

To What Extent Does Society Need to Support LGBTQ+ Prisoners in American Prison Housing?

Andrew Li¹

¹Shanghai American School Puxi, Shanghai 201107, China, andrewguoli2022@gmail.com

ABSTRACT

Though tremendous progress has been made in advancing the rights of the LGBTQ+ community, sexual minorities continue to face overt discrimination in American prison housing. The American prison system routinely neglects and abuses LGBTQ+ prisoners. The aim of this paper is to examine the abuse of LGBTQ+ prisoners in American correctional facilities and propose possible solutions. This paper recommends the government to build upon pre-existing safety standards by instituting self-identification policies; the state ought to provide flexibility and limited autonomy for LGBTQ+ prisoners to protect vulnerable sexual minorities.

Keywords: *LGBTQ, Abuse, Prison*

1. INTRODUCTION

Issues relating to different sexual orientations and genders have long been sidelined in America. From the Lavender scare to the Stonewall riots, the historical experiences of LGBTQ+ are fraught with neglect, abuse, and violence. In the last fifty years, we have made tremendous progress in actualizing liberty, equality, and the ability to pursue happiness for people of all genders. We have celebrated events like Pride parades and movies such as *Moonlight*. However, there is still a group of people — trapped in the darkest recesses of society — that we, as a nation, have neglected: LGBTQ+ prisoners of the criminal justice system, suffering from a particularly brutal type of oppression. Inmates of the LGBTQ+ community deserve to have special treatment and be allowed to self-identify in order to curb the worst abuses that can occur within a prison housing unit.

Before examining the terrible conditions LGBTQ+ prisoners live in, it is important to understand the full context of the issue. LGBTQ+, an acronym for lesbian, gay, bisexual, transgender, and more, is used to describe a collective group of people that defy traditional assignment and expression of gender [1]. During the 1950s and 1960s, when America became a post-WW2 global superpower, homosexuality was still considered illegal in 49 states, punishable by fines and even imprisonment [2]. Medical professionals perversely equated different sexual orientations to mental illnesses. The aversion to different gender expressions in Western

liberal states can be traced back to Christianity. In many biblical interpretations, not only are traditional gender norms reinforced but the act of sodomy itself is considered a sin. As a whole, in the 1950s and 60s, members of the LGBTQ+ community are constantly exposed to harassment, discrimination, and even violence. On June 28th, 1969, the Stonewall riots erupted in the city of New York. This large-scale defiance marked the beginning of the Gay Liberation movement among other pushes for equal rights, eventually leading to significant changes in the quality of life for sexual minorities [2]. Recently, under the administration of Obama, there have been many legislative victories for the LGBTQ+ community. On December 18th, 2010, the U.S. senate successfully repealed the "Don't Ask, Don't Tell" policy, paving the way for sexual minorities to serve in the military without discrimination. On June 26th, 2015, the U.S. Supreme Court narrowly legalized same-sex marriage in all 50 states of America, gifting the right to marriage to hundreds of thousands of people previously deprived of this choice. The cultural landscape has shifted away from exuding prejudice and indifference towards sexual minorities; instead, not conforming to traditional gender norms is not only accepted but celebrated as something "cool" and admirable [3].

2. LGBTQ+ AND PRISON

Despite the astronomical advances made in liberating everyday citizens of different sexual orientations and gender identities, most people fail to recognize the plight of LGBTQ+ criminals, specifically, prisoners. Empirical

evidence shows that the criminal justice system has routinely persecuted people of different sexual orientations. According to a research report from the National Center for Transgender Equality, "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." More often than not, the final destination of repeated interactions with law enforcement is prison [1]. Therefore, prison is a LGBTQ+ issue.

2.1. Abuse of LGBTQ+ prisoners

The disproportionate representation of LGBTQ+ individuals within the criminal justice system magnifies the issue of prison housing, where vulnerable sexual minorities are treated badly in prison cells. According to the Federal Bureau of Justice, in 2011-2012, approximately 162,000 adult prisoners identified to be not heterosexual, making up almost 8% of the prison population in contrast to the small proportion of LGBTQ+ individuals in the U.S. population as a whole, which is only 4% [4]. LGBTQ+ inmates face abuse by two distinct actors: the system and fellow prisoners.

The American prison system itself has routinely neglected the suffering of LGBTQ+ inmates under the hands of discriminatory prison staff. The system is designed in a way in which abuses against the LGBTQ+ community are structurally neglected. Firstly, in the U.S., most federal and state prisons house inmates based on perceived anatomical sex. Inmates suffer humiliating examinations by prison staff who can unilaterally discredit their experiences and define their sexual identity based on physical appearance [5]. This means many members of the LGBTQ+ community are relegated to a sex they may not identify with, forced to conceal their gender, and unable to express their gender identity; nearly 80% of gender nonconforming prisoners experience acute emotional suffering [6]. Secondly, prisons often fail to provide adequate healthcare services, which disproportionately affects transgenders. Most transgenders suffer from gender dysphoria, a serious medical condition that requires intensive and expert care, often by trained professionals. Many times, medical staff in prisons are unable to psychologically comfort patients and medically treat their symptoms [4]. Furthermore, transgenders may require hormone therapy or gender-affirming surgery. Many agencies are currently unwilling and unable to provide life-saving services to transgenders [1]. Even if important medical decisions are not denied, the identities of transgenders are disrespected on a daily basis. Certain states prevent gender-appropriate clothing, like bras for transgender women, even if these items are normally distributed to female prisons [4]. Past court cases only affirm the ability of medical staff to deny important treatments to transgenders. A continuation of *Kosilek v. Spencer* in December 2014 enabled courts to

freely decide the type of care to inmates that should be provided, regardless of the inmate's input, at the discretion of prison medical staff. Facilities often try to justify bans on such medical procedures on the grounds of it being purely for cosmetic purposes [6]. Even if transgender inmates managed to win the right to specific medical treatment, these are often victories fought through a case-by-case basis, meaning not all prisoners will have the money and time for a legal victory. Transgenders are forced to see their bodies and identities radically change without their consent. Thirdly, LGBTQ+ individuals often face sexual violence from prison staff. Bianca, a female-identified prisoner in the New York state men's prison, was raped by correctional officers on a daily basis. Her complaints were met with lies by correctional officers, that she assaulted them [5]. This example illustrates the pernicious nature of staff abuse, which given the asymmetrical structure of power, often goes unnoticed by overseers. According to a U.S. Government Accountability Office study of immigration detention facilities between 2009 and 2013, more than 20% of substantiated sexual abuse and assault allegation cases involved transgender detainees. According to the National Transgender Discrimination Survey, 37% of transgenders who have reported being incarcerated had said that they had been harassed by correctional officers or staff [4]. While federal data is not entirely transparent about the rate of physical and sexual abuse of sexual minorities by prison staff, from more than one source, we can see that these vulnerable groups are likely to be targeted and victimized by discriminatory staff.

By placing members of the LGBTQ+ community in accordance to biological or perceived anatomical sex, sexual minorities are also often victimized by fellow inmates. Federal data indicates that the rate of sexual assault is about three times higher for non-heterosexual prisoners and about ten times higher for transgender prisoners in comparison to heterosexual inmates. 40% of transgender inmates have reported a sexual assault in past federal surveys [1]. It's important to recognize that prisons are breeding grounds of toxic masculinity, where aggression and violence are not only normalized but encouraged. Prison rape is an endemic problem, and effeminate inmates are more often than not the victims of sexual abuse [7]. This abuse primarily directed against people of different gender identities can significantly affect the physical, emotional, and mental wellbeing of inmates. It "lead[s] 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" [1]. LGBTQ+ prisoners often suffer egregious harms due to fellow inmates.

3. PAST AND POSSIBLE SOLUTIONS

Almost all state officials are quick to stand against the enormous abuses the LGBTQ+ community faces in prison. However, there is a multitude of different perspectives on how to deal with this issue.

One perspective, primarily supported by traditional and conservative politicians and prison officials, is the idea of utilizing existing protection. The PREA Standards, heavily influenced by the Prison Rape Elimination Act of 2003, are a set of federal rules that address a facility's ability to respond to sexual abuse [1]. Theoretically, under this set of rules, all prisoners should be equally protected from potential sexual abuse from inmates and staff. In reality, these standards only afford basic levels of protection. Firstly, under PREA, many facilities are still afforded a large degree of freedom in choosing their own standards; there are different versions, and these rules do not specifically address nuanced issues the LGBTQ+ community face, such as crucial medical treatments. PREA fails to challenge the genitalia-based classification policy that forces people into uncomfortable situations in the first place. By choosing to create flexible individualized policies, PREA fails to address the issues of the LGBTQ+ community as a class. The actions left up to each individual prison officials "are unlikely to improve conditions for prisoners whose needs remain deeply misunderstood" [5]. Secondly, PREA recommends using separation as a last resort for decreasing rates of abuse. However, given the nebulous nature of "last resort," officials will often respond to potential abuse of LGBTQ prisoners by relegating them to be solitarily confined—"effectively punishing them for being potential victims" [1]. Solitary confinement means being placed in isolation every day, with little human interaction and activity. Experts such as the United Nations Special Rapporteur on Torture have found that, in prolonged periods of time, solitary confinement can amount to torture [1]. Unfortunately, "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" [1]. This administrative segregation would only lead to long-term psychological harm, all while preventing access to jobs or treatment programs given the isolation. It also sends the message that gender identity is threatening to the system and other inmates, increasing discrimination. This issue applies even if LGBTQ+ inmates get collective housing units. Collective housing units specifically for LGBTQ+ communities still run the risk of abuse and improper placement [5].

A different perspective championed by the progressive left demands more protection for LGBTQ+

inmates through self-identification policies. Note that self-identification policies are not mutually exclusive to the PREA standards. These policies are meant to improve upon the current model of protection. In September 2020, governor Gavin Newsom signed a law that required Californian state prisons to house transgender inmates based on gender identity. Checks such as obligatory written statements to reject requests are built-in with the law [8]. Many jurisdictions, such as New South Wales, Australia, already presume that "inmates have a right to be placed in the facility of their 'gender identification' unless it is determined, on a case-by-case basis, that they should be placed elsewhere" [5]. Self-identification allows LGBTQ+ prisoners to navigate the complex nature of their own "gender identity, expression, and body diversity," avoiding the unilateral assignment of gender by staff. Self-identification policies that default to gender identity, not perceived anatomical sex, are ideal classification policies.

A possible limitation of this solution can be increasing the risk of sexual violence to other prisoners if certain prisoners falsify their gender identities. However, in the words of Scott Wiener, a Democrat from San Francisco who authored the bill, "It's just a false narrative about transgender people and about transgender women in particular that they're somehow not really women and are just trying to scam their way into women's bathrooms or facilities in order to do bad things. Overwhelmingly, the people who are being victimized are trans people." Though the Californian bill explicitly states that the state can rehouse inmates based on "management or security concerns," there is still the potential of mismanagement that can increase the risk to other prisoners [8]. Even though this limitation exists, flexibility and autonomy are still essential in providing adequate care to LGBTQ+ prisoners.

4. CONCLUSION

As we become more cognizant of LGBTQ+ issues, it is imperative for both the administration and the people to address the injustices LGBTQ+ prisoners suffer in custody. If no action is to be taken, then LGBTQ+ prisoners will continue to be irreversibly harmed in correctional facilities. If we build upon existing protections and allow for self-identification policies, then we respect the different forms of gender identity and expression people may have. Vulnerable sexual minorities, even prisoners, need to be protected.

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