup>32</sup> Title IX may protect prisoners who are denied access to educational programs because they are LGBTQ or do not conform to gender stereotypes (including prisoners whose access to programs was restricted because they were placed in a segregated unit on the basis of their LGBTQ identity or gender nonconformity), as well as prisoners who were denied access to educational programs that are consistent with their gender identity. It may also protect prisoners who faced anti-LGBTQ harassment or violence in those educational programs.

Additionally, some states and local governments have nondiscrimination protections and other laws and ordinances that protect prisoners' rights. You should check if your state has a law prohibiting discrimination in government-run programs, public accommodations, or other settings

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<sup>25</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976).

<sup>26</sup> *Norsworthy v. Beard*, 87 F.Supp.3d 1104 (N.D. Cal. 2015) (transgender people are a protected class under Equal Protection Clause and so discrimination against them received heightened scrutiny); *Adkins v. City of New York*, -- F.Supp.3d --, No. 14-CV-7519 (JSR), 2015 WL 7352192 (S.D.N.Y. Nov. 16, 2015) (same).

<sup>27</sup> See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) ("discrimination against a transgender individual because of her gender nonconformity is sex discrimination" under Equal Protection Clause); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000).

<sup>28</sup> For more information about using federal disability laws in prisons and jails, see *Columbia Human Rights Law Review*. (2017). Chapter 28: Rights of Prisoners with Disabilities. A Jailhouse Lawyer's Manual, Eleventh Edition. Available at: <http://blogs2.law.columbia.edu/jlm/wp-content/uploads/sites/13/2017/05/40.-Ch.-28.pdf>.

<sup>29</sup> Section 504 of the Rehabilitation Act applies to programs that receive federal funding or are run by the federal government, including federal prisons, immigration detention centers, the vast majority of state prisons, and a large number of local jails. Title II of the Americans with Disabilities Act applies to state and local government entities and programs, including prisons and jails, but not to federal prisons and federal immigration detention centers.

<sup>30</sup> *Blatt v. Cabela's Retail*, No. 5:14-cv-04822, 2017 WL 2178123 (E.D. Pa. May 18, 2017).

<sup>31</sup> See, e.g., *Doe v. Dzurenda*, No. 3:16-CV-1934 (D. Conn. filed June 28, 2017); *Doe v. Massachusetts Department of Corrections*, 1:17-cv-12255 (D. Mass. filed Nov. 15, 2017).

<sup>32</sup> See, e.g., *Jeldness v. Pearce*, 30 F.3d 1220, 1225–26 (9th Cir.1994).

# KEY ISSUES FACING LGBTQ PRISONERS

THIS SECTION PROVIDES A BRIEF SUMMARY OF SOME OF THE KEY issues facing LGBTQ prisoners, and some of the legal standards under PREA and the Constitution that apply. For a more in-depth discussion of these issues and recommended policies, see *POLICIES TO INCREASE SAFETY AND RESPECT FOR TRANSGENDER PRISONERS: A guide for agencies and advocates*. Keep in mind that this area of law is still developing. This summary is not exhaustive, and doesn't cite many cases (usually older ones) that have rejected claims by LGBTQ prisoners.<sup>33</sup>

## Violence by Staff and Other Prisoners

LGBTQ prisoners face horrifying rates of sexual abuse and other forms of violence by staff and other prisoners, with federal data indicating that the rate of sexual assault in the past year was about three times higher for non-heterosexual prisoners and about ten times higher for transgender prisoners.<sup>34</sup> Transgender women who are housed in men's prisons are at especially high risk of sexual abuse. For example, one statewide study in California found that when transgender women were automatically housed with men, they were 13 times more likely to be sexually assaulted than male prisoners in the same facilities.<sup>35</sup>

Prisons and jails have a responsibility to protect prisoners from violence at the hands of other prisoners, as well as prison staff and correctional officers. If prison officials do not uphold this duty to protect, they may have violated the Eighth Amendment of the U.S. Constitution, which prohibits cruel and unusual punishment.

The current standard governing prison officials' legal obligations was set forth by the U.S. Supreme Court in the case of a transgender woman who was repeatedly sexually assaulted and beaten by other prisoners. In that case, the Supreme Court stated that prison officials may be liable for such abuse when "the official knows of and disregards an excessive risk to inmate health or safety."<sup>36</sup> The Supreme Court also said that an excessive risk of abuse can be established when a prisoner belongs to "an identifiable group of prisoners who are frequently singled out for violent attack by other inmates," such as transgender people.<sup>37</sup> When officials know that a person is LGBTQ and therefore vulnerable, failure to take adequate steps to protect them from abuse can violate the Constitution.<sup>38</sup>

Under this standard—called "deliberate indifference"—prisoners must prove not only that prison officials failed to take steps to stop or prevent abuse, but also that they knew that the abuse was likely to happen, which can be very difficult to prove. While some prisoners have been able to win cases and advance reforms, "deliberate indifference" can be an exceptionally hard standard to meet in court—and arguably one that devalues the lives and safety of incarcerated people.

## Housing and Placement

Too often, LGBTQ prisoners are housed in a manner that jeopardizes their safety and wellbeing—including extensive use of solitary confinement or, in the case of transgender prisoners, placement in facilities that do not match their gender.

### *Solitary Confinement and Other Isolating Conditions*

Often, jail or prison officials will respond to the vulnerability of LGBTQ prisoners by placing them in solitary “protective custody”—effectively punishing them for being potential victims. For example, the Department of Justice has found that lesbian, gay, and bisexual prisoners are substantially more likely to be subjected to solitary confinement or segregation than heterosexual prisoners, with more than a quarter (28%) of LGB people in prisons being placed in solitary confinement in just the past year, compared to 18% of heterosexual people in prisons.<sup>39</sup> Solitary confinement, especially when used for prolonged periods of time, can be a harsh and often traumatizing experience, and experts such as the United Nations Special Rapporteur on Torture have found that in many cases it amounts to torture.<sup>40</sup> For many, being placed in segregation or protective custody means being locked down for 22–24 hours a day in a small cell with very little human interaction or activity of any kind. The trauma of these kinds of conditions can lead to long-term psychological harm, and they can be especially damaging for youth and those with pre-existing mental health conditions or cognitive or developmental disabilities.<sup>41</sup>

PREA regulations require prison officials to use “protective custody” as a last resort, after a determination that there is no available alternative for protecting the prisoner.<sup>42</sup> The PREA standards also limit how long someone can be in segregation for their protection and require them to have as much access to work and educational opportunities and programs as possible. The law permits officials to segregate LGBTQ prisoners as a short-term, temporary measure when specific circumstances demand, such as upon admission while determining an appropriate long-term placement, or immediately following an assault and during its investigation.<sup>43</sup> Whether ongoing segregation of a vulnerable prisoner is permissible depends on the purpose of segregation, the existence of feasible alternatives, the harshness or restrictiveness of conditions, its duration, and how frequently the continued appropriateness of segregation is reviewed.<sup>44</sup> Some courts have ruled that the use of solitary confinement or other isolating practices with juveniles is unconstitutional.<sup>45</sup> Inhumane treatment of transgender individuals in police lockups, such as handcuffing a person to a railing for hours, has also been subject to legal challenge.<sup>46</sup> Institutions may not impose a blanket policy of automatically and indefinitely segregating all LGBTQ individuals without considering reasonable alternatives or individual circumstances,<sup>47</sup> and the PREA standards almost entirely eliminate their ability to automatically place people in special units based on their LGBTQ status.<sup>48</sup>

### *Gender-Specific Placement of Transgender Prisoners*

Most agencies automatically house transgender prisoners in men’s or women’s facilities based on their genital characteristics or the gender they were thought to be at birth—often putting them at extremely high risk of violence and abuse. This practice continues to be widespread despite PREA regulations that forbid agencies from housing transgender prisoners based on their anatomy alone, without consideration of other factors.<sup>49</sup> The PREA Standards require agencies to conduct a case-by-case assessment when placing transgender prisoners, considering factors such as the prisoner’s health and safety and giving serious consideration to prisoners’ own views about where they would be safest.<sup>50</sup> In some cases, automatically placing a transgender prisoner based on their anatomy despite knowing the risks of violence they are likely to face may violate the Eighth Amendment of the Constitution.

## Searches and Showers

Searches, especially strip searches, can be unpleasant, humiliating, and in some cases traumatic for LGBTQ and non-LGBTQ people alike. But these searches can be especially traumatic for transgender prisoners, who are often searched by someone of a different gender, and are sometimes searched simply so that prison staff can see their genital characteristics, or for the purpose of humiliating or harassing them. In general, jail and prison officials have wide latitude to conduct personal searches to identify weapons or contraband. However, searches must be conducted for a legitimate reason—not simply to harass an LGBTQ prisoner—and strip searches should be conducted out of view of other prisoners except in extremely urgent situations.<sup>51</sup> While some courts have held that strip searches must be conducted by officers of the same gender absent an emergency,<sup>52</sup> courts have not said how this rule applies to transgender people. However, PREA regulations set out a number of requirements regarding searches of transgender prisoners, including prohibiting searches transgender people solely for the purpose of observing or documenting their genital characteristics and requiring searches to be conducted in the least intrusive manner possible.<sup>53</sup> PREA guidance from the U.S. Department of Justice also outlines other policies agencies should follow when searching transgender prisoners, which can include providing transgender prisoners with an opportunity to indicate whether they would be safer being searched by male or female staff.<sup>54</sup>

The PREA Standards also require facilities to take other measures to protect transgender prisoners' privacy, such as allowing them to shower separately from others if they choose.<sup>55</sup>

## Medical Care

Prisons and jails have almost universally inadequate policies for evaluating and treating gender dysphoria, a serious medical condition that many transgender people have.<sup>56</sup> Despite a widespread recognition among medical professionals that treatment for gender dysphoria is medically necessary and effective,<sup>57</sup> many agencies refuse to allow prisoners to receive this often life-saving care. In some cases, prison staff have tried to justify a ban on care for gender dysphoria by falsely claiming that the treatment was cosmetic or would put the transgender prisoner at risk of greater violence, and in some cases they have provided limited and grossly inadequate care by medical staff with no expertise in treating transgender people.

Failing to provide adequate health care—including care for gender dysphoria—can constitute cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution.<sup>58</sup> In order to be considered adequate, medical treatment in prisons must be based on medical considerations, rather than financial or political factors,<sup>59</sup> and cannot be blatantly inappropriate.<sup>60</sup> Courts have consistently stated that gender dysphoria is a serious medical condition that requires treatment for purposes of the Eighth Amendment,<sup>61</sup> meaning that prisons must provide transgender people who are diagnosed with gender dysphoria with adequate medical treatment, consistent with accepted medical standards.<sup>62</sup>

Transgender prisoners have clearly established constitutional rights with regard to treatment for gender dysphoria. Prisoners who wish to be evaluated for an initial gender dysphoria diagnosis should be seen by a doctor or medical expert with some specialized expertise in treating transgender people.<sup>63</sup> Treatment decisions regarding transgender prisoners must be made based on individual medical needs. A facility cannot have a blanket policy that prohibits specific types of treatments, such as an absolute ban on hormone therapy or surgery.<sup>64</sup> However, some



courts have said that while a blanket ban is impermissible, transgender prisoners may not have a constitutional right to a specific kind of treatment or to the best treatment for their condition.<sup>65</sup> Additionally, prisoners who are already undergoing hormone therapy for gender dysphoria cannot be abruptly taken off such treatment unless there is a clear medical reason to do so.<sup>66</sup> In some cases, courts have also held that prisoners can establish a medical need to be treated in a gender-appropriate manner with respect to pronoun use or access to items such as bras, cosmetics, or compression garments where that need is supported by a health care provider, and that denying transgender prisoners' access to such items may be unconstitutional.<sup>67</sup>

Prison officials cannot deny certain gender dysphoria treatments based solely on the argument that such treatments would increase the risk of violence towards the prisoners receiving the treatments. Several courts have outright rejected these types of arguments,<sup>68</sup> while other courts have stated that security concerns must be balanced against medical needs and have a real basis.<sup>69</sup>

## **Privacy**

For many LGBTQ prisoners, privacy around sensitive information—like information about their LGBTQ status or medical information, like their HIV status or past treatments for gender dysphoria—can be critical to protect their safety. But too often, staff disclose this information—whether through carelessness or for the purpose of gossip or harassing the prisoner. Disclosure of this highly personal information to people who do not need to know it may violate prisoners' constitutional rights. Privacy related to personal information is protected by the Constitution, even in prison.<sup>70</sup> This means that unless a prisoner has disclosed this information themselves, staff may not disclose it to other prisoners and various other third parties without a legitimate reason.<sup>71</sup>

## **Equal Treatment in Visitation, Conduct, and Other Opportunities**

Courts have held that facilities may not exclude LGBTQ individuals from prison employment or programs simply because of their identity, absent some legitimate reason.<sup>72</sup> Some courts have also held that facilities may not ban visitation by same-sex partners,<sup>73</sup> completely prohibit same-sex hugging or kissing between prisoners,<sup>74</sup> or prohibit prisoners from receiving LGBTQ publications.<sup>75</sup> The Supreme Court has ruled that prisoners have the right to marry while behind bars,<sup>76</sup> and the advent of nationwide marriage equality extended this right to couples regardless of gender.

In some cases, concerns about protecting prisoners from abuse have been misused to stigmatize LGBTQ prisoners and punish them for their identities, relationships, or any displays of affection. Prisoners sometimes report being harassed by staff or disciplined for “PREA violations” for consensual hand-holding, hugging, or kissing with another prisoner. While the PREA Standards specify that consensual sexual contact among prisoners cannot be treated as sexual abuse, they do permit facilities to prohibit such contact—prohibitions that have been disproportionately used against LGBTQ people.<sup>77</sup>



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<sup>33</sup> For more extensive summaries, see, e.g., Columbia Human Rights Law Review. (2017). "Chapter 30: Special Considerations for Lesbian, Gay, Bisexual, and Transgender Prisoners." A Jailhouse Lawyer's Handbook, Eleventh Edition. Available at: <http://blogs2.law.columbia.edu/jlm/wp-content/uploads/sites/13/2017/05/42.-Ch.-30.pdf>; National Institute of Corrections. (2013). Policy and Development Guide: LGBTI Persons in Custodial Settings. Available at: <http://nicic.gov/Library/027507>.

<sup>34</sup> Beck, A. J. (2014). Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12: Supplemental Tables: Prevalence of Sexual Victimization Among Transgender Adult Inmates. Washington, DC: Bureau of Justice Statistics, available at [https://www.bjs.gov/content/pub/pdf/svpjri1112\\_st.pdf](https://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf); Beck, A. J., Berzofsky, M., Caspar, R., & Krebs, C. (2013). Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12. Washington, DC: Bureau of Justice Statistics. Available at: <https://www.bjs.gov/content/pub/pdf/svpjri1112.pdf>.

<sup>35</sup> Jenness, V., Maxson, C. L., Matsuda, K. N., & Sumner, J. M. (2009). Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault, p. 3. Irvine, CA: Center for Evidence-Based Corrections.

<sup>36</sup> Farmer v. Brennan, 511 U.S. 825, 837 (1994).

<sup>37</sup> Farmer, 511 U.S. at 843.

<sup>38</sup> See, e.g., Diamond v. Owens, 131 F.Supp.3d 1346 (M.D. Ga. 2015) (prison staff that knew a transgender prisoner was being abused and did not adequately protect her violated her rights under the Eighth Amendment); Zollicoffer v. Livingston, 169 F.Supp.3d 687 (S.D. Tex. 2016); Green v. Bowles, 361 F.3d 290, 294-95 (6th Cir. 2004); Taylor v. Michigan Department of Corrections, 69 F.3d 76, 87 (6th Cir. 1995). See also Johnson v. Johnson, 385 F.3d 503 (5th Cir. 2004) (allegation that staff denied prisoner's request for increased protection due to his sexual orientation stated Equal Protection claim); Schwenk v. Hartford, 204 F.3d 1187, 1200–02 (9th Cir. 2000) (allegation that staff sexual assault was motivated in part by prisoner's transgender status stated claim under Gender Motivated Violence Act).

<sup>39</sup> Bureau of Justice Statistics. (2015). Use of Restrictive Housing in U.S. Prisons and Jails, 2011–12 (p. 4). Washington, DC: Department of Justice Statistics. Available at: <https://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf>. The Department of Justice found that 28% of LGB people in prisons were placed in solitary confinement or segregated housing in the previous year, compared to 18% of heterosexual prisoners. In jails, 22% of LGB people and 17% of heterosexual people were placed in solitary confinement or segregated housing in the previous year. Data for transgender prisoners was not available.

<sup>40</sup> Méndez, J. E., Special Rapporteur of the United Nations Human Rights Council. (2011). Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhumane or Degrading Treatment of Punishment. Available at: <http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf>.

<sup>41</sup> For more information about the impacts of solitary confinement, see Solitary Watch's FAQ, available at: <http://solitarywatch.com/facts/faq/>. Also see Use of Restrictive Housing in U.S. Prisons and Jails, 2011-12, a Department of Justice report finding that prisoners who were placed in solitary confinement were more likely to experience a range of mental health problems (see note 1).

<sup>42</sup> Prison Rape Elimination Act National Standards—Prisons and Jails: Protective Custody. C.F.R. § 115.43 (2012).

<sup>43</sup> See, e.g., Murray v. U.S. Bureau of Prisons, 106 F.3d 401 (6th Cir. 1997) (table of unreported decisions).

<sup>44</sup> Estate of DiMarco v. Wyoming Dept. of Corr., 473 F.3d 1334 (10th Cir. 2007) (segregation of intersex prisoner); Meriwether v. Faulkner, 821 F.2d 408, 416 (7th Cir. 1987) (segregation of transgender prisoner). See also Wilkinson v. Austin, 545 U.S. 209 (2005); Hutto v. Finney, 437 U.S. 678, 686-87 (1978). Historically, some systems also segregated individuals based on HIV status, however this practice has been abandoned by every state prison system. See Henderson v. Thomas, 913 F.Supp.2d 1267 (M.D. Ala. 2012) (holding HIV segregation policy unconstitutional).

<sup>45</sup> See, e.g., D.B. v. Tewksbury, 545 F.Supp. 896, 905 (D.Or. 1982); Inmates of Boys' Training School v. Affleck, 346 F.Supp. 1354 (D.R.I. 1972); Lollis v. N.Y. State Dep't of Soc. Servs., 322 F.Supp. 473, 480-82 (S.D.N.Y. 1970). Although few courts have considered the issue recently, one court did, finding that where youth are held in juvenile detention, the use of "protective" isolation is presumptively treated as cruel, harmful, and unconstitutional. R.G. v. Koller, 415 F. Supp. 2d 1129, 1155-56 (D. Haw. 2006) (Concluding that, "The

<sup>46</sup> Adkins v. City of N.Y., 143 F. Supp. 3d 134, 138-140 (S.D.N.Y. 2015) (alleged pattern of handcuffing transgender people to railings was subject to heightened scrutiny under the Equal Protection Clause).

<sup>47</sup> See, e.g., *Tates v. Blanas*, No. S-00-2539, 2003 WL 23864868, \*10 (E.D. Cal. Mar. 11, 2003) (automatic segregation of all transgender prisoners); *Medina-Tejada v. Sacramento County*, No. Civ.S-04-138FDC/DAD, 2006 WL 463158 (E.D. Cal. Feb. 27, 2006) (same).

<sup>48</sup> Prison Rape Elimination Act National Standards—Prisons and Jails: Use of Screening Information. C.F.R. § 115.42 (2012).

<sup>49</sup> National PREA Resource Center. (March 23, 2016). Does a policy that houses transgender or intersex inmates based exclusively on external genital anatomy violate Standard 115.42(c) & (e)? Available at: <https://www.prearesourcecenter.org/node/3927> (emphasis added).

<sup>50</sup> Prison Rape Elimination Act National Standards—Prisons and Jails: Use of Screening Information. C.F.R. § 115.42 (2012).

<sup>51</sup> See, e.g., Farmer v. Perrill, 288 F.3d 1254 (10th Cir. 2002) (holding that a transgender prisoner had a clearly established right "not to be subjected to a humiliating strip search in full view of several (or perhaps many) others unless the procedure is reasonably related to a legitimate penological interest"); see also Elliott v. Lynn, 38 F.3d 188 (5th Cir. 1994); Cornwell v. Dahlberg, 963 F.2d 912 (6th Cir. 1992); Mays v. Springborn, 575 F.3d 643 (7th Cir. 2009); Franklin v. Lockhart, 883 F.2d 654 (8th Cir. 1989); Michenfelder v. Sumner, 860 F.2d 328 (9th Cir. 1988); Hayes v. Marriot, 70 F.3d 1144 (10th Cir. 1995).

<sup>52</sup> See, e.g., Byrd v. Maricopa County Sheriff's Dept., 629 F.3d 113 (9th Cir. 2011) ("Courts throughout the country have universally frowned upon cross-gender strip searches in the absence of an emergency or exigent circumstances"). PREA Standards also prohibit cross-gender searches in the absence of exigent circumstances. Prison Rape Elimination Act National Standards—Prisons and Jails: Limits to Cross-Gender Viewing and Searches. C.F.R. § 115.43 (2012).

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<sup>53</sup> Prison Rape Elimination Act National Standards—Prisons and Jails: Limits to Cross-Gender Viewing and Searches. C.F.R. § 115.43 (2012).

<sup>54</sup> National PREA Resource Center. (Dec. 2, 2016). Can you please clarify the parameters of conducting a search of a transgender or intersex inmate/resident? Available at: <https://www.prearesourcecenter.org/node/3257>.

<sup>55</sup> Prison Rape Elimination Act National Standards—Prisons and Jails: Use of Screening Information. C.F.R. § 115.42 (2012).

<sup>56</sup> Gender dysphoria, as defined by the American Psychiatric Association, is a medical condition marked by clinical significant distress or impairment associated with the incongruence between an individual's gender identity and the gender they were assigned at birth. American Psychiatric Association. (2013). *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*. (p. 452).

<sup>57</sup> See, e.g., American Medical Association. (2008). *AMA Policies on GLBT Issues, Patient-Centered Policy H-185.950, Removing Financial Barriers to Care for Transgender Patients*; American College of Physicians. (2015). *Lesbian, Gay, Bisexual and Transgender Health Disparities: A Policy Position Paper from the American College of Physicians*. *Annals of Internal Medicine* 163(2), 135-137; American Psychological Association. (2008). *Policy on Transgender, Gender Identity & Gender Expression Non-Discrimination*; American Psychiatric Association. (2012). *Position Statement on Discrimination Against Transgender and Gender Variant Individuals*. Available at: <https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-2012-Transgender-Gender-Variant-Discrimination.pdf>; American Academy of Family Physicians. (2012). *Resolution No. 1004: Transgender Care*. Available at: [http://www.aafp.org/dam/AAFP/documents/about\\_us/special\\_constituencies/2012RCAR\\_Advocacy.pdf](http://www.aafp.org/dam/AAFP/documents/about_us/special_constituencies/2012RCAR_Advocacy.pdf); Wylie C. Hembree et al., (2009). *Endocrine Treatment of Transsexual Persons: An Endocrine Society*

<sup>58</sup> *Estelle v. Gamble*, 429 U.S. 97 (1976) (“[Eighth Amendment] principles establish the government’s obligation to provide medical care for those whom it is punishing by incarceration.”)

<sup>59</sup> See, e.g., *Harris v. Thigpen*, 941 F.2d 1495, 1509 (11th Cir. 1991) (holding that treatments cannot be denied merely because they are expensive); *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988) (holding that treatment must be “based on medical considerations”).

<sup>60</sup> See, e.g., *Edwards v. Snyder*, 478 F.3d 831 (7th Cir. 2007) (holding that treatment cannot be “blatantly inappropriate”); *Johnson v. Doughty*, 433 F.3d 1001, 1013 (7th Cir. 2006) (holding that care cannot be such that “no minimally competent professional would have so responded under those circumstances”); *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 704 (11th Cir. 1985) (holding that medical care cannot be “so cursory as to amount to no treatment at all”).

<sup>61</sup> See, e.g., *De'Lonta v. Angelone*, 330 F.3d 630, 635 (4th Cir. 2003); *Cuoco v. Moritsugu*, 222 F.3d 99 (2d Cir. 2000); *Brown v. Zavaras*, 63 F.3d 967 (10th Cir. 1995); *Phillips v. Michigan Department of Corrections*, 731 F.Supp. 792, 799 (W.D. Mich. 1990); *Meriwether v. Faulkner*, 821 F.2d 408 (7th Cir. 1987).

<sup>62</sup> See *Castello v. Martin*, 197 Fed. Appx. 14, 16 (1st Cir. 2006) (holding that medical care in prisons must be “at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards”); *Barrett v. Coplan*, 292 F.Supp. 2d 281, 286 (D.N.H. 2003) (“‘Adequate medical care’ requires treatment by qualified medical personnel who provide services that are of a quality acceptable when measured by prudent professional standards in the community, tailored to a prisoner’s particular medical needs, and that are based on medical considerations.”)

<sup>63</sup> Cf., e.g., *Hayes v. Snyder*, 546 F.3d 516, 526 (7th Cir. 2008); *Mata v. Saiz*, 427 F.3d 745, 756 (10th Cir. 2005) (holding nurse’s failure to perform “gatekeeper” role by referring patient to a practitioner for symptoms of cardiac emergency could be deliberate indifference); *Hartsfield v. Colburn*, 371 F.3d 454, 457 (8th Cir. 2004) (holding six weeks’ delay in sending prisoner to a dentist, resulting in infection and loss of teeth, raised an Eighth Amendment claim); *LeMarge v. Wisneski*, 266 F.3d 429, 440 (6th Cir. 2001) (failure to make timely referral to specialist or tell the patient to seek one out was deliberate indifference); *Oxendine v. Kaplan*, 241 F.3d 1272, 1278-79 (10th Cir. 2001) (prison doctor who reattached accidentally severed finger, which became gangrenous, could be found deliberately indifferent for failing to refer prisoner for specialist care at any point; denial of access to “medical personnel capable of evaluating the need for treatment” and providing treatment one is not qualified for can be deliberate indifference).

<sup>64</sup> *Diamond*, 131 F.Supp.3d at 1375 (prison officials’ to provide transgender prisoner with treatment they knew was medically necessary or refer her for treatment violated Eighth Amendment); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) (permitting Equal Protection claim where officials denied surgery even though they knew it to be medically necessary); *Rosati v. Iginoso*, 791 F.3d 1037 (9th Cir. 2015) (holding that alleged blanket ban on surgical care was subject to constitutional challenge); *De'Lonta v. Johnson*, 708 F.3d 520 (4th Cir. 2013) (categorical refusal to even evaluate patient with persistent gender dysphoria symptoms for surgical treatment stated plausible Eighth Amendment claim); *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011) (holding that Wisconsin’s blanket rule against state funds being used to treat prisoners diagnosed with gender dysphoria constituted cruel and unusual punishment); *Allard v. Gomez*, 9 Fed. Appx. 793, 795 (9th Cir. 2001) (finding triable question of fact as to whether transgender prisoner was denied hormone therapy based on medical evaluation or as result of blanket rule); *Kosilek v. Maloney*, 221 F.Supp.2d 156 (D.Mass. 2002) (holding that blanket policy that prohibits a prison’s medical staff from making a medical determination of an individual prisoner’s medical needs violates the Eighth Amendment), *rev’d sub nom. Kosilek v. Spencer*, 774 F.3d. 63, 91 (1st Cir. 2014) (en banc) (reaffirming that a blanket prohibition on care for gender dysphoria is not permissible but finding that the plaintiff’s personal medical history did not support the conclusion that the denial of the requested treatment was unconstitutional).

<sup>65</sup> See, e.g., *Kosilek v. Spencer*, 774 F.3d at 91; *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987); *South v. Gomez*, 211 F.3d 1275 (9th Cir. 2000).

<sup>66</sup> See *De'Lonta*, 330 F.3d 630; *Wolfe*, 130 F. Supp. 2d 648; *Phillips*, 731 F.Supp. at 800.

<sup>67</sup> See *Quine v. Beard*, No.14-cv-02726, 2017 WL 1540758 (N.D. Cal. Apr. 28, 2017) (finding that a policy limiting transgender prisoners’ access to personal items such as gender-related clothing, accessories, and compression garments like binders is unconstitutional); *Kosilek*, 221 F. Supp. 2d at 167; *Konitzer v. Frank*, 711 F.Supp.2d 874 (E.D. Wis. 2010); *Tates v. Blanas*, No. S-00-2539 OMP P, 2003 WL 23864868 (E.D. Cal. 2003).

<sup>68</sup> *Fields v. Smith*, 653 F.3d 550, 557 (7th Cir. 2011) (rejecting contention that hormone therapy would increase risk of assaults, which defendants’ own expert called “an incredible stretch”); *Tates v. Blanas*, No. S-00-2539, 2003 WL 23864868, \*10 (E.D. Cal. 2003) (officials could not deny transgender woman a bra where they failed to balance security risks against medical needs and where other women were issued bras).

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<sup>69</sup> See *Battista v. Clarke*, 645 F.3d 449 (1st Cir. May 20, 2011).

<sup>70</sup> See, e.g., *Sterling v. Borough of Minersville*, 232 F.3d 190, 196 (3d Cir. 2000) (sexual orientation); *Powell v Shriver*, 175 F.3d 107, (2d Cir. 1999) (transsexualism). See also *Doe v. Delie*, 257 F.3d 309, 317 (3d Cir. 2001) (HIV status); *Moore v. Prevo*, 379 F. App'x. 425, 428 (6th Cir. 2010) (same); *Thomas v. District of Columbia*, 887 F. Supp. 1, 4 (D.D.C. 1995) (sexual orientation); but see *Franklin v. McCaughtry*, 110 F. App'x 715, 719 (7th Cir. 2004) (suggesting that any such right is limited to “the purposeful dissemination of intensely private medical information” such as HIV or transsexualism).

<sup>71</sup> See also *Thomas v. District of Columbia*, 887 F. Supp. 1, 4 (D.D.C. 1995) (pattern of sexual harassment including spreading rumors concerning prisoner's sexual orientation that resulted in emotional distress and fear for safety could establish Eighth Amendment claim).

<sup>72</sup> See, e.g., *Phelps v. Dunn*, 965 F.2d 93, 100 (6th Cir. 1992) (religious services); *Johnson v. Knable*, 862 F.2d 314 (4th Cir. 1988) (table) (prison employment); *Kelley v. Vaughn*, 760 F. Supp. 161 (W.D. Mo. 1991) (same). While courts are usually deferential to prison officials' justifications, some courts have held in other contexts that discrimination based on sexual orientation and gender identity are subject to heightened scrutiny. E.g., *Windsor v. U.S.*, 699 F.3d 169 (2d Cir. 2012) (sexual orientation), *aff'd*, 133 S.Ct. 2675 (2013); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (gender identity).

<sup>73</sup> *Doe v. Sparks*, 733 F. Supp. 227 (W.D. Pa. 1990).

<sup>74</sup> *Whitmire v. State of Arizona*, 298 F.3d 1134 (9th Cir. 2002).

<sup>75</sup> *Espinoza v. Wilson*, 814 F.2d 1093 (6th Cir. 1987); but see *Wilson v. Buss*, 370 F.Supp.2d 782 (N.D. Ind. 2005) (upholding ban on “blatantly homosexual” publications in prison on the basis that they would make a prisoner a target for abuse).

<sup>76</sup> *Turner v. Safley*, 482 U.S. 78 (1987).

<sup>77</sup> Prison Rape Elimination Act National Standards—Prisons and Jails: Disciplinary Sanctions for Inmates. C.F.R. § 115.78 (2012).

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## CONCLUSION

The issues discussed in this introductory guide represent just a sample of some of the issues LGBTQ prisoners may face. There are many issues beyond those addressed here that affect the lives of incarcerated LGBTQ people—including increasing oversights of jails and prison systems as a whole, working to reduce the number of people who are incarcerated in the first place, and supporting individuals in reintegrating into the community when they're released.

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## About the National Center for Transgender Equality

The National Center for Transgender Equality advocates to change policies and society to increase understanding and acceptance of transgender people. In the nation's capital and throughout the country, NCTE works to replace disrespect, discrimination, and violence with empathy, opportunity, and justice.

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