Chapter 8

A New Iron Closet: Failing to Extend the Spirit of *Lawrence .v. Texas* (2003) to Prisons and Prisoners

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Introduction

During the seven years I spent as a prisoner in California, Minnesota, and Illinois, one of the most troubling conditions of my confinement was the re-criminalization of my identity as a gay man. At any given moment, my sexuality could bring about swift and durable punishment from the state. Segregated into Los Angeles County Jail's gay and transgender K6G unit (well documented by Robinson and Dolovich[i]), I witnessed the systematic maltreatment of LGBT prisoners. In all, I was classified, housed, and watched-over in eight additional county jails and 14 prisons. In each, I experienced mistreatment and fear, and watched as other LGBT prisoners – particularly transgender prisoners – were degraded and punished on a daily basis.

Of course, prisons are intended to punish. But what I witnessed was not the ordinary state-sanctioned punishment doled out every day in prisons across America (which has its own set of problems). The mistreatment of LGBT prisoners goes above and beyond the normal degradation meted out by the state, enacting a disparate set of punishments for LGBT people markedly different than prisoners perceived as heterosexual and/or gender

conforming. Through my personal experience and the experience of others like me, I came to believe that America's prisons are Iron Closets for LGBT citizens – backwards spaces void of the legal, cultural and social recognition and protections that, outside prison walls, have emerged since Stonewall.

As I show in this chapter, America's prisons and jails regularly police and punish consensual, same-sex sex. These punitive policies have continued unabated in the wake of the Supreme Court's 2003 groundbreaking ruling in *Lawrence v. Texas*, which struck down sodomy statutes nationwide and thus forbid the state from criminalizing private, same-sex sex. But as I show in this essay, the Supreme Court's reach did not permeate prison walls. Beyond sexuality, I also show how prisons regulate gender by policing and punishing prisoners who do not conform to traditional gender roles and presentations.

This essay will explore the current state of what can ostensibly be categorized as LGBT criminalization[ii] in state and Federal prisons in the United States. First, I introduce the reader to the characteristics of contemporary prison rules that construct an iron closet for LGBT prisoners, criminalizing both sexual and gender identity as well as same-sex sex. These administrative rules, known as "sexual misconduct rules" are institutionalized in every prison and jail nationwide. Second, I will present cases obtained through Freedom of Information Act requests that can be viewed as typical violations of sexual misconduct rules; the first for engaging in consensual same-sex sex between prisoners and the second for non-conforming gender presentation among prisoners. Third, I discuss the legal and institutional logics that construct these rules as legitimate for prisons and explain how rules remain persistent despite LGBT progress in broader society. Lastly, I will argue for prison officials to reconsider prisons as within (rather than outside of) the expanding landscape of cultural and social acceptance for LGBT citizens. Until officials ameliorate the conditions that make prisons a new Iron Closet, LGBT prisoners will continue to be forced to time-travel to a place that existed prior to our social movements, to a place that criminalizes our very identities and behaviors.

Criminalizing LGBT Prisoners

LGBT citizens have more legal rights, protections, and social acceptance today than could have been imagined before Stonewall. Yet, this expansion of legal recognition has been slow to reach American prisons and jails and

the millions of prisoners incarcerated behind their fences and walls. Outside prison gates, same-sex sex is legal and LGBT couples and transgender citizens enjoy access to an ever-greater number of legal protections. Within our prisons from coast-to-coast, the picture is starkly different, as LGBT identity and same-sex sex remain *criminalized*. Administrative rules barring consensual, same-sex sex between prisoners are a part of each and every prison system across the United States. Plainly speaking, it is against prison rules for prisoners to have any type of intimate physical contact with one another. If prisoners are caught kissing, hugging, hand-holding or found engaging in oral or anal sex, prisoners can be written up for violating sexual misconduct rules.

A sexual misconduct ticket is a serious matter. The Federal Inmate Handbook – the guide for the 215,324 prisoners residing in our Federal Bureau of Prisons facilities –ranks "engaging in sexual acts" and the "proposal of sexual acts" in the "high category of code prohibited acts," which also includes aggravated assault (FBOP 2014). Only murder, rape, and sexual assault rank as a higher category physical offenses within the Federal prison system's 116 facilities nationwide. Violations of "high category" acts are punishable by lengthening time to parole, forfeiture of good time, disciplinary transfer, segregation, loss of privileges, removal from program and group activities, loss of job and restriction to quarters (FBOP 2014).

State prisons nationwide, housing over 1,500,000 prisoners, similarly structure sexual misconduct rules. The Iowa Department of Corrections defines sexual misconduct as follows:

> *An offender commits sexual misconduct when the offender proposes a sexual contact or relationship with another person through gestures, such as, kissing, petting, etc., or by written or oral communications, or engages in a consensual sexual contact or relationship. Gestures of a sexual nature designed to cause, or capable of causing, embarrassment or offense to another person shall also be punishable as sexual misconduct.* (Iowa Department of Corrections 2006)

What we see is that the meaning and context of the rule are remarkably subjective. What exactly is a "sexual proposal"? What is a "gesture of a sexual nature"? Who determines when that line-in-the-sand has been breached? Today, after decades of ever-greater acceptance for LGBT

citizens, an out and proud individual can be pushed back into an iron closet by a prison system that criminalizes his or her identity.

Contrary to what some of us may logically assume "sexual misconduct" means, this rule category is not applied to violent sexual assault or rape between prisoners; there are separate administrative rules dedicated to prohibiting and punishing violent sexual behaviors.[iii] The sexual misconduct rule pertains to two things: consensual sex between prisoners, who are usually of the same gender as prisons are segregated by objective gender assignment at birth; and the active presentation of transgender identity as normatively understood by prison officials.

For instance, a female transgender prisoner housed in a male prison facility may be written a sexual misconduct ticket for wearing make-up or having her hair in a style normatively understood as appropriate for cisgender female prisoners. The Michigan Department of Corrections (MDOC), in their "*Prisoner Discipline Policy Directive*," details examples of sexual misconduct as "…wearing clothing of the opposite sex; wearing of makeup by male prisoners…" as well as "consensual touching of the sexual or other parts of the body of another person for the purpose of gratifying the sexual desire of either party…" (MDOC 2012).

Punishments for infractions can be severe,[iv] to include relegating the prisoner to non-resourced areas of the prison where education, substance abuse treatment, recreation, religious services, employment, library, and visiting privileges are unavailable or drastically reduced. The Indiana Department of Corrections notes that violating the sexual misconduct rule carries up to 180 days in "administrative segregation." More commonly known as solitary confinement, this prison within a prison is a punishment with widely known, highly deleterious consequences for the physical, mental, and emotional health of prisoners; many view it as a form of torture that violates basic human rights (AFSC 2003, Mendez 2011).[v]

Prison authorities may also decide to change the security level of a prisoner who violates sexual misconduct rules, which can trigger her relocation to a higher security facility such as a Supermax Prison with isolative housing arrangements mimicking solitary confinement and its associated damages. Rules violations in general, and sexual misconducts specifically, can lengthen time to parole, contaminate parole hearings, and may affect the crucial relationships that released prisoners have with their parole agents

by defining these prisoners as rule-breakers as well as sexual and gender deviants.

Beyond these direct consequences, sexual misconduct rule violations can have simultaneous, collateral consequences for prisoners during incarceration and beyond. The MDOC notes, "a prisoner cannot earn good time or disciplinary credits during any month in which s/he engaged in [rules violations]," that the prisoner "shall accumulate disciplinary time" which is time added that lengthens the original sentence, that "each prisoner…. shall be reviewed by the Security Classification Committee" which often results in transfer to disciplinary facilities with fewer resources and opportunities for rehabilitation, and finally that "a prisoner may be reclassified to administrative segregation based solely on a guilty finding without a separate hearing being conducted" thus prefiguring an array of harsh penalties for violating Michigan's sexual misconduct rule (MDOC 2012). In short, violating the sexual misconduct rule can result in grave consequences for incarcerated citizens.

Readers may be wondering, "But didn't the Supreme Court in *Lawrence v. Texas* strike down sodomy laws that criminalized same-sex sex?" Technically, this is true. But as many essays in this collection describe, the high court's 2003 decision has had a rather delimited effect. *Lawrence* stops at the prison gate; prisons and prisoners do not fall under its purview. Legal scholars have criticized *Lawrence* for its vagueness, which has necessarily limited its application to other forms of injustice faced by LGBT people. One of these injustices is the failure to establish liberty interests for prisoners in the *spirit* of the landmark decision, which could allow prison officials to reconsider the validity of these rules in an era of expanding LGBT rights and legal protections.

The retrograde nature of these rules and punishments in prisons are remarkably similar to the violent legal landscape that existed for LGBT citizens (including those individuals who do not identify as LGBT but yet engage in same-sex sex) prior to *Lawrence*. Dale Carpenter, an expert in constitutional law, describes the Texas Homosexual Conduct Law that initiated the arrest of the plaintiffs in *Lawrence*, as,

> *What was nominally a law criminalizing homosexual conduct in fact was a law criminalizing the status of being homosexual. In Texas, being gay became a crime. As John Lawrence responded when*

> *his partner, Jose Garcia asked why they had been charged, "We were arrested for being gay." In a technical sense that was untrue, but in the real world, simply being gay was a crime in Texas. The Homosexual Conduct law was, in practice, a Homosexual Status law. (Carpenter 2012: 109).*

If we read the quote above, substituting "prison" for "Texas," we instantly see an analog: the "homosexual conduct law" is remarkably similar to the "sexual misconduct" rule in our nation's prisons as each activates a set of instrumental and symbolic punishments for LGBT citizens and those who engage in same-sex sex.

In prison, just as in Texas before 2003, "If persons engaged in that prohibited conduct, they violated the law – no matter whether they were actually gay or were straight and experimenting or settling for second-best sex" (Carpenter 2012: 106-107). Sexual misconduct rules have both instrumental and symbolic effects upon prisons as state institutions, and the prisoners within their walls. In my own work with state prison officials, a director of a state prison system in the South notes:

> *I think that throughout the U.S. you'll find that consensual sexual behavior between prisoners is prohibited. It doesn't mean that the rules do not get violated. Yes, they do get violated, but when they're violated the sanctions, in most jurisdictions, the sanctions are swift and certain. So, we do not accept or acknowledge consensual sexual relationships between offenders.*

In this light, an inescapable iron closet has been constructed for LGBT prisoners and prisoners who engage in same-sex sex; an iron closet that does not recognize broader social progress since Stonewall and the legal protections of our liberty established in *Lawrence*.

Punishing Same-Sex Sex[vi]

As I noted in the beginning of this chapter, same-sex sex is criminalized and punished in prisons nationwide. The following incident reports have been retrieved through Freedom of Information Act (FOIA) requests to the Michigan Department of Corrections in order to detail the types of sexual misconduct rules violations that commonly occur for same-sex sex in Michigan prisons.

The first case involves two prisoners and is a "Notice of Intent to Classify to Segregation."

> *Prisoner Jackson was found guilty of sexual misconduct. Prisoner Jackson was found by unit staff to be in an embrace and kissing Prisoner Munson. Prisoner Jackson was also found guilty of sexual misconduct in 2008 where he was caught with another prisoner in a sexual act. Both of these incidents indicate that prisoner Jackson is sexually active and should not be housed in a general population housing unit. A hearing needs to be held to determine if prisoner Jackson should be classified to administrative segregation because of his sexually active nature.*

Following this "Notice of Intent to Classify to Segregation," a hearing was held for Prisoner Jackson with the following severe result:

> *Prisoner Jackson was classified to Administrative Segregation for two major sexual misconducts. The first incidence took place where Jackson and another prisoner were directly observed in a cell together with erect penises. The second incident took place in 2009 where Jackson and the same prisoner were directly observed standing face-to-face in an embrace, kissing each other on the lips. Prisoner Jackson has been classified to Administrative Segregation for a period of 1 year.*

Despite *Lawrence*, consensual same-sex sex is criminalized in Michigan prisons to the extent that kissing and embracing is regarded as violating the sexual misconduct rule. And, this rules violation clearly brings about severe consequences as Prisoner Jackson is subsequently sent to administrative segregation aka solitary confinement for a period of one year.

Notwithstanding an inability to access important prison resources such as education and substance abuse treatment while in administrative segregation, experts have detailed the potential psychiatric damages of isolation in administrative segregation units, saying "The Courts have recognized that solitary confinement can cause a very specific kind of psychiatric syndrome, which in its worst stages can lead to an agitated, hallucinatory, confusional psychotic state often involving random violence

and self-mutilation, suicidal behavior, agitated, fearful and confusional kinds of symptoms" (AFSC 2003).

In another case from 2011, a "MDOC Class 1 Misconduct Hearing Report" presents an additional case of criminalizing same-sex contact, which may be difficult for some to view as same-sex sex or misconduct of any sort. Here from the reporting officer's report we read, "Prisoner Franzen was kissing Prisoner Johnson's neck as Johnson rubbed Franzen's feet. I find that this was consensual touching of each other that was done for the purposes of sexual gratification. The charge is upheld. Prisoner Johnson is being placed in Administrative Segregation."

To make matters more complicated, in a third case we see that the MDOC uses prisoners as confidential informants, revealing dubious, impossible to verify, instances of same-sex sex between prisoners. Prisoners with bias against LGBT prisoners can thus make confidential reports of same-sex sex between prisoners that can be punished similarly to reports originated by prison staff. Here, Prisoner Davidson who has been accused of having sex, claims that he "had conflicts with [the informants] and now they're getting back at him by saying they saw him having oral sex with another prisoner [Peterson]." The report goes on to note that, "Based on confidential statements, Prisoner Peterson was seen with Prisoner Davidson's penis is Prisoner Peterson's mouth. This sexual act is a violation; prisoners are prohibited from having any sexual contact with another prisoner." As in the previous cases, the prisoners were found guilty of violating the sexual misconduct rule -"as confirmed by witnesses, it is found that Davidson had mutual physical contact for sexual gratification." Peterson and Davidson were then sent to administrative segregation with the possibility of irreparable physical and mental harm, for the *crime* of same-sex sex in Michigan's prisons as reported, but not verified by prisoner informants who may have been motivated by LGBT bias.

Misunderstanding Transgender Prisoners Troubles the Equation

We now know that consensual same-sex sex is a crime in our prisons. To complicate the case, we can again look to Michigan's prisons as but one of numerous states with correctional departments that conflate non-normative gender presentation with heightened sexuality. The following cases demonstrate how transgender prisoners in Michigan can be issued sexual misconduct rule violation tickets for wearing clothing of the "opposite" gender in facilities that are gender segregated and how prison

officials target transgender prisoners disproportionately for additional surveillance and security procedures. These cases are illustrative of common trends in how transgender prisoners are treated in prisons nationwide.

I became aware of the case at hand during my time collaborating with the American Friends Service Committee Michigan Criminal Justice Office (AFSC), a leader in the broad-based, collaborative effort to reform policy and practice within the Michigan Department of Corrections and nationwide. Through (FOIA) requests beginning in 2011 and continuing through 2014, AFSC sought to obtain evidence documenting the treatment of transgender prisoners in Michigan's prisons in order to verify prisoner narratives, claims, and anecdotal evidence that indicated widespread maltreatment of transgender prisoners. The records obtained reveal a normative conflation of sexuality with gender identity on the part of prison officials, from line staff to the executive leadership, which drives disproportionate surveillance and punishment upon the bodies of transgender prisoners.

This systemic maltreatment of transgender prisoners makes an already difficult situation (prison) worse. The records obtained by AFSC reveal extraordinary levels of sexual and identity harassment on the part of prisoners and prison officials alike. One transgender female, Candace (a pseudonym), notes how her fellow male prisoners treat her: "It's all kids and they are tormenting me daily. I am the only one like myself here and feel very lost." Within this hostile environment staff also bully and ridicule Candace, reportedly telling her, "You have a wide load. How do you expect to be the prison whore if you can't bend over and grab your ankles?" She goes on to state "I was so embarrassed I had to leave the chow hall." In addition to the verbal abuse, Candace has been written up multiple times for violating the sexual misconduct rule, with officer's claims of "impersonating a female" to justify the ticketing and subsequent punishment:

> *CO Tom asked me if I had make-up on. I told him no, that I fill in my eyebrows because they do not grow from tweezing them so long. He inferred that I was impersonating a female. I explained that I am a female - that I lived my entire life as a female. He stated, "Do you want to go in your cell and take care of it or let Major Court decide if you have a gender disorder?" He seemed very upset with the*

> *explanation and I did not want to get in a debate with him so I said, I'll let the court decide.*

In Candace's case, she was found guilty of sexual misconduct numerous times for her non-conforming gender identity in prison. These violations contaminated the remainder of her prison sentence, including her possibility for parole. All totaled, Candace has spent nearly four years in the iron closet of administrative segregation or solitary confinement for the crime of being transgender.

The following email from the MDOC headquarters in Lansing, Michigan to all MDOC wardens, captains, and lieutenants, details the way sexual misconduct rules are understood and operationalized by prison officials, revealing an environment of abuse, characterized by heightened surveillance and punishment directed toward transgender prisoners:

> *They [prisoners] know that we, I will not tolerate the behavior and that it is a policy violation to wear effeminate appearing clothing, et cetera. I am good with sexual misconducts if they are upheld. Just the other day I told Candace to lose the eye liner, Kool-Aid, and scrunchy in his hair. Let's have staff search their cells and confiscate anything that violated policy and we can go from there. If they want attention, we will oblige (MDOC 2011).*

Following up on the executive level directive, a subsequent email from MDOC Headquarters indicates the logics that the MDOC directs upon its transgender prisoners.

> *We have been having problems with prisoners wearing homemade make up and wearing their hair like a women [sic]. I have reviewed the policy directive and was unable to find any information that allows them to wear makeup or wear their hair like a women [sic]. They have been warned numerous times by Officer Tom. Today Officer Tom took photographs and wrote Class I Sexual Misconduct tickets.* (MDOC 2011)

We know that sexual misconduct violations can spell trouble for prisoners. In reviewing Candace's file and the files of other transgender female prisoners in Michigan prisons, a pattern of systematic abuse emerges wherein transgender prisoners spend a high proportion of their

incarceration spells in administrative segregation or solitary confinement. In fact, prisoners like Candace are criminalized for their identity without engaging in behavior that remotely resembles a normative understanding of "sexual" misconduct.

This treatment makes conditions of confinement particularly harsh for transgender prisoners and is not unusual. In my own experience as a prisoner in over 20 facilities in California, Minnesota, and Illinois, I witnessed countless cases of prison staff treating transgender prisoners with extra administrative hurdles, surveillance, punishment, abuse, and isolation. In a forthcoming paper, Jenness and Sexton provide additional detail on the environment of abuse transgender prisoners experience in California prisons. One male prisoner reports that, "Most transgenders [sic] on this yard, well, they get called cum buckets. These guys here have no respect for them and they have no respect for themselves." This lack of respect and understanding is clearly part of the logics of sexual misconduct rules as applied to transgender prisoners such as Candace.

Prison Logics and Prison Jurisprudence

Why do sexual misconduct rules go unquestioned? For the better part of our union, prison officials have been allowed broad latitude and professional expertise to operate prisons as they see fit. In this sense correctional officials can be seen as sovereign in their ability to conceptualize and actualize the ways their prisons operate (Schmitt 1985). From roughly 1871 until the early 1970s, judicial and legislative relationships with corrections were informed by the *Hands-off Doctrine* as delineated in *Ruffin v. Commonwealth (1871)*. That doctrine claimed that a prisoner forfeits their liberty and all their personal rights, except which the law in its humanity accords to them, as "he is for the time being a slave of the state" (*Ruffin v. Commonwealth* 1871).

Since that time, there has only been one brief period in which the rights of prisoners were expanded. This short-lived time of change developed as an outgrowth of the Civil Rights movement and, in the field of penology, is referred to as the "rehabilitative turn" in corrections. During this time, a set of Federal and Supreme Court Cases[vii] forced prison officials to adopt a new orthodoxy and praxis in order to conform to new rehabilitative frameworks for managing prisoners. These policy directives redefined constitutional protections under the law for prisoners and facilitated their ability to have prisoner voices heard at court (Feeley and Rubin 1999).

At the height of the prison reform era and in line with broader social movements, the Supreme Court articulated that, "prisoners are still persons entitled to all constitutional rights unless their liberty has been constitutionally curtailed by procedures that satisfy all of the requirements of due process" (*Procunier v. Marinez, 1974: 428*). In line with general social trends promising greater equality among and between citizens that led to the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968, President Johnson's War on Poverty, and the introduction of the Equal Rights Amendment in 1972, prisons began generating programming designed to rehabilitate prisoners and help them reenter society.

However, the Supreme Court began to take a dimmer view on prisoners' rights in the late 1970s, asserting a deferential stance toward the expertise of prison officials. For the court, prisons become special places with special orderings and necessities – so exceptional, in fact, that the court must defer to the specialized knowledge of correctional authorities. By 1987, Justice O'Connor effectively ended prisoner rights expansion, by writing that:

> *Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have, as we indicated in Martinez, additional reason to accord deference to the appropriate prison authorities.*
> *(Turner v. Safley,1987)*

O'Connor goes on to write that, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penalogical interests." This reasoning contradicts reform era precedent, which held that a prisoner's constitutional rights did *not* stop at the prison gate (*Procunier v. Martinez* 1974). Steering corrections toward wider autonomy, the Court's opinion in *Turner* is a decisive move away from reform-era standards, and assists in the operation of the punitive turn that ultimately brought about today's system of mass incarceration.

Shortly after the early deference decisions, legal scholars began to claim a retreat toward a "new hands-off" doctrine and a deliberate evasion of judicial responsibility in prison law cases (Berger, Dolovich, Giles, Horwitz). The opinion in *Turner* thus provides wide latitude to correctional officials as experts, capable of answering myriad questions regarding good corrections or the proper shape of confinement, who need not be concerned with strict constitutional review of their orthodoxy and praxis[viii]. Deference thus provides state prison officials a legitimate, jurisprudential framework to ignore or dismiss rights expansion for LGBT citizen prisoners.

Building on the instrumental and symbolic barrier to successful prisoner litigation constructed in *Turner*, the Prison Litigation Reform Act of 1996 (PLRA) further incapacitates incarcerated individuals by limiting prisoner access to courts. PLRA codifies a wide-spread belief that prisoners too frequently engage in frivolous litigation, which could perhaps be resolved by prison administration. PLRA requires prisoners to exhaust internal prison due process and grievance procedures in order to access the court. Yet, accessing the court is difficult for prisoners. Previous research has noted that "prisoners who miss a filing deadline or otherwise fail to comply with a procedural requirement in the prison grievance process might be forever barred from bringing their claim to court," thus allowing the court to evade answering the tough questions that may be present in their claim through various technicalities. (Shay 2010: 342).

In response, some state departments of corrections have promulgated additional barriers to filing grievances (usually time-based), thus making it increasingly difficult for prisoners to reach the court for relief. The primary method of constructing these barriers is in narrowing the window of time to file internal grievances. Prisoner petitions for relief can thus be thrown out at court on procedural, time-based grounds as opposed to being tossed on the merits of their claims. Since the advent of the PLRA, prison litigation has dropped by nearly 50% (Clear and Frost 2013).

With these legal developments, scholars note that prisons are once again structured as highly autonomous, lacking transparency or accountability in their day-to-day operations (Berger, Dolovich, Horwitz, Shay). Deference and the PLRA operationalize the logics of mass incarceration including sexual misconduct rules that target same-sex sex and gender non-conforming prisoners. For today's prisoners and their advocates, access to the courts is blocked; their ability to challenge the logics of sexual

misconduct rules as within, at minimum, the *spirit* of *Lawrence* in order to escape the iron closet is nearly impossible. Shay goes on to note that,

> *Despite its importance, the area of corrections regulation is a kind of 'no-man's land.' In many jurisdictions, and in many subject areas, prison and jail regulations are formulated outside of public view. Because of deference afforded prison officials under prevailing constitutional standards, such regulations are not given extensive judicial attention. Nor do they receive much focus in the scholarly literature* (Shay 2010: 331).

In this light, the prison is purposefully constructed to hide the damages it inflicts upon vulnerable populations behind prison walls and fences, at great social and geographical distance from those who are not incarcerated (Foucault, Garland, Simon).

Of course, a lot of activities happen behind prison walls that are no longer criminalized in broader society because of *Lawrence*. Many prisoners engage in consensual, same-sex sexual activity, regardless of their self-reported sexual identity, during their incarceration spells. Recent research has found that over 40% of prisoners engaged in consensual sex while incarcerated (Hensley, Tewksbury and Wright) and the Bureau of Justice Statistics found that 7% of prisoners sampled classified themselves as homosexual or bisexual (Bureau of Justice Statistics 2009). A recent report from the U.S. Department of Justice notes that many prisoners (40%) are punished for being victims of rape and sexual assault. Sexual assault victims are often treated as culpable participants. Of the 10,200 respondents to the 2008 National Former Prisoners Survey who reported being victims of sexual assault, 34% reported being placed in segregation or protective custody; 24% reported being confined to their cell; 14% reported being classified to a higher level of custody; and 28.5% reported being given a disciplinary write-up for being the *victim* of sexual assault (U.S. Department of Justice 2008: 31). As such, rules barring consensual same-sex sex in prisons extend even to victims of rape and assault, punishing them for being victims of violence perpetrated against them.

Conclusion

Deference as well as the PLRA reinforce the independence and autonomy of prison officials by allowing them to construct and maintain rules and punishment frameworks targeting LGBT prisoners and prisoners who engage in consensual same-sex sex. Correctional orthodoxy and practice, regardless of their motivations, are thus prevented from interacting with *Lawrence* to expand the landscape of LGBT rights since Stonewall to prisons and prisoners.

Aside from these legal barriers for prisoner access to the courts, I suggest that there are myriad reasons officials choose to define sexual misconduct rules in prisons as rules rather than crimes. By defining these violations as "rule breaking," prison officials are able to draw attention away from the hostile climate faced by LGBT prisoners (as well as non-LGBT identifying prisoners who practice same-sex sex). Thus, the state can claim that same-sex behavior is not *criminalized* – it is merely managed administratively.

In practice, the distinction between a "rule violation" and a "crime" is largely academic. Viewing the prison as its own society – with its own set of rules, regulations, and codes of conduct – helps to explain why this is so. Like the removal of individuals who commit crimes from everyday society, prisoners who violate prison regulations are segregated from the general prison population. They are removed from where they live and taken to an alternate space where heightened restrictions are placed on the prisoner, limiting their freedom and access to resources; in essence, they are taken to a virtual *jail within the prison.* Indeed, during these instances, many prisoners often claim that they are being "taken to jail" as they are hauled in for violating formal behavioral codes. Thus, while authorities maintain that rule infractions do not constitute "crimes" in the conventional sense, the prisoner – whose rights and freedoms are infringed upon in either circumstance – would not be blamed for viewing this distinction as entirely semantic.

By categorizing the arbitrary processes the state employs to punish same-sex sex and gender non-conformity among prisoners as "rule breaking," the state is able to reframe their unjust treatment of LGBT prisoners in largely bureaucratic terms. "Rule breaking" does not signal the punishments and damages derived by long-lasting periods in isolation and segregation for prisoners that I detail in this chapter. As I have shown, by framing these practices as "rules," prison officials have helped to seal prisons walls against

the expansion of LGBT rights occurring in broader society. I argue that the term "crime" more accurately describes the conditions or logics that allow these systems to operate by connoting the serious social problems of inequality, marginalization and citizenship.

Yet despite this bleak scenario, there may be an opening for reconsideration. I have interviewed a number of pragmatic correctional directors who have indicated that consensual, same-sex sex is a frequent characteristic of prison life. As such, they believe it requires less attention and less punishment. One long-term state correctional department director from the Southwest asks,

> *Are we going to not recognize that there's sex in prisons between inmates? Or are we going to say if we don't recognize it, it's not happening? It's going to happen. It's the nature of the most complex creature, the human being. That drive is there. Inmates will tell you that they're not gay, but the best sex they ever had was in prison and once they get out they go back to being totally heterosexual.*

Bauman (1990) advises us of the danger of bureaucracy "to disguise, or even subsume, profound questions of morality that should detain us all." Bauman thus provides leverage to examine why prisons have viewed themselves as special places, as places where a disjoint legality, morality or landscape of rights between prison and society as outside the contemporary understanding of human rights makes sense. However, as my interviews with correctional directors suggest (and as the prison reform era proves), shifting cultural attitudes are able to support new ways of managing prisoners. In this light, emerging correctional logics informed by LGBT rights movements could lead to a wider belief that alternative identities and behaviors are unsuitable for punishment.

None of this should be read as diminishing the significance *Lawrence* has had in the landscape of legal and societal changes for LGBT citizens in American society. These structural, cultural, and epistemological changes have fostered greater acceptance and inclusion of LGBT Americans in social institutions and popular culture including the church, television, politics, and the media. Yet, the ability of *Lawrence* to impact social institutions such as the military, marriage, and prisons, has varied. The inability to extend the spirit of *Lawrence* to the military was remedied in 2012 with the repeal of "Don't Ask Don't Tell," which brought to light a

clear and persistent social fact: LGBT citizens are part of our military and have defended our country for decades. In particular, changes in military policy have reshaped concepts of citizenship that have historically reinforced the policing of identity and same-sex sex. Thus, an expansion of the spirit of *Lawrence* to prisons and prisoners could potentially be delivered through a critical interrogation of correctional logics to determine if sexual behavior between prisoners or alternative sexual and gender identity necessarily violate prison rules and norms. If it is determined that behviors and identities do violate rules and norms, are the current severe responses appropriate to the case at hand? Is the iron closet constructed for these prisoners commensurable with broader societal, legal and cultural acceptance?

These broader cultural changes are signaled by Justice Thomas in his dissent to *Lawrence*. Although he did not agree with the Court's finding that sodomy laws violated basic constitutional protections, he did nonetheless argue that "punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources" (*Lawrence v. Texas 2003d*). Justice Thomas goes on to acknowledge that broad-based cultural change can generate institutional change. Given that both Justice Kennedy and Justice Thomas agree that laws criminalizing consensual sexual behavior are at the very least (in the words of Thomas) "uncommonly silly," why do prisons remain outside this realm of logic? Why do our prisons continue to punish, criminalize, and damage prisoners like Candace, Jackson, Davidson and countless others? Why are our prisons iron closets for LGBT prisoners? The presence of LGBT prisoners and the reality of consensual same-sex sex in prisons are social facts. By viewing prisons as not outside the contemporary landscape of expanding rights and acceptance for LGBT citizens, we can begin to reform prisons to make them more just and equitable institutions for LGBT people.

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Endnotes

[i] See Dolovich, Sharon. 2010. "Strategic Segregation in the Modern Prison." *American Criminal Law Review.* 48(1) and Robinson, Russel. 2011. "Masculinity as Prison: Sexual Identity, Race and Incarceration." *California Law Review.* 99(1309).

[ii] Hannssens, Catherine et. al. 2014 note that "LGBT people and PLWH are overrepresented in U.S. prisons and jails, and face widespread and pervasive violence, inadequate healthcare, nutritional deprivation, and exclusion from much needed services and programs. LGBT prisoners and prisoners with HIV are more likely to be placed in administrative segregation or solitary confinement [….] and to be denied access to mail, jobs, and programs while in custody. LGBT prisoners have also experienced unanticipated negative impacts from the Prison Rape Elimination Act (PREA), including being punished through new policies purportedly created to comply with PREA that forbid gender non-conforming behavior and punish consensual physical contact."

[iii] However, even in cases of violent sexual assault and rape, victims who are disproportionately LGBT identified, are often charged with sexual misconduct as well, indicating that prison officials view LGBT prisoners as sexual instigators who are somehow deserving of the assaultive behavior perpetrated upon them.

[iv]There is a hearing process for prisoners who are charged with violating prison rules, including sexual misconduct rules. However, the prison rules hearings adjudication process is fraught with procedural hurdles and barriers to the effective representation of facts, including the use of anonymous prison informants, in order to mount an accurate defense against biased claims made by guards in same-sex sex and LGBT identity cases. See Giovanna, Shay. 2010. AdLaw Incarcerated.

[v] The American Friends Service Committee as well as Juan E. Mendez, the United Nation's Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment view solitary confinement, otherwise known as administrative segregation, or protective custody as a violation of human rights and extreme form of torture that leads in many cases to extremely deleterious physical, mental and emotional health outcomes for prisoners unfortunate enough to spend even short stays in these conditions of confinement.

[vi]In the following cases describing the criminalization and punishment of same-sex sex as well as gender non-conformity, pseudonyms are used to protect the identity and confidentiality of prison staff and prisoners alike.

[vii] Prominent prisoner rights cases during the reform era include: *Cooper v. Pate*, 378 U.S. 546 (1964), *Hutto v. Finney*, 437 U.S. 678 (1978), *Pugh v. Locke*, 406 F.2d 318 (M.D. Ala.1976), *Procunier v. Martinez*, 416 U.S. 396 (1976), *Ruiz v. Estelle* 503 F. Supp. 1265 (SD Texas 1980), *Wolff v. McDonnell, 418 U.S. 539 (1974).*

[viii] The *Turner* decision provided a highly subjective *rational basis test* to be used by the judiciary to affirm or deny claims made by prisoners and the answers provided by prison officials as defendants in prison law cases. Known as the *Turner Test*, the decision-making method operates with less scrutiny than the *strict scrutiny* standards applied during the reform era that were spelled out in *Procunier*. With the *Turner Test* a prison practice, rule, or regulation may be ruled as legitimate if it meets 4 discreet, yet highly subjective criteria: (1) if there is a "valid, rational connection between the prison regulation and the legitimate government interest put forward to justify it;" (2) "whether alternative means of exercising the right(s) that remain open to prison inmates" are available; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates;" and (4) if there are "ready alternatives" to choose from such that prison officials can achieve their intended goal(s) (*Turner v. Safley* 1987)