COMMENTS

Better To Be Out in Prison Than Out in Public: LGBTQ Prisoners Receive More Constitutional Protection If They Are Open About Their Sexuality While in Prison

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> When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded.[1]

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1. Procunier v. Martinez, 416 U.S. 396, 428 (1974) (Marshall, J., concurring).

I. INTRODUCTION

"If you want to be a ho, you'll be treated like a ho."[2] This was a classification committee member's response to inmate Roderick Johnson's plea for protective custody against gangs who forced him into sexual slavery.[3] Johnson was continually tortured by gang members while prison officials stood idly by and let the abuse occur. Another committee member told him, "You ain't nothing but a dirty tramp. Learn to fight or accept the f**king."[4] "Over an 18-month period between September 2000 and April 2002, Johnson . . . asked repeatedly for separate housing from the general prison population because his status as a homosexual man left him vulnerable to sexual assault."[5] However, officials at the James V. Allred Unit in Iowa Park, Texas, had another agenda. Johnson appeared before the corrections committee a total of seven times, begging to be placed in protective custody; with each attempt, his request was denied.[6] Subsequently, the United States Court of Appeals for the Fifth Circuit has found the executive director of the Texas Department of Criminal Justice and several Allred Prison officials liable for violations of the Fourteenth and Eighth Amendments.[7]

Johnson's harrowing experience is not unfamiliar.[8] Prison staff and administrators, acting on behalf of the institution, routinely overlook constitutional, statutory, and institutional rules designed to protect lesbian, gay, bisexual, transgender, and queer or questioning (LGBTQ) inmates from violence and discrimination.[9] Gay, lesbian, and transgender prisoners bear the brunt of such misconduct.[10] These individuals are not only specifically targeted for physical and sexual abuse, but they are also deprived of many of the rights afforded other inmates, including visitation, access to reading materials, and eligibility to earn good time.[11]

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2. Bryan Robinson, *'Sexually Enslaved' Gay Inmate Sues*, ABC NEWS (Apr. 18, 2002), http://abcnews.go.com/US/print?id=91740, *archived at* http://perma.cc/0bU1igvNgBA.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Johnson v. Johnson, 385 F.3d 503, 507 (5th Cir. 2004).

8. *See* Ronald C. Russo, *No Protection: A Prisoner's True Story*, BODY POSITIVE (Dec. 2002), http://www.thebody.com/content/art31122.html, *archived at* http://perma.cc/6Qz8-8KFN.

9. *See* Joan Howarth, Note, *The Rights of Gay Prisoners: A Challenge to Protective Custody*, 53 S. CAL. L. REV. 1225, 1225-27, 1231-36 (1979).

10. Meredith Duffy, *Special Information for Lesbian, Gay, Bisexual, and Transgender Prisoners*, *in* A JAILHOUSE LAWYER'S MANUAL 823, 853 (Columbia Human Rights Law Review ed., 9th ed. 2011).

11. Zachary Wolfe, *Gay and Lesbian Prisoners: Recent Developments and A Call for More Research*, PRISON LEGAL NEWS, https://www.prisonlegalnews.org/20578_displayArticle.aspx (last visited Sept. 7, 2013), *archived at* http://perma.cc/T82V-24FR.

Currently, there are over 2.2 million people behind bars in the United States, the highest incarceration rate in the world.[12] As a nation, we have 760 prisoners per 100,000 citizens,[13] and, of this remarkably large incarcerated population, one study indicates that as many as 30% identify as either gay or bisexual.[14] Thus, issues pertaining to LGBTQ inmates affect a substantial number of individuals. While there has been "increased judicial and public attention . . . focused on the rights of prisoners and of gay men and women in recent decades, very little attention has been paid to the men and women who are both gay and in prison."[15] Recent studies show that LGBTQ detainees are hit hardest by violence and discrimination in the justice system.[16] Among the problems of these prisoners are the refusal of prison officials to allow any LGBTQ literature,[17] the isolation of all gay inmates to one housing unit,[18] to forced participation in negative therapy programs that seek to "cure" homosexuality, and even parole denials rooted in homophobic attitudes.[19]

Though LGBTQ inmates suffer disproportionately compared to other detainees in many ways, this Comment is concerned with three areas of disparate treatment: first, as targets of sexual and physical abuse; second, as victims of discriminatory visitation rights; third, on their limited access to any sexuality-related literature.[20] The focus of this Comment is not to create solutions for these particular issues, but rather to examine the avenues available to LGBTQ detainees to challenge their mistreatment. The primary method prisoners can use to challenge abusive prison officials and discriminatory policies is a civil action for deprivation of rights,[21] claiming that state officials have deprived them of their Eighth Amendment right to be free from cruel and unusual

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12. CHRISTOPHER HARTNEY, NAT'L COUNCIL ON CRIME & DELINQUENCY, U.S. RATES OF INCARCERATION: A GLOBAL PERSPECTIVE 2 (Nov. 2006), *available at* http://www.nccdglobal.org/sites/default/files/publication_pdf/factsheet-us-incarceration.pdf, *archived at* http://perma.cc/0GZ5nW985uF.

13. Fareed Zakaria, *Zakaria: Incarceration Nation*, CNN (Mar. 30, 2012, 6:34 PM), http://globalpublicsquare.blogs.cnn.com/2012/03/30/zakaria-incarceration-nation-2/, *archived at* http://perma.cc/K9GZ-N9WF.

14. Lauren E. Gibson & Christopher Hensley, *The Social Construction of Sexuality in Prison*, 93 PRISON J. 355, 361 (Sept. 2013).

15. Howarth, *supra* note 9, at 1225.

16. *Lesbian, Gay, Bisexual, Transgender, and Intersex Offenders*, NAT'L INST. OF CORRECTIONS, http://www.nicic.gov/LGBTI (last visited Feb. 9, 2014), *archived at* http://perma.cc/QL67-84F4.

17. Howarth, *supra* note 9, at 1225.

18. Wolfe, *supra* note 11.

19. Howarth, *supra* note 9, at 1225.

20. 42 U.S.C. § 1983.

21. Duffy, *supra* note 10, at 823-24.

punishment and their Fourteenth Amendment right to equal protection under the law.[22] These claims are extremely difficult for prisoners to win because the parameters of their rights are largely undefined.[23] Prison officials justify their discriminatory actions and policies within the framework of equal protection law by asserting that they are furthering penological interests. In response to this argument, courts have held that deprivation of the rights of LGBTQ prisoners is acceptable when the deprivation serves a legitimate penological interest.[24] The LGBTQ community has prevailed against this "penological interest" argument only when the prisoner has been open about their sexuality or gender identity.[25] When a prison institution is aware of an inmate's sexual orientation or gender identity, the inmate is afforded more constitutional protection under our judicial system. To demonstrate this claim, I will analyze and discuss the prevalence of the three specific issues mentioned above within the prison infrastructure. Next, I will discuss the legal and political history behind the courts' expansion of the rights of both prisoners and LGBTQ individuals. Following that, I will prove how being openly gay, lesbian, bisexual, and/or transgender in prison may guarantee greater constitutional protection by comparing the successful and unsuccessful claims made by open and closeted inmates.[26] Finally, I will explore the larger policy implications of this judicial trend and what it may mean to the LGBTQ community in general.[27]

II. THE DISCRIMINATION AND MISTREATMENT OF LGBTQ INMATES

A. Sexual and Physical Abuse

Roderick Johnson's experience of sexual abuse in the James V. Allred Unit unfortunately is not unique or rare.[28] "The well-being of our prisoners isn't a topic that often garners much sympathy. Perhaps that is why few Americans know that rapes and sexual assaults of U.S. inmates

22. Duffy, *supra* note 10, at 823-24.
23. *Id.* at 826.
24. Howarth, *supra* note 9, at 1259.
25. *See* Whitmire v. Arizona, 298 F.3d 1134, 1136 (9th Cir. 2002) (holding that there is no "common-sense" basis for prisons to prevent, for safety reasons, displays of affection between same-sex couples when a prisoner is openly gay); Doe v. Sparks, 733 F. Supp. 227, 234 (W.D. Pa. 1990) (holding that prohibiting same-sex visitation rights furthered no purpose of preserving internal security and was, therefore, unconstitutional).
26. *See infra* Part III.
27. *See infra* Part IV.
28. Russo, *supra* note 8.

have reached epidemic proportions."[29] According to a Bureau of Justice Statistics study, "[N]early one in [ten] prisoners report having been raped or sexually assaulted by other inmates, staff or both."[30] The widespread existence of prison rape gained national attention in 2003 when the Prison Rape Elimination Act was passed and the National Prison Rape Elimination Commission was established to uncover and combat this epidemic.[31] While lobbying for national attention, advocacy groups conducted many surveys about the prevalence of rape in prison.[32] One survey demonstrated an alarming contrast between an estimated 3.5% of heterosexual males who reported being sexually victimized by an officer or another inmate, as compared to 34% of bisexual and 39% of homosexual men.[33] In prison, LGBTQ inmates are frequently targeted for physical and sexual assaults due to their size or stature; "feminine" characteristics, such as long hair or a high voice; unassertive, unaggressive, or shy demeanor; or having been convicted of a sexual offense.[34] Prisoners possessing any one or a combination of these characteristics typically face an increased risk of sexual abuse.[35] LGBTQ detainees often have little access to protection from these assaults because pervasive homophobia may cause prison officials to ignore the risk; this creates an environment in which abuse is tolerated and allowed to flourish.[36] Ultimately, LGBTQ prisoners are afforded limited protections and forced to endure abuse in silence.

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29. David Person, *Column: Nightmare of Prison Rape*, USA TODAY (June 26, 2011), http://usatoday30.usatoday.com/news/opinion/forum/story/2012-06-26/prison-rape-sexual-assault/55844922/1, *archived at* http://perma.cc/VJ3J-HCVC.

30. *Id.*; *see also* ALLEN J. BECK & CANDACE JOHNSON, BUREAU OF JUSTICE STATISTICS, NATIONAL FORMER PRISONER SURVEY: SEXUAL VICTIMIZATION REPORTED BY FORMER STATE PRISONERS, 2008 (May 2012), http://www.bjs.gov/content/pub/pdf/svrfsp08.pdf, *archived at* http://perma.cc/3U27-CTAB.

31. Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972.

32. *Id.*

33. BECK & JOHNSON, *supra* note 30, at 5; *see also* Press Release, Just Detention Int'l, New Report from Department of Justice: One in Ten State Prisoners Sexually Abused (May 17, 2012), *available at* http://www.justdetention.org/en/listserv/2012/051712_2.aspx, *archived at* http://perma.cc/E9P9-VTX5 (describing the crisis identified by the Bureau of Justice Statistics' report).

34. Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 158-59 (2006); Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender and Rule of Law*, 29 YALE L. & POL'Y REV. 1, 13-16 (2010).

35. Ristroph, *supra* note 34, at 143; Buchanan, *supra* note 34, at 13-16.

36. Ristroph, *supra* note 34, at 143; Buchanan, *supra* note 34, at 13-16.

B. LGBTQ Prisoners' Visitation Rights

Apart from being direct targets of physical and sexual abuse, LGBTQ prisoners also incur mistreatment through facially discriminatory prison policies. Prisons commonly preclude same-sex partners from visiting LGBTQ prisoners.[37] "In most regards, visitation policies vary . . . greatly" among the states "and are . . . dependent upon individualized factors relating to each prisoner."[38] However, "[m]ost state prisons and all federal prisons have policies that, subject to restrictions, allow prisoners to visit with their family members."[39] "[M]any of these policies define family narrowly."[40] As a result, LGBTQ prisoners are generally not permitted visits from their same-sex partners.[41] Under *Block v. Rutherford*, the United States Supreme Court established the principle that prisoners have no right to visitation and that prisons may place limitations on visitation or exclude visitation altogether if it is in the interest of serving "legitimate security concerns."[42] In federal prisons, an inmate must submit a list of proposed visitors to prison staff members.[43] The staff looks over the list, does background checks, and then decides whether visitation with any of these individuals will be permitted.[44] If an official wants to exclude an immediate family member or relative, they must have a compelling reason to do so.[45] However, they may bar a non-family member by claiming that there is a "reasonabl[e] fear that [the] visitor will harm security or [the prisoner's] rehabilitation."[46]

This poses a serious problem for LGBTQ inmates whose same-sex partners are not considered family members or relatives under federal

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37. Wolfe, *supra* note 11.
38. *Id.*
39. Duffy, *supra* note 10, at 847.
40. *Id.*
41. *Id.* at 841.
42. 468 U.S. 576, 588-89 (1984).
43. *See, e.g.*, FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, No. BAS 5267.08C, INSTITUTION SUPPLEMENT: VISITING REGULATIONS 2 (2009), *available at* http://www.bop.gov/locations/institution/bas/BAS_visti_hours.pdf, *archived at* http://perma.cc/QR53-RUBM [hereinafter INSTITUTION SUPPLEMENT]; *General Visiting Information*, FED. BUREAU OF PRISONS, http://www.bop.gov/inmates/visiting.jsp (last visited Feb. 9, 2014), *archived at* http://perma.cc/9ZCK-NKCE; *see also* FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, No. 5267/08, PROGRAM STATEMENT: VISITING REGULATIONS 5 (2006), *available at* http://www.bop.gov/policy/progstat/5267_008.pdf, *archived at* http://perma.cc/6G4L-2Z4U [herein-after PROGRAM STATEMENT] (providing that an inmate desiring to have a regular visitor must submit a list of proposed visitors to the designated staff for approval).
44. *See* Wolfe, *supra* note 11.
45. *See* PROGRAM STATEMENT, *supra* note 43, at 1.
46. Duffy, *supra* note 10, at 848.

law.[47] Thus, prison officials are permitted to use their discretion in excluding an inmate's same-sex partner from visitation simply because such an individual is not afforded the equivalent status of a spouse or family member. Officials often abuse this discretion and refuse same-sex visitation as a tactic to demonstrate power and control over specific inmates or because of their own homophobia.[48] Similarly, state visitation policies often give officials the discretion to exclude potential visitors.[49] The prevalence of this abuse of power and its impact on LGBTQ detainees is evidenced by the American Civil Liberties Union's campaign, launched against the California Department of Corrections in 2007, urging a change in the Department's policies to grant domestic partners visitation rights.[50]

Moreover, even in the few states where same-sex partners are permitted to visit, LGBTQ inmates are limited in how they may interact with their partners.[51] Many LGBTQ detainees and their partners are prohibited from touching or exhibiting displays of affection, even when their heterosexual counterparts are permitted to touch, hug, and kiss loved ones during their visiting sessions.[52] This issue was raised in *Whitmire v. Arizona*, where prisoners challenged an Arizona prison policy that granted prisoners permission to hug and kiss family members, including heterosexual partners but explicitly excluding same-sex partners, at the beginning and end of visits.[53]

C. Access to Reading Materials

In addition to denying same-sex visitation privileges, prison officials may exploit their discretionary power by choosing to censor what reading materials inmates can access.[54] Prisons often fail to respect an inmate's right to receive information and literature on LGBTQ issues.[55] Under *Thornburgh v. Abbott*, prisons may ban any publications that they feel may cause a threat to the daily operations of the prison.[56]

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47. *Id.*
48. *Id.* at 849.
49. *Id.* at 850.
50. *Id.*
51. *Id.*
52. Wolfe, *supra* note 11. *But see* CAL. DEP'T OF CORR. & REHAB., VISITING A FRIEND OR LOVED ONE IN PRISON 15 (2008), *available at* http://www.cdcr.ca.gov/visitors/docs/inmate visitingguidelines.pdf, *archived at* http://perma.cc/R86T-G3QM (making no distinction between same-sex and opposite-sex visitors in the official California prison policy).
53. 298 F.3d 1134, 1136 (9th Cir. 2002).
54. Wolfe, *supra* note 11.
55. *Id.*
56. 490 U.S. 401, 407 (1989).

Thus, LGBTQ publications are repeatedly denied entry into facilities because the prison administration decides that those publications pose a threat to security, order, or discipline. In *Thornburgh*, the Court upheld a prison policy explicitly listing "[h]omosexual [material] (of the same sex as the institution population)" as material to be discarded, on two grounds: (1) homosexual material would, once in the prison, circulate and lead to "disruptive conduct," and (2) if prisoners observed a fellow prisoner reading such material, they might draw inferences about the prisoner's sexual orientation.[57] This ruling has effectively enabled prison officials to censor homosexual material while permitting and proliferating literature bearing a heterosexual stamp of approval. In its opinion, the Court admitted that the ban would be unconstitutional outside of the prison context.[58] However, it refused to "second-guess" prison administrators on matters relating to prison security, "even when those matters affect constitutional rights of inmates in a manner [the court found] discomforting."[59] Since *Thornburgh*, many issues regarding receipt of information continue to surface for LGBTQ prisoners.[60] A court in Indiana recently upheld a prison's refusal to grant a prisoner's request for subscriptions to *The Advocate* and *Out* magazine.[61] Because reading materials are a vital lifeline connecting incarcerated individuals to the outside world and are a major source of intellectual stimulation that occupies their time, denying LGBTQ inmates access to publications of their choosing is a substantial deprivation. Their heterosexual counterparts, generally, face minimal restrictions on reading material.[62]

These three major problems that afflict LGBTQ detainees—sexual and physical assaults, limited visitation rights, and the lack of access to LGBTQ literature—have all been litigated under the First, Eighth, and Fourteenth Amendments.[63] However, plaintiffs have found little help from the court system because many courts still do not consider sexual

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57. *Id.* at 405 n.6, 412.

58. *Id.* at 407.

59. Espinoza v. Wilson, 814 F.2d 1093, 1097 (6th Cir. 1987) (quoting Brown v. Johnson, 743 F.2d 408, 412-13 (6th Cir. 1984)).

60. *See* JUST DETENTION INT'L, A CALL FOR CHANGE: PROTECTING THE RIGHTS OF LGBTQ DETAINEES 1-4 (Feb. 2009), http://www.justdetention.org/pdf/CFCLGBTQJan09.pdf, archived at http://perma.cc/4A8X-SDSX.

61. Willson v. Buss, 370 F. Supp. 2d 782, 784, 792 (N.D. Ind. 2005).

62. *See* Beards v. Banks, 548 U.S. 521, 526-27 (2006); Clement v. Cal. Dep't of Corrs., 364 F.3d 1148, 1151-52 (9th Cir. 2004).

63. *See* Wolfe, *supra* note 11. *See generally* Duffy, *supra* note 10 (discussing concerns for LGBTQ prisoners and legal challenges to prison policy).

orientation a classification requiring special protection.[64] As a result, the government only needs a rational basis for infringing on LGBTQ rights, giving prisons an easy way to circumvent constitutional protections by stating that their policies serve a legitimate security purpose.[65]

The topic of LGBTQ prisoner rights, including the prevalence of sexual abuse, the segregation of LGBTQ inmates, and the reinforcement of homophobia and traditional notions of masculinity through prison policies, has been addressed by many legal scholars.[66] However, there has yet to be a scholarly discussion about whether self-identified LGBTQ inmates are better positioned to receive privileges and assume constitutional rights than inmates who are not open about their sexuality. Could there be some benefit to being openly gay in prison?

III. LEGAL BACKGROUND

Before we can answer this question of whether LGBTQ prisoners are afforded more rights in prison if they are open about their sexuality, it is important to look back and understand how the legal rights of both general population prisoners and the LGBTQ population have evolved. Reflecting society's uneasiness toward shifting notions of sexuality, judicial opinions that interpret the civil rights of gay, lesbian, bisexual, and transgender individuals have resulted in varied outcomes.[67] Likewise, attitudes concerning the rights of prisoners have changed rapidly in recent years.[68] Understanding the comprehensive legal history for both prisoners and the LGBTQ community will enable us to understand not only the present judicial conception of the rights to which LGBTQ prisoners are entitled, but also what rights they may be afforded in the future.

For many years, courts took a "hands off" approach toward the rights of inmates, deferring to the expertise of prison officials rather than interfering with the internal prison administration.[69] However, in the

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64. *See, e.g.*, Inskeep v. W. Res. Transit Auth., No. 12 MA 72, 2013 WL 979054 (Ohio Ct. App. Mar. 8, 2013) (finding that sexual orientation is not a protected class under Ohio law for purposes of state sexual harassment claim).

65. *See* Wolfe, *supra* note 11.

66. *See generally* Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1 (2011); Odeana R. Neal, *The Limits of Legal Discourse: Learning from the Civil Rights Movement in the Quest for Gay and Lesbian Civil Rights*, 40 N.Y. L. SCH. L. REV. 679 (1996).

67. Howarth, *supra* note 9, at 1227.

68. *See* Turner v. Safley, 482 U.S. 78, 96 (1987).

69. *See* Hudson v. Palmer, 468 U.S. 517, 530, 555 (1984) (holding that prisoners are not entitled to Fourth Amendment protection of privacy in their cell); *see also* William G. Babcock, *Courts Return to Hands-Off Policy in Prison Rights*, PHILA. INQUIRER (July 31, 1989), http://

hallmark case of *Wolff v. McDonnell*, the Court held that "a prisoner does not shed his basic constitutional rights at the prison gate"; thus, courts began to shift their attitudes from deference to intervention, ensuring that constitutional principles are upheld behind the steel prison bars.[70] In *Wolff*, a prisoner asserted a claim against the prison for violating his due process rights by inspecting and reading through his mail sent from his attorney.[71] The Court found that it is lawful for a prison to "make[] unavailable many rights and privileges of the ordinary citizen," due to the "considerations underlying our penal system" and the "exigencies of [an] institutional environment."[72] However, the court reasoned that a prisoner is not wholly stripped of constitutional protections, asserting, "There is no iron curtain drawn between the Constitution and the prisons of this country."[73] Following this ruling, courts have extended prisoners' rights to religious freedom under the First and Fourteenth Amendments, as well as the right of access to the justice system.[74]

Additionally, the Supreme Court has extended the Equal Protection Clause of the Fourteenth Amendment to prisoners, holding that prisons cannot segregate inmates solely on the basis of race.[75] Courts have also stepped in to uphold prisoners' constitutional rights in findings that certain conditions, such as overcrowding,[76] inadequate medical treatment,[77] and physical abuse by the guards,[78] constitute cruel and unusual punishment in violation of the Eighth Amendment.[79] The ultimate result of these cases is the notion that prisoners may claim the protections of the Constitution and may not be deprived of life, liberty, or property without due process of law.[80] When prison officials violate inmates' constitutional rights, federal statute 42 U.S.C. § 1983 is

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www.articles.philly.com/1989-07-31/news/26134493_1_legitimate-penological-prison-administrators-institutional-security, *archived at* http://perma.cc/YA4L-ESU2.

70. 418 U.S. 539, 581 (1974).

71. *Id.* at 542-45.

72. *Id.* at 555-56 (quoting Price v. Johnston, 334 U.S. 266, 285 (1948) (internal quotation marks omitted)).

73. *Id.* at 555-60.

74. Heleva v. Kramer, 214 F. App'x 244, 244 (3d Cir. 2007); Jackson v. Mann, 196 F.3d 316 (2d Cir. 1999).

75. Lee v. Washington, 390 U.S. 333, 333-34 (1968); *see also* Johnson v. California, 543, U.S. 499, 505-09 (2005) (holding that strict scrutiny applies to prison policies segregating inmates on the basis of race).

76. Hutto v. Finney, 437 U.S. 678, 681-83 (1978).

77. Estelle v. Gamble, 429 U.S. 97, 99-101 (1976).

78. Sweet v. S.C. Dep't of Corr., 529 F.2d 854, 863 (4th Cir. 1975).

79. *See, e.g.*, *Estelle*, 429 U.S. at 99; *Hutto*, 437 U.S. at 690; *Sweet*, 529 F.2d at 863.

80. Howarth, *supra* note 9, at 1229.

available to them for a civil suit. This statute permits any individual to sue a person, who, acting in an official capacity, violated either (1) one of the individual's federal statutory rights or (2) a constitutional right (such as the Eighth Amendment right to be free from cruel and unusual punishment or the right to equal protection and due process guaranteed by the Fourteenth Amendment).[81] Prisoners have had varying degrees of success in asserting such claims, depending on the specific facts of each case.[82]

Just as it is important to know what rights prisoners are guaranteed, it is equally valuable to understand how courts have perceived the rights of LGBTQ individuals. One of the most significant cases in solidifying the inherent rights of the LGBTQ community is *Lawrence v. Texas*, wherein the Court found the right to privacy, guaranteed by the Fourteenth Amendment, includes the right to engage in consensual same-sex sexual activity.[83] With this decision, the Supreme Court directly overturned *Bowers v. Hardwick*, which had previously permitted states to create laws prohibiting homosexual acts under the rationale that the right to engage in homosexual acts is not a fundamental right guaranteed by the Constitution.[84] In a significant departure from allowing homophobic attitudes to drive the law, the holding in *Lawrence* is monumental to the LGBTQ community for two reasons.[85] First, it made private homosexual conduct legal, and second, it made "moral disapproval" an invalid reason to treat others differently.[86] However, despite *Lawrence*'s guaranteed right to privacy for consenting individuals engaging in homosexual conduct, this privacy privilege has not been extended to prisoners.[87] In *Willson v. Buss*, a prisoner sued the superintendent of his prison for the right to receive magazines with homosexual content.[88] Though the court noted that *Lawrence* had established a constitutionally protected right to consensual homosexual relationships in society, the court refused to extend that right to the prison context, where constitutional guarantees are permissibly limited to serve necessary institutional needs.[89]

While the *Lawrence* ruling focused on upholding individuals' fundamental right to privacy, LGBTQ individuals have also argued for

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81. Duffy, *supra* note 10, at 847.
82. *Id.* at 824-27.
83. 539 U.S. 558, 578-79 (2003).
84. 478 U.S. 186, 191-95 (1986).
85. *Lawrence*, 539 U.S. at 565-606.
86. Duffy, *supra* note 10, at 824-30 (citing *Lawrence*, 539 U.S. at 582).
87. *See* Willson v. Buss, 370 F. Supp. 2d 782, 786 (N.D. Ind. 2005).
88. *Id.* at 784.
89. *Id.* at 786-90.

heightened protection under the Equal Protection Clauses.[90] Equal protection is applied differently to different classifications of people. Where the government makes a distinction upon race, courts require that the government show that the distinction is narrowly tailored to serve a "compelling government interest."[91] However, when the government discriminates on the basis of gender, the distinction needs only to be "substantially related to [a] government objective," passing an "intermediate scrutiny" evaluation.[92] Other distinctions, such as those based on age, require an even lower threshold of review: the need must "be rationally related to a legitimate government purpose."[93] *Romer v. Evans* is the leading case for LGBTQ individuals asserting their equal protection rights.[94] In *Romer*, the plaintiffs challenged an amendment to a state constitution that invalidated local laws barring discrimination on the basis of sexual orientation.[95] The outcome of the case was beneficial to the LGBTQ community because the Supreme Court found the law was merely motivated by an "animus toward the class it affects."[96] Unfortunately, the Supreme Court did not find the LGBTQ community to be a class in need of further protection of their rights,[97] holding that sexual orientation is only entitled to a rational basis review.[98] Though *Romer* was a disappointment to the LGBTQ community in that it did not solidify their status as a class guaranteed a substantial degree of protection under the Constitution, it does show how a rational basis evaluation can be used to achieve favorable outcomes against discrimination toward LGBTQ populations.

Similar to *Romer*, LGBTQ prisoners have also asserted their rights through the Equal Protection Clause of the Constitution.[99] For example, in *Johnson v. Johnson*, a homosexual inmate argued that prison officials violated his right to be equally protected under the law because they were motivated by their attitudes surrounding his sexuality and chose not to intercede on his behalf against violence and rape perpetrated by other prisoners.[100] The United States Court of Appeals for the Fifth Circuit

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90. Duffy, *supra* note 10, at 827.
91. *Id.* at 826.
92. *Id.*
93. *Id.*
94. *Id.*
95. Romer v. Evans, 517 U.S. 620, 623-25 (1996).
96. *Id.* at 632.
97. *Id.*
98. Rational basis review is the lowest legal standard, needing only a rational basis to fulfill a legitimate government purpose to be considered constitutional. *Id.* at 633.
99. Duffy, *supra* note 10, at 826.
100. 385 F.3d 503, 514 (5th Cir. 2004).

noted that all prisoners are entitled to reasonable protection from sexual assault and that, although neither the Supreme Court nor the Fifth Circuit has recognized sexual orientation as a suspect classification, "a state violates the Equal Protection Clause if it disadvantages homosexuals for reasons lacking any rational relationship to legitimate governmental [interests]."[101] This decision marked a substantial turning point for LGBTQ inmates, proving they are entitled to treatment equal to other detainees.

Still, LGBTQ prisoners have had varying degrees of success arguing for equal protection of their rights behind prison bars.[102] On the one hand, their claims can be easily defeated because sexual orientation is not a protected class, and prisons can easily justify discriminatory policies as fulfilling a legitimate government security interest.[103] On the other hand, when a prison cannot prove that its discriminatory policy serves any legitimate government purpose, LGBTQ prisoners will likely be more successful.[104] This was the rationale articulated in *Brown v. Johnson*, where LGBTQ prisoners were not permitted to participate in religious services because the prison argued that any prisoner who participated in this religious group, specifically organized by and for homosexuals, would subsequently be vulnerable to attack by other prisoners because participation would signal to other inmates that they were homosexual.[105] The court found the restriction served a valid prison security interest of protecting LGBTQ prisoners who are more vulnerable to attack, declaring it justified and not in violation of constitutional equal protection.[106]

However, in *Holmes v. Artuz*, the United States District Court for the Southern District of New York found that a prison's decision to remove a gay prisoner from his food service prison job due to his sexuality bore no rational relationship to a valid security purpose.[107] The opinion noted, "A person's sexual orientation, standing alone, does not reasonably, rationally, or self-evidently implicate mess hall security concerns."[108] The court denied the prison's argument that the ban on LGBTQ mess hall employees was designed to prevent potential

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101. *Id.* at 532 (citing *Romer*, 517 U.S. at 631-32).
102. Duffy, *supra* note 10, at 841.
103. *Id.* at 825.
104. *See* Holmes v. Artuz, No. 95 Civ. 2309, 1995 U.S. Dist. LEXIS 15926, at *3-4 (S.D.N.Y. Oct. 26, 1995).
105. 743 F.2d 408, 412-13 (6th Cir. 1984).
106. *Id.* at 413.
107. *Holmes*, 1995 U.S. Dist. LEXIS 15926, at *3-4.
108. *Id.* at *4.

disciplinary and security problems arising from inmates discovering that homosexual or transgender inmates were serving and preparing their food.[109] These two cases demonstrate the vacillating nature of the Equal Protection Clause as applied to the LGBTQ prison community.

IV. BETTER TO BE OUT IN PRISON

Because the courts have historically limited both the rights of prisoners and of LGBTQ individuals, it is no surprise that the courts narrowly define the rights of the amalgamated group of LGBTQ prisoners. Due to this limited scope, LGBTQ prisoners are subject to far worse treatment than other detainees and are afforded minimal constitutional protection.[110] When LGBTQ prisoners have asserted their rights, those inmates who have been open about their sexuality while in prison have received more constitutional protection from the courts.[111] Cases involving prisoners' § 1983 claims show that prisons commonly justify their discriminatory policies by claiming they serve a rationally related security purpose of protecting vulnerable LGBTQ inmates from being outed in the facility.[112] When LGBTQ prisoners make their sexuality or gender identity known to other prisoners, this discriminatory policy is stripped of its purpose and functions solely to target a class of inmates without achieving any legitimate government goal. Thus, it is evident in the context of the three issues previously presented—(1) LGBTQ prisoner vulnerability to assault, (2) lack of visitation privileges for same-sex partners, and (3) limited access to reading material of their choice—it may be better to be out in prison.

A. Eighth Amendment Claims Resulting from the Failure To Protect

LGBTQ prisoners who are physically and sexually assaulted by other inmates must show that the prison's failure to act resulted in cruel and unusual punishment in violation of their Eighth Amendment rights.[113] Prison officials violate the Eighth Amendment when they stand idly by and fail to protect inmates from abuse at the hands of other inmates.[114] To

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109. *Id.*

110. *See generally* Duffy, *supra* note 10.

111. *See, e.g.*, Johnson v. Johnson, 385 F.3d 503, 527 (5th Cir. 2004); Greene v. Bowles, 361 F.3d 290, 294 (6th Cir. 2004); Whitmire v. Arizona, 298 F.3d 1134, 1143 (9th Cir. 2002); Mauro v. Arpaio, 188 F.3d 1054, 1060 (9th Cir. 1999); Doe v. Sparks, 733 F. Supp. 227, 233 (W.D. Pa. 1990).

112. *See, e.g.*, *Doe*, 733 F. Supp. at 232-33; *Whitmire*, 298 F.3d at 1134-37.

113. Duffy, *supra* note 10, at 840.

114. *Id.*

prove an official's failure to act amounts to cruel and unusual punishment under the Eighth Amendment, an inmate must show that (1) the official showed "deliberate indifference" to the safety of the inmate by disregarding a known substantial risk, and (2) the injury the inmate incurred was severe.[115] Inmates who are open about their sexuality or gender identity may have a greater chance of proving an officer's subjective knowledge of risk as required to satisfy a finding of deliberate indifference.[116]

This is evident in the difference in outcomes between *Farmer v. Brennan*, where a transgender inmate was open about her gender identity,[117] and *Harvey v. California*, where a targeted inmate was not open about his sexual orientation.[118] In *Farmer*, a transgender prisoner argued that prison officials acted with deliberate indifference by failing to protect her from attacks stemming from her feminine appearance.[119] The prisoner, assigned male at birth and living in an all-male prison facility, had undergone estrogen therapy and breast implantation and had unsuccessfully attempted castration.[120] The Court held that "a prison official may be held liable under the Eighth Amendment . . . only if he [subjectively] knows that inmates face a substantial risk of serious harm *and* disregards that risk."[121] The Court remanded the case to determine whether the officers subjectively knew of the inmate's heightened risk for abuse due to her gender identity.[122] The Court defined "deliberate indifference" as the failure of prison officials to act when they know of a "substantial risk of serious harm."[123] The Court went on to say that an "inference from circumstantial evidence" could be used to demonstrate that prison officials had knowledge of a risk.[124] The Court considered that, given the inmate's feminine appearance and the treatment she received from the other prisoners, it was impossible for the officers not to have acquired subjective knowledge that she was unsafe and at higher

115. *Id.*
116. *Id.*
117. Farmer v. Brennan, 511 U.S. 825, 829, 847 (1994) (holding unanimously that prison officials can be liable for damages if they are deliberately indifferent in failing to protect prisoners from harm caused by other prisoners).
118. Harvey v. California, 82 F. App'x 544, 545 (9th Cir. 2003) (holding the prisoner did not demonstrate officers knew of his heightened vulnerability).
119. *Farmer*, 511 U.S. at 831.
120. *Id.* at 829.
121. *Id.* at 847 (emphasis added).
122. *Id.*
123. *Id.* at 834.
124. *Id.* at 842.

risk for harm.[125] Thus, the Court remanded the case to determine the officials' personal awareness of the inmate's sexuality.[126] A similar analysis was employed in *Greene v. Bowles*, where the United States Court of Appeals for the Sixth Circuit likewise recognized an Eighth Amendment deliberate indifference claim because the warden admitted to knowing that the plaintiff was transgender when he placed her in a housing unit where he was aware a "predatory inmate" was also living.[127] The court reasoned that, because the warden knew *and* was motivated by this knowledge to subject the inmate to further harm, this action constituted a violation of the Eighth Amendment.[128]

On the contrary, in *Harvey v. California*, the United States Court of Appeals for the Ninth Circuit denied a gay inmate's Eighth Amendment claim stemming from abuse by a fellow inmate because he failed to show that prison guards in fact knew of the risk and ignored it.[129] In *Harvey*, the court found that the plaintiff's statement to the guard that he was "nervous" about being in the same cell with another prisoner was inadequate to show that the officer acted with deliberate indifference to the inmate's safety.[130] The inmate did not reveal his sexual orientation to other inmates or prison officials, and thus the court believed there was no reason the officers would be aware that he was particularly vulnerable to attack based on his sexual orientation.[131] It was the inmate's right not to reveal his sexual orientation, but in order to prove the officers should have known he was at greater risk for assault, his orientation must have been known or at least nominally indicated to the officers.[132] Absent proof that the corrections officers knew of his sexuality, the inmate could not demonstrate that officers intentionally chose not to protect him from his cellmate.[133] Thus, it seems prisoners who openly identify themselves as LGBTQ within prison walls are more successful in proving that prison officials knew of their vulnerabilities and acted with deliberate indifference by failing to protect them from harm.

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125. *Id.*
126. *Id.* at 851.
127. 361 F.3d 290, 294 (6th Cir. 2004).
128. *Id.* at 295; *see also Farmer*, 511 U.S. at 837.
129. 82 F. App'x 544, 545 (9th Cir. 2003).
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*

B. Equal Protection Challenges to Prison Visitation Policies

Similarly, LGBTQ prisoners are much more successful in proving prison policies unfairly discriminate against them based on their sexuality, in violation of the Equal Protection Clause, if the prisoner is open about their sexuality. This is seen both in the context of LGBTQ prisoners' equal rights to visitation by their same-sex partners, as well as their right to obtain LGBTQ literature.[134] Because LGBTQ prisoners are not considered by courts to be a suspect class entitled to a high degree of protection, prison officials need only a "rational basis" for security measures that impose limitations.[135] Prisons and prison officials have justified their refusal to allow LGBTQ inmates to receive visits from their same-sex partners or access literature of their choice by claiming they have a legitimate interest in preserving the security of the facility and protecting the LGBTQ prisoners from being outed and left vulnerable to attack from other prisoners.[136] However, if LGBTQ prisoners are already out, the purpose and goals of these discriminatory policies are no longer achieved by their existence. For example, in the case of *Doe v. Sparks*, the United States District Court for the Western District of Pennsylvania struck down a Blair County Prison policy that banned same-sex partner visitation but permitted heterosexual partners to visit.[137] The prison claimed that this policy existed to promote the "internal security" of the prison by preventing inmates from discovering the sexual orientation of other inmates through their visitation with same-sex partners.[138] The court, however, found that because inmates were fare more likely to discern an inmate's sexual orientation "during the 166 hours per week when that inmate is not receiving visitors," the policy served no effective purpose.[139] The Ninth Circuit employed similar reasoning in *Whitmire v. Arizona*, when an LGBTQ inmate challenged a prison policy that permitted heterosexual partners to kiss and hug during visits but precluded any "same-sex displays of affection."[140] The prison claimed that allowing homosexual prisoners to kiss and hug their same-sex partners would cause other prisoners to discover an inmate's sexual preference and make the inmate prey to abuse from other prisoners.[141]

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134. *See, e.g.*, Doe v. Sparks, 733 F. Supp. 227 (W.D. Pa. 1990).
135. Duffy, *supra* note 10, at 850-51.
136. *Id.* at 847-51.
137. *Doe*, 733 F. Supp. at 229, 234-35.
138. *Id.* at 234.
139. *Id.* at 233.
140. 298 F.3d 1134, 1136 (9th Cir. 2002).
141. *Id.*

The prison claimed that prohibiting same-sex contact during visitation ultimately served to protect their safety.[142] However, in *Whitmire*, the prisoner was openly gay, and the Ninth Circuit found that the prison policy lacked a "common-sense connection" to its intended security purpose because an inmate who would display affection toward a same-sex partner during a visit is likely already out.[143] Therefore, if an LGBTQ prisoner openly identifies as LGBTQ, these discriminatory policies no longer achieve their objective of protecting them from being outed.

Discriminatory policies that do not serve or accomplish any legitimate security purpose are plainly unconstitutional.[144] Moreover, because some states' laws have recently evolved to recognize same-sex partnerships, open LGBTQ prisoners might secure benefits through individualized state programs designed to facilitate family values.[145] Currently, New York has a Family Reunion Program that allows close family members a chance for more private visits with prisoners.[146] As of June 2011, when the New York State legislature amended its constitution to permit same-sex marriages, this program applies to LGBTQ inmates.[147] Thus, with respect to visitation rights, openly LGBTQ inmates may not only be granted more protection by courts, but also may be entitled to more privileges than those who remain in the closet.

C. Equal Protection Challenges to Prison Censorship

The argument against visitation prohibitions can be similarly applied in the context of prison censorship of LGBTQ literature. Akin to their argument against same-sex visitation rights, prisons claim their prohibition of LGBTQ literature is acceptable because it is rationally related to the purpose of protecting LGBTQ inmates from being targeted by other inmates for abuse.[148] The Sixth Circuit employed such reasoning in *Espinoza v. Wilson* when it upheld a prison policy banning any literature with homosexual content.[149] In *Espinoza*, two inmates were denied access to LGBTQ literature that discussed the religious and educational backdrop of the LGBTQ community.[150] The warden at the

142. *Id.*
143. *Id.* at 1136-37.
144. *See id.*
145. Duffy, *supra* note 10, at 850.
146. N.Y. COMP. CODES R. & REGS. tit. 7, § 220.1 (2013).
147. *See* N.Y. DOM. REL. LAW § 10-a (McKinney 2011); *see also* N.Y. COMP. CODES R. & REGS. tit. 7, § 220.3 (2013).
148. Espinoza v. Wilson, 814 F.2d 1093, 1098-99 (6th Cir. 1986).
149. *Id.* at 1099.
150. *Id.* at 1095.

Kentucky Correction Cabinet personally decided to prohibit this literature on the basis that it was in the interest of inmate safety and institutional order.[151] The warden's actions were based on a longstanding belief that such publications call attention to LGBTQ inmates and will be detrimental to their safety as well as the safety of others within the facility.[152] The Sixth Circuit accepted the belief and upheld the ban.[153] However, under the same argument employed in *Whitmire*, when an inmate's sexuality is known, the purpose of the prison's LGBTQ literature ban becomes moot.[154] Moreover, one can argue that just because an inmate is reading LGBTQ-associated literature does not plainly mean that they identify as LGBTQ, nor does it mean that they are particularly vulnerable to attack. This argument may once again render the underlying purpose of prison censorship void. Though the courts have yet to look at a case where prisoners have used such reasoning to assert their right to the literature of their choice, it is apparent that prisons' traditional justification for this discriminatory ban is susceptible to challenges.

V. CONCLUSION

LGBTQ prisoners have limited avenues to assert their rights both because of their sexual orientation or gender identity and because of their incarceration. These inmates not only face the societal stain associated with imprisonment, but also the stigma and discrimination that society has traditionally created and continues to project upon LGBTQ persons.[155] Prison officials exploit this heightened vulnerability by abusing their discretion in all three of these contexts: first, in their failure to effectively prevent widespread sexual and physical assaults of LGBTQ inmates; second, in their policies prohibiting same-sex partner visitation; and lastly, in their censorship of LGBTQ reading materials.[156] As the above-mentioned cases illustrate, at present, an LGBTQ inmate will receive the most constitutional protection if they are open about their sexuality.

The claim that it is better to be out in prison is particularly relevant to the broader debate of whether a person's, let alone a prisoner's, sexual orientation ought to be a protected class under equal protection standards.

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151. *Id.*
152. *Id.* at 1097.
153. *Id.* at 1098.
154. *See* Whitmire v. Arizona, 298 F.3d 1134, 1135 (9th Cir. 2002).
155. Duffy, *supra* note 10, at 823.
156. *Id.* at 839-41, 847-53.

Although the Supreme Court found the Defense of Marriage Act to be unconstitutional, violating the Equal Protection Clause, it failed to elevate sexual orientation to a suspect class.[157] Such a finding would have required any policy that inflicts disparate treatment based on sexual orientation to satisfy a heightened scrutiny standard in order to be considered constitutional. This higher standard would have wide-reaching effects on gay, lesbian, and bisexual inmates by requiring prison policies targeting them to pass a higher threshold for constitutionality. However, in order to obtain protection for the entire LGBTQ community, gender identity must receive similar judicial treatment.

LGBTQ inmates experience some of the worst treatment in the United States penal system.[158] They are often targeted for mistreatment by prison officials and incur severe deprivations of their constitutional rights.[159] The lack of successful cases brought by LGBTQ detainees serves to discourage LGBTQ inmates from asserting their rights in court.[160] The purpose of this Comment is to highlight an avenue where there have been successful challenges to the discriminatory practices and policies of prisons. The common link among these successes has been the LGBTQ inmate's openness about their sexuality or gender identity. Whether it pertains to sexual or physical abuse, prohibited visitation rights or limited access to literature, courts are more likely to protect the rights of inmates who are open about their sexuality or gender identity than those who are not. Being open about one's sexuality or gender identity in prison is a viable method to defeat the unbridled discretionary power of prison officials.

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157. United States v. Windsor, 133 S. Ct. 2675 (2013).

158. JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL. & THE NAT'L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 163 (Feb. 2011), *available at* http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf, *archived at* http://perma.cc/PH3L-J95Q; *see also* Gibson & Hensley, *supra* note 14, at 370; *Prisoners' Rights*, ACLU, http://www.aclu.org/prisoners-rights (last visited Nov. 6, 2013), *archived at* http://perma.cc/364Y-DABV; HUM. RTS. WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS 70-71 (2001), *available at* http://www.hrw.org/reports/2001/prison/, *archived at* http://perma.cc/CXS2-5DNT.

159. JUST DETENTION INT'L, *supra* note 60, at 4.

160. *See* Duffy, *supra* note 10, at 823.