

CHAPTER 25

YOUR RIGHT TO BE FREE FROM ILLEGAL BODY SEARCHES*

A. Introduction

This Chapter explains your right to be free from involuntary exposure and illegal body searches. Part A is the Introduction. Part B explains your rights regarding involuntary cross-gender exposure (when persons of the opposite sex see your body against your wishes) and your privacy rights regarding your body, focusing mainly on the rights of women prisoners. Part C focuses on body searches for both men and women. Finally, Part D explains what you can do to protect your rights and what legal remedies you can use to remedy violations of your rights.

This Chapter explains your rights using both federal constitutional law (from the U.S. Constitution) and New York State laws. When addressing problems surrounding searches, including body cavity searches, courts generally refer to the Fourth Amendment, which protects you against unreasonable searches.¹ Remember that rulings from the U.S. Supreme Court apply to the whole country. If you are in a prison outside of New York, you should research the laws and cases in your state. You should try to use the laws and court decisions of the federal circuit where you are located. Reading Chapter 2 of the *JLM*, “Introduction to Legal Research,” before you read this Chapter (or any other chapter of the *JLM*) is a good idea because it will help you understand how to research the law and understand which laws apply to you and your legal problem.

If you think your rights are being violated, you should first try to protect your rights through your institution’s administrative grievance procedures.² You *must* go through the prison grievance process to protect your right to sue in federal court under the Prison Litigation Reform Act (“PLRA”). Read Chapter 14 of the *JLM* on the PLRA to know what to do—otherwise you might lose your right to sue (and possibly your good-time credit).

If the grievance system does not help you, or if it does not help you enough, you can then file a lawsuit. Prisoners who challenge illegal body searches and involuntary exposure usually file claims under 42 U.S.C. § 1983 (“Section 1983”),³ through a *Bivens* action in state or federal court, or through an Article 78 petition in state court (if you are in New York).⁴ Other chapters of the *JLM* have more information on these claims, including Chapter 5, “Choosing a Court and a Lawsuit,” Chapter 16, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law,” and Chapter 22, “How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules.” If you want to

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1. The Fourth Amendment states that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” U.S. CONST. amend. IV.

2. See *JLM*, Chapter 15, “Inmate Grievance Procedures,” for more information on prisoner grievance procedures.

3. Remember that “§” is the symbol for “section.” For example, § 1983 means “Section 1983.” Therefore, “§ 1983” refers to a specific section—section 1983—of a law (here the United States Code).

4. An Article 78 petition refers to a petition under Article 78 of the New York Civil Practice Law & Rules. You cannot use Article 78 to seek money damages. You can only use an Article 78 petition to go to court to challenge decisions made by New York State administrative bodies or officers, like the Dep’t. of Corr. and Cmty. Supervision or prison employees, and only if you think the decision was illegal, arbitrary or grossly unfair. If a decision is arbitrary, it means that there was no good reason or policy to justify it. For instance, a prisoner might file an Article 78 petition to request judicial review of a prison disciplinary determination resulting from what the prisoner believes to have been an illegal search. See, e.g., *Ocean v. Selsky*, 252 A.D.2d 984, 985, 676 N.Y.S.2d 380, 381 (4th Dept. 1998) (challenging prison director’s actions in violating the rules for a “pat frisk” using Article 78); *Medina v. Portuondo*, 298 A.D.2d 733, 734, 749 N.Y.S.2d 291, 293 (3d Dept. 2002) (challenging determination that prisoner violated prison rules by possessing contraband and controlled substances using Article 78); *Young v. Coombe*, 227 A.D.2d 799, 800, 642 N.Y.S.2d 443, 444 (3d Dept. 1996) (seeking judicial review of Commissioner’s determination that prisoner was in violation of prison disciplinary rules by, among other things, not complying with a frisk under Article 78). See Part C(4) of Chapter 5 of the *JLM*, “Choosing a Court and a Lawsuit,” and Chapter 22 of the *JLM*, “How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules,” for more about Article 78 proceedings.

learn more about your rights against assaults in prison, *see* Chapter 24 of the *JLM*, “Your Right to Be Free From Assault.”

If you bring a civil suit, it is important to know that the court recognizes only physical abuse, not emotional damage. According to Section 803(d) of the PLRA, “no Federal civil action may be brought by a prisoner confined in a jail, prison or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act . . .”⁵ *See* Chapter 14 of the *JLM* for more information on the PLRA.

Also, because prison officers are government actors, they can use the defense of “qualified immunity”⁶ to counter a Section 1983 action. This means that even if you can prove you were illegally searched, the officials may not be liable because of their qualified immunity defense.⁷ For a detailed discussion of qualified immunity and Section 1983, *see* Part (C)(3)(c) (Qualified Immunity) and Part B (Section 1983) of Chapter 16 of the *JLM*, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law.”

B. Involuntary Exposure

This Part discusses your privacy rights regarding your naked body.⁸ “Involuntary exposure” is when your naked, or partly naked body is seen by guards of the opposite sex, such as when you are using showers or toilets. In *Turner v. Safley*, the Supreme Court stated that although prisoners have diminished liberty interests, prison regulations that restrict the rights of prisoners must be reasonably related to legitimate penological (prison-related) interests.⁹ Thus, your privacy rights can be limited if the prison gives a reason that is reasonably related to a legitimate prison policy. For example, your state could enact a regulation allowing prison guards of the opposite sex to see your naked body during an emergency.¹⁰

But you can expect to have some privacy rights with respect to your naked body. Courts generally do not like prison policies requiring prisoners to be routinely searched or seen by guards of the opposite sex.¹¹ Courts have held that prisons may accommodate prisoners’ privacy interests when such actions are reasonable and do not affect penological interests. But courts have not been clear about which specific prison actions violate your privacy rights.¹² The court in *Hudson v. Goodlander* held that a prisoner’s privacy rights

5. Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. § 1997e(e) (2012).

6. “Qualified immunity” is defined as “[i]mmunity from civil liability for a public official who is performing a discretionary function, as long as the conduct does not violate clearly established constitutional or statutory rights.” BLACK’S LAW DICTIONARY 818 (9th ed. 2009).

7. *See, e.g.,* Way v. Cnty. of Ventura, 445 F.3d 1157, 1163 (9th Cir. 2006), *cert. denied*, 549 U.S. 1052, 127 S. Ct. 665, 166 L. Ed. 2d 513 (2006) (holding strip search of arrestee unconstitutional but finding in favor of the County because of the officers’ qualified immunity); Lay v. Porcker, 371 F. Supp. 2d 1159, 1167 (C.D. Cal. 2004) (holding that a body cavity search of naked male prisoner in the presence of a female officer did violate the prisoner’s constitutional rights, but granting summary judgment to the prison because of the prison official’s qualified immunity). *But see* Edgerly v. City & Cnty. of San Francisco, 599 F.3d 946, 951 (9th Cir. 2010) (“We also hold that the Officers are not entitled to a qualified immunity for the search as alleged.”).

8. For other privacy rights, *see* Chapter 19 of the *JLM*, “Your Right to Communicate with the Outside World” (monitoring of telephone calls, inspection of mail, etc.), and Chapter 26 of the *JLM*, “Infectious Diseases: AIDS, Hepatitis, Tuberculosis, and MRSA in Prisons” (on the right to privacy regarding health status).

9. *Turner v. Safley*, 482 U.S. 78, 87, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 78 (1987).

10. *See* Thornburgh v. Abbott, 490 U.S. 401, 404, 109 S. Ct. 1874, 1877, 104 L. Ed. 2d 459 (1989) (upholding a regulation that allowed prison wardens to prevent inmates from reading books and magazines which were “determined detrimental to the security, good order, or discipline of the institution or...might facilitate criminal activity.”).

11. *See* Mills v. City of Barboursville, 389 F.3d 568, 579 (6th Cir. 2004) (“As to jail employees of the opposite gender viewing prison inmates or detainees, we have recognized that a prison policy forcing prisoners to be searched by members of the opposite sex or to be exposed to regular surveillance by officers of the opposite sex while naked—for example while in the shower or using a toilet in a cell—would provide the basis of a claim on which relief could be granted.”) (citations omitted); Fortner v. Thomas, 983 F.2d 1024, 1030 (11th Cir. 1993) (recognizing prisoners’ right to bodily privacy “because most people have ‘a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating” (quoting Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1981))); Sepulveda v. Ramirez, 967 F.2d 1413, 1415–16 (9th Cir. 1992) (noting that the right to bodily privacy was extended to prisoners in 1985 in the Ninth Circuit and to parolees in 1988); Kent v. Johnson, 821 F.2d 1220, 1226 (6th Cir. 1987) (recognizing that a prisoner has a constitutional claim when the prison fails to reasonably accommodate the interests of prisoners and female employees).

12. *See* Ashann-Ra v. Virginia, 112 F. Supp. 2d 559, 565 (W.D. Va. 2000) (recognizing that routinely or regularly exposing an unclothed prisoner to female guards may constitute a constitutional violation, but noting an evidentiary hearing may be required to make the determination on particular encounters between female officers and naked male

were violated by assigning female guards to posts where they could view a male prisoner while he was completely unclothed.¹³ The court stated that voluntary restrictions on employment of female correction officers should adequately protect prisoner privacy and could be removed during times of emergency.¹⁴

One obstacle to challenging involuntary exposure situations is that prisons must obey federal employment discrimination laws that require male and female employees to be treated the same. Prohibiting guards of the opposite sex from viewing nude prisoners may violate laws requiring equal employment opportunities, because whether the guard is a man or a woman would then become a factor in employment decisions.¹⁵ Most courts have held that prison policies allowing cross-sex viewing of nude prisoners do *not* violate prisoners' rights.¹⁶ The Ninth Circuit in *Oliver v. Scott* held that a male prisoner's Fourth and Fourteenth Amendment rights were not violated after female prison guards strip searched the prisoner and observed him showering and using the bathroom.¹⁷ Also, the Eighth Circuit in *Timm v. Gunter* held that allowing female guards, like male guards, to pat search male prisoners was a reasonable regulation and did not violate any privacy interests of the prisoners.¹⁸

Courts have used several methods to balance prisoners' privacy rights and correction officers' right to be free from sex discrimination in employment. For example, the court in *Johnson v. Pennsylvania Bureau of Corrections* held that a prison's security interests were reasonable when it assigned female officers to patrol housing units, since they were required to announce their presence when entering housing areas to avoid unnecessarily invading the privacy of inmates of the opposite sex.¹⁹ Other methods approved by the courts

prisoners); *Oliver v. Scott*, 276 F.3d 736, 744–46 (5th Cir. 2002) (upholding under the *Turner* reasonable relationship standard a policy “permitting all guards to monitor all inmates at all times” because it “increases the overall level of surveillance” and finding that bathrooms and showers can be the site of violence, making it reasonable for prisons to monitor such areas); *Hill v. McKinley*, 311 F.3d 899, 903–05 (8th Cir. 2002) (holding both male and female staff could participate in transfer of unruly naked female prisoner, since not enough female guards were available; however, leaving the prisoner exposed on a restraint board in male officers' presence violated the Fourth Amendment); *Somers v. Thurman*, 109 F.3d 614, 617–23 (9th Cir. 1997) (finding no clearly established Fourth Amendment protection against cross-gender strip searches, and dismissing Eighth Amendment claim that female officers subjected male plaintiff to visual body cavity searches, watched him shower, pointed at him, and made jokes about him).

13. *Hudson v. Goodlander*, 494 F. Supp. 890, 891–95 (D. Md. 1980); *see also Fortner v. Thomas*, 983 F.2d 1024, 1029–30 (11th Cir. 1993) (holding that male prisoners suing to prevent female guards from coming into living quarters where they were exposed may be entitled to injunctive relief in light of court's recognition of limited constitutional right to bodily privacy); *Arey v. Robinson*, No. Y-90-3009, 1992 U.S. Dist. LEXIS 21810, at *32 (D. Md. Apr. 6, 1992) (*unpublished*) (finding the design and operation of bathroom facilities violated the prisoner's privacy rights), *adopted by*, 819 F. Supp. 478, 479 (D. Md. 1992).

14. *Hudson v. Goodlander*, 494 F. Supp. 890, 893–94 (D. Md. 1980).

15. *See Csizmadia v. Fauver*, 746 F. Supp. 483, 491 (D.N.J. 1990) (discussing the tension between prisoners' constitutional privacy rights and guards' equal employment rights). *But see* *Tharp v. Iowa Dep't. of Corr.*, 68 F.3d 223, 225 (8th Cir. 1995) (finding that assignment of female guards to female prison units did not violate equal employment rights and could be viewed as serving a positive interest for the prison as long as guards were not being denied opportunities for promotion or being discriminated against by these assignments).

16. *See, e.g., Grummett v. Rushen*, 779 F.2d 491, 496 (9th Cir. 1985) (rejecting prisoner's claim challenging assignment of female officers to male housing units); *Smith v. Chrans*, 629 F. Supp. 606, 611 (C.D. Ill. 1986) (dismissing case when prisoner alleged nothing more than occasional and inadvertent sightings by female prison employees of prisoners in cells or open shower or toilet facilities engaged in basic bodily functions); *Mills v. City of Barbourville*, 389 F.3d 568, 579 (6th Cir. 2004) (finding no Fourth Amendment violation where male employee accidentally saw female plaintiff's bare chest while female jailers were searching her upon entry to prison). *But see* *Morris v. Newland*, No. CIV S-00-2794 GEB GGH P, 2007 U.S. Dist. LEXIS 15725, at *17 (E.D. Cal. Mar. 6, 2007) (*unpublished*) (dismissing claim that prisoner's Fourth Amendment rights were violated by three prison guards watching him shower, but declining to dismiss the prisoner's retaliation claim that the guards had “repeatedly ogled him in retaliation for his having filed inmate grievances regarding female guards being allowed to watch him showering or otherwise undressed”); *Cerniglia v. Cnty. of Sacramento*, No. 2:99-cv-01938-JKS-DAD, 2008 U.S. Dist. LEXIS 32346, at *48 (E.D. Cal. Apr. 18, 2008) (*unpublished*) (finding no violation of a prisoner's right to privacy where prisoner was strip searched in a dayroom where anyone could have seen him, but there was no evidence that anyone actually did).

17. *Oliver v. Scott*, 276 F.3d 736, 746 (5th Cir. 2002); *see also* *Johnson v. Phelan*, 69 F.3d 144, 147 (7th Cir. 1995) (noting that limiting the prison guards that could monitor prisoners in the shower or toilets to a specific gender or sexual orientation would be inefficient staff deployment and therefore is not required).

18. *Timm v. Gunter*, 917 F.2d 1093, 1100 (8th Cir. 1990) (“We are persuaded that allowing such searches on the same basis as same-sex pat searches is a reasonable regulation as applied at [the prison], and thus is not a constitutional violation.”).

19. *Johnson v. Pa. Bureau of Corr.*, 661 F. Supp. 425, 432 (W.D. Pa. 1987).

include allowing female prisoners to cover the windows of their cells for short periods of time,²⁰ allowing prisoners to cover their genitals with a towel when guards are present in the restrooms,²¹ and providing pajamas for sleeping.²² At least one court has even held that prisons should change the design of bathroom facilities to protect a prisoner's privacy rights.²³

C. Body Searches

This Part discusses when and how prison officials are allowed to search your body. Part C(1) introduces the names which courts use for different types of body searches. Part C(2) explains the Fourth Amendment protections against illegal searches for convicted prisoners. Part C(3) explains how the Eighth Amendment also limits certain body searches. Part C(4) talks about privacy rights and DNA testing. Part C(5) describes your privacy rights under state statutes, especially New York law. Part C(6) explains how each prison's own rules can also protect you from illegal searches. Part C(7) explains why, in general, it is better for prisoners not to resist being searched, even if you believe the search is illegal.

Note that both arrestees and pretrial detainees have more constitutional protections against body searches than convicted prisoners. When you research your case, *remember that the reasonableness standard for searches of arrestees/pretrial detainees differs from the reasonableness standard for convicted prisoners at key points.* For instance, strip/body cavity searches have been held to be unconstitutional where authorities had no reasonable suspicion that the arrestee was concealing contraband.²⁴ Also, law enforcement-related searches of pretrial detainees' cells are protected by the Fourth Amendment, but searches of convicted prisoners' rooms are not.²⁵ Refer to Part C(2) of this section to learn about the reasonableness standard for searches of prisoners.

1. Types of Body Searches

It is important to remember that most searches of prisoners are legal. Prison officials may legally touch you for security reasons, such as when performing a valid search.²⁶ But, courts have recognized that sometimes prison officials use searches, especially strip searches and body cavity searches, to harass or abuse prisoners, and this is not legal. (For more on harassment, see Part B(3) of Chapter 24 of the *JLM*, "Your Right to Be Free From Assault.") The courts, and the Supreme Court, have created some standards to accommodate the needs of both prisons and prisoners.²⁷ This Section explains five types of searches:

20. *Torres v. Wis. Dep't. of Health & Social Servs.*, 859 F.2d 1523, 1524 (7th Cir. 1988) (en banc) (permitting female prisoners at women's maximum security prison to cover windows in the doors of their rooms with privacy cards for up to 10 minutes between the hours of 6 a.m. and 9 p.m. while they are dressing or using the toilet).

21. *Timm v. Gunter*, 917 F.2d 1093, 1102 (8th Cir. 1990) (holding that "[t]he use of a covering towel while using the toilet or while dressing and body positioning while showering or using a urinal allow the more modest inmates to minimize invasions of their privacy").

22. *Forts v. Ward*, 621 F.2d 1210, 1217 (2d Cir. 1980) (finding that a "suitable nighttime garment" can protect prisoners from inappropriate viewing of their private parts).

23. *Arey v. Robinson*, 819 F. Supp. 478, 487 (D. Md. 1992) (stating that the "combined effect of [an] open dormitory and [an] open bathroom area" that puts inmates "on display virtually 24 hours a day no matter how personal an activity" for guards of the opposite sex undermines "basic human dignity" and thus requires adjustments to bathroom design in order to create some sort of privacy).

24. *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986).

25. *Willis v. Artuz*, 301 F.3d 65, 69 (2d Cir. 2002) (justifying the differential treatment of convicted prisoner's room because "a convicted prisoner's loss of privacy rights can be justified on grounds other than institutional security," such as retribution).

26. Prison officials are allowed to use bodily force to maintain control and security within the prison as long as their actions relate to some penological need, meaning the action helps them manage and maintain control of the prison. *See* N.Y. Correct. Law § 137(5) (McKinney 2013) ("When any inmate...shall offer violence to any person, or do or attempt to do any injury to property, or attempt to escape, or resist or disobey any lawful direction, the officers and employees shall use all suitable means to defend themselves, to maintain order, to enforce observation of discipline, to secure the persons of the offenders and to prevent any such attempt or escape."). *But see* *Turner v. Huibregtse*, 421 F. Supp. 2d 1149, 1152 (W.D. Wis. 2006) (finding that inappropriate grabbing and fondling of the prisoner in a harassing manner rather than the touching requisite to a search may violate the prisoner's constitutional rights).

27. *See generally* *Hudson v. Palmer*, 468 U.S. 517, 526–27, 104 S. Ct. 3194, 3200–01, 82 L. Ed. 2d 393, 403–04 (1984) (establishing a standard of reasonableness); *Bell v. Wolfish*, 441 U.S. 520, 539, 99 S. Ct. 1861, 1874, 60 L. Ed. 2d 447 (1979) (using a reasonableness standard); *Turner v. Safley*, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79–80 (1987) (establishing a four part test to determine if a violation of a constitutional right was reasonable), *superseded by statute*, 42 U.S.C. § 2000cc-1 (2000) (as applied to infringements on religious freedom).

- (1) pat frisk search—a search where a prison guard searches your body and clothes while you are still dressed (but you will usually have to remove your hat, shoes, and coat);
- (2) strip search—a search where you remove all of your clothing, and the prison official searches your clothes after you take them off (the prison guard does not touch you or search your body cavities);
- (3) strip frisk search—a search where the official searches your clothes after you have taken them off and also looks at (but does not touch) your body cavities (all prisoners must bend over to have their anal cavities searched; women must also squat so that the guards can look into their vaginal cavity);
- (4) body cavity search—a search that includes contact with any or all of your body cavities; these searches should be performed by trained medical personnel only; and
- (5) cross-gender body search—any search performed by someone of the opposite sex.

2. Fourth Amendment Protections

Prisoners usually use the Fourth Amendment, which forbids “unreasonable searches and seizures,”²⁸ to challenge body searches. Prisoners have some, *but very limited*, privacy rights to their bodies under the Fourth Amendment.²⁹

This Section first tells you when courts do allow body searches under the Fourth Amendment. Part C(2)(a) explains the Fourth Amendment’s “reasonableness standard,” which courts use to decide if a search was lawful. Part C(2)(b) discusses strip search cases, Part C(2)(c) discusses strip frisks, and Part C(2)(d) covers body cavity searches. Finally, Part C(2)(e) explains your limited right to not be searched by someone of the opposite sex (cross-gender body searches).

(a) Reasonableness Standard for Searches of Prisoners

The lawfulness of a body search depends on whether a prison guard performs the search reasonably. In *Bell v. Wolfish*, the Supreme Court said that body searches are constitutional, but only if performed in a “reasonable manner.”³⁰ Guards must act reasonably when searching prisoners because searches invade prisoners’ privacy and can easily become abusive.³¹ In other words, courts balance the state’s need for the search against how much the prisoner’s privacy is invaded.

The courts do not have one particular rule for what is reasonable in body searches. Instead, they have decided that some practices are unreasonable. To decide whether a search is unreasonable and unnecessarily invasive of prisoners’ privacy, *Bell v. Wolfish* requires courts to look at: (1) how the search is performed; (2) the reason for the search; and (3) the place of the search.³²

Different courts make different decisions using this test, depending on how reasonable a court finds the prison officials’ explanation for the search and the conduct during the search. Note that courts will generally

28. U.S. Const. amend. IV. But remember that the Fourth Amendment does not protect you from searches and seizures of your prison cell, because the Supreme Court has said that prisoners have no legitimate expectation of privacy in their prison cells. *See Hudson v. Palmer*, 468 U.S. 517, 526, 104 S. Ct. 3194, 3200, 82 L. Ed. 2d 393, 402–03 (1984) (holding that the Fourth Amendment prohibition against unreasonable searches does not apply to prison cells because “[t]he recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions”); *Block v. Rutherford*, 468 U.S. 576, 591, 104 S. Ct. 3227, 3235, 82 L. Ed. 2d 438, 450 (1984) (holding searches of pretrial detainees’ cells were not unconstitutional, because they served the important government purpose of maintaining security in the jail); *Willis v. Artuz*, 301 F.3d 65, 68–69 (2d Cir. 2002) (holding that prisoners are not protected from cell searches by prosecutors or police even though such searches are not related to prison security). *But see United States v. DeFonte*, 441 F.3d 92, 94 (2d Cir. 2006) (finding that attorney-client privilege extends to journal entries recording conversations with counsel kept in an inmate’s cell, even though there is no reasonable expectation of privacy in them for Fourth Amendment purposes).

29. *Nicholas v. Goord*, 430 F.3d 652, 658 (2d Cir. 2005), *cert. denied*, 549 U.S. 953, 127 S. Ct. 384, 166 L. Ed. 2d 270 (2006) (“[P]risoners retain a right to bodily privacy, even if that right is limited by institutional and security concerns.”), *overruled on other grounds by* *United States v. Amerson*, 483 F.3d 73 (2d Cir. 2007); *Peckham v. Wis. Dep’t. of Corr.*, 141 F.3d 694, 696 (7th Cir. 1998) (citations omitted) (stating some loss of privacy is of course to be expected in prison, however “those who are convicted of criminal offenses do not surrender all of their constitutional rights”); *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (“We are persuaded to join other circuits in recognizing a prisoner’s constitutional right to bodily privacy because most people have ‘a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.’”).

30. *Bell v. Wolfish*, 441 U.S. 520, 560, 99 S. Ct. 1861, 1885, 60 L. Ed. 2d 447, 482 (1979).

31. *Bell v. Wolfish*, 441 U.S. 520, 559–60, 99 S. Ct. 1861, 1884–86, 60 L. Ed. 2d 447, 481–83 (1979).

32. *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S. Ct. 1861, 1884–85, 60 L. Ed. 2d 447, 481–82 (1979).

believe prison officials when they claim that they needed to search a prisoner for security reasons. Courts usually do not want to second-guess prison safety policies used to maintain prison control.³³ While courts will not allow prison officials to do anything they wish (courts can and have struck down unreasonable policies), a prison official can typically prove the need for a search policy easily. Some examples of “reasonable” searches are:

- (1) a visual, public strip search and urine analysis drug test as part of a prison administration’s efforts to stop prison drug use;³⁴
- (2) drawing a prisoner’s blood or saliva to add DNA to a criminal profiling database;³⁵ and
- (3) a policy of visually strip searching all arrestees when they are admitted to the general population of a detention center, regardless of the reason for their arrest, in order to prevent dangerous or illegal materials from entering the prison.³⁶

In general, searches should not be performed abusively (in violation of the Eighth Amendment’s ban on cruel and unusual punishment)³⁷ or conducted in an unnecessarily public manner.³⁸ *Who* conducts the search can be important—for example, courts generally do not second guess body cavity searches performed by trained medical personnel.³⁹ *Where* the search is performed is also a factor—for example, prison officials should not perform strip searches in public without a good reason.⁴⁰ *Which prisoners* are being searched is considered critical—courts allow more intrusive searches of maximum security prisoners,⁴¹ though the

33. See *Bull v. City and Cty. of San Francisco*, 595 F.3d 964, 972 (9th Cir. 2010) (noting that courts owe great deference to prison officials’ judgment of security interests, even in the case of pre-trial arrestees); *Elliot v. Lynn*, 38 F.3d 188, 191–92 (5th Cir. 1994) (agreeing with the prison’s claim that a state of emergency existed that necessitated the deprivation of privacy where prison officials conducted a massive prison shakedown after an increase in murders and violence, and the strip searches were conducted in front of other prisoners and several non-prison staff persons); *Whitman v. Nesic*, 368 F.3d 931, 934–35 (7th Cir. 2004) (deferring to prison’s claim of security justifications for requiring prisoners to be strip-searched before giving urine samples in a random drug testing program, because “[p]rison officials must be accorded wide-ranging deference in matters of internal order and security”).

34. See *Thompson v. Souza*, 111 F.3d 694, 699–701 (9th Cir. 1997) (upholding a strip search of prisoners in front of other inmates, even though strip searches were not an official part of the prison’s policy and holding that requiring prisoners to provide urine samples for the purposes of drug tests does not violate the prisoners’ constitutional rights).

35. See *Hamilton v. Brown*, 630 F.3d 889, 894–96 (9th Cir. 2011) (holding that prison officials can collect blood samples from prisoners for the purpose of DNA identification); *Padgett v. Donald*, 401 F.3d 1273, 1277–80 (11th Cir. 2005) (holding that there is no constitutional violation in collecting saliva samples for the purpose of creating a DNA database of prisoners).

36. See *Florence v. Bd. of Chosen Freeholders of Cty. of Burlington*, 132 S. Ct. 1510, 1518, 182 L. Ed. 2d 566, 577 (2012) (concluding that a prison policy of strip searching every person admitted into a detention center, no matter the offense arrested for, was constitutional).

37. See, e.g., *Calhoun v. DeTella*, 319 F.3d 936, 940 (7th Cir. 2003) (holding that conducting strip searches while opposite-sex staff were invited to watch, accompanied by sexual harassment and taunting, would be “designed to demean and humiliate” and would thus state an Eighth Amendment claim). *But see Somers v. Thurman*, No. 96-55534, 1997 U.S. App. LEXIS 12272, at *31 (9th Cir. Feb. 6 1997) (*unpublished*) (“To hold that gawking, pointing, and joking violates the prohibition against cruel and unusual punishment would trivialize the objective component of the Eighth Amendment test and render it absurd.”).

38. See, e.g., *Farmer v. Perrill*, 288 F.3d 1254, 1260 (10th Cir. 2002) (holding that the prisoner has “the right not to be subjected to a humiliating strip search in full view of several (or perhaps many) others unless the procedure is reasonably related to a legitimate penological interest”).

39. See, e.g., *Geder v. Lane*, 745 F. Supp. 538, 539 (C.D. Ill. 1990) (noting that medical personnel are authorized to perform a broader variety of searches than nonmedical personnel).

40. See, e.g., *Farmer v. Perrill*, 288 F.3d 1254, 1260–61 (10th Cir. 2002) (affirming denial of summary judgment as to a challenge to visual strip searches en route to the recreation yard conducted in view of other prisoners, and holding that the government must be justified when doing the visual strip searches in public); *Smith v. Taylor*, 149 F. App’x 12, 14 (2d Cir. 2005) (holding that the presence of more officers at a strip search than prison rules authorized suggested a privacy violation not necessary to serve penological interests).

41. See, e.g., *Arruda v. Fair*, 710 F.2d 886, 886–88 (1st Cir. 1983) (upholding the practice of subjecting maximum-security prisoners to body cavity searches upon non-contact visitations, visits to the infirmary and library, and upon leaving cells, finding the practice reasonable given prison officials’ need to find smuggled contraband among segregated prisoners in maximum-security prison); *Savard v. Rhode Island*, 338 F.3d 23, 30–31 (1st Cir. 2003) (holding that maximum-security prison’s policy authorizing blanket strip and body cavity searches did not violate prisoner’s Fourth Amendment rights, because the general interest of internal security in such a prison is compelling); *Mitchenfelder v. Sumner*, 860 F.2d 328, 333 (9th Cir. 1988) (“The fact that Unit 7 houses the state’s most difficult prisoners gives rise to a legitimate governmental security interest in procedures that might be unreasonable elsewhere.”); *Rickman v. Avani*, 854 F.2d 327, 328 (9th Cir. 1988) (holding that policy of performing visual strip and body cavity searches on prisoners in

Supreme Court has recently held that even people who are arrested for minor crimes can be visually strip searched when admitted into detention.⁴²

The New York State Department of Corrections and Community Supervision (“DOCCS”) relies on this standard of what is or is not reasonable when trying to figure out what kind of pat frisks are okay. According to Directive 4910, a pat frisk is okay if an official has “an articulable basis to suspect that an inmate may be in possession of contraband.”⁴³ This new standard replaces the old standard, which required “reasonable suspicion that an inmate is in possession of contraband.”⁴⁴ The old reasonable suspicion standard required a “particularized and objective basis.”⁴⁵ This meant that from an objective point of view, the circumstances leading up to the search would have made a reasonable person believe that the inmate was in possession of contraband.⁴⁶ The wording in the new standard—“articulable basis”—gives prison officials even greater leeway when determining if a pat frisk is necessary. As long as a prison official can give a reason (and it may not be a good reason) to suspect that you may be carrying contraband, he can pat frisk you.⁴⁷ An official will also pat frisk you before you speak with Department officials or enter the visiting room.⁴⁸

(b) Strip Search

In a strip search, you take off your clothes and a prison official searches them and inspects your naked body. In a strip search, the official does not touch you or search your body cavities. At least one circuit court has held that a strip search does not have to be “deliberate,” meaning that it does not matter if the officer *intended* to see your naked body, as long as the officer *did* see your naked body.⁴⁹ Courts generally allow strip searches if prison officials have a legitimate reason based on safety and security for conducting the search. For example, these are situations where there has been an increase in violence at the prison, or where prisoners have had contact with visitors from outside of the prison.⁵⁰ It is a violation of your Fourth or

administrative segregation unit whenever these prisoners left their cells was constitutional in light of security interests for most restrictive unit); *cf. Lopez v. Youngblood*, 609 F. Supp. 2d 1125, 1136 (E.D. Cal. 2009) (distinguishing a county jail’s unreasonable blanket strip search policy from the reasonable searches at a maximum security facility such as the one in *Mitchelder*).

42. *Florence v. Bd. of Chosen Freeholders of Cty. of Burlington*, 132 S. Ct. 1510, 182 L. Ed. 2d 566 (2012); *see also Brown v. Hilton*, 492 F. Supp. 771, 776–77 (D.N.J. 1980) (holding visual anal inspections of prisoners entering a segregated unit were proper for prisoner who was an accomplice of two other prisoners caught with contraband).

43. State of New York, Dep’t. of Corr. and Cmty. Supervision, Directive No. 4910, Control of and Search for Contraband 2 (2001) (*as revised* Dec. 11, 2006).

44. *See Rivera v. Smith*, 118 Misc. 2d 921, 924, 462 N.Y.S.2d 352, 354 (Sup. Ct. N.Y. Wyoming County 1983) (stating that prison guards can frisk members of the opposite sex in violation of religious beliefs only when there is reasonable cause to believe that the inmate possesses contraband, or there are other emergency situations, as long as the justification is not to avoid minor delays).

45. *See Ornelas v. United States*, 517 U.S. 690, 696, 116 S. Ct. 1657, 1661–62, 134 L. Ed. 2d 911, 918–19 (1996) (discussing “reasonable suspicion” in the context of a police officer’s decision to stop, question, and inspect a car on suspicion that drugs were stored in that car).

46. *See Ornelas v. United States*, 517 U.S. 690, 696, 116 S. Ct. 1657, 1661–62, 134 L. Ed. 2d 911, 918–19 (1996).

47. Though never explicitly discussed by the courts in the context of Directive No. 4910, in other contexts, an articulable basis standard is met when the person conducting the search “possesses a reasonable belief based on ‘specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant’ that belief. *Michigan v. Long*, 463 U.S. 1032, 1049, 103 S. Ct. 3469, 3487, 77 L. Ed. 2d 1201, 1220 (1983) (upholding a warrantless search of a car based on an officer’s suspicion that it contained weapons that could be used to harm the officers).

48. State of New York, Dep’t of Corr. and Cmty. Supervision, Directive No. 4910, Control of and Search for Contraband 2 (2001) (*as revised* Dec. 11, 2006).

49. *Wood v. Hancock Cnty. Sheriff’s Dep’t.*, 354 F.3d 57, 63–65 (1st Cir. 2003) (defining strip searches to be “exposing one’s naked body to official scrutiny,” and holding that “[t]he critical question is whether viewing the naked body was an objective of the search, rather than an unavoidable and incidental by-product,” and finding a strip search does not necessarily stop being a strip search when a prisoner stands naked in front of an official without being asked to open one’s mouth or lift one’s arms contrary to the definition of the district court). *But see Stanley v. Henson*, 337 F.3d 961, 963–64 (7th Cir. 2003) (finding observed clothing swap in which prisoner was never fully naked was not a “strip search,” because it was an administrative procedure with the purpose of ensuring that contraband was not brought into the jail).

50. *See, e.g., Peckham v. Wis. Dep’t. of Corr.*, 141 F.3d 694, 695–97 (7th Cir. 1998) (finding strip searches that were for legitimate, identifiable purposes and not for punishment or harassment purposes did not violate prisoner’s rights); *Bruscino v. Carlson*, 854 F.2d 162, 165 (7th Cir. 1988) (upholding rectal searches in maximum security federal prison and noting the incidents of extreme violence involving murder of prison guards and the amount of contraband

Eighth Amendment constitutional rights to strip search you only because the prison wants to harass or punish you, and not because the prison has other legitimate security reasons.⁵¹ In addition, courts are usually more skeptical of strip searches for people charged with minor offenses.⁵²

Courts around the country disagree on what the Fourth Amendment's reasonableness standard for strip searches actually means. In *Arruda v. Fair*, the First Circuit held that a policy requiring strip searches of maximum security prisoners when entering or leaving the unit to go to the library or infirmary and after meeting visitors was reasonable, even though a guard accompanied prisoners to the infirmary and there was a wire screen in the visiting area because particularly dangerous criminals were involved.⁵³ However, in *Roberts v. State of Rhode Island*, also decided by the First Circuit almost 18 years later, the court said that the policy of strip searching people charged with minor offenses at the intake facility for the same maximum security prison as *Arruda* violated the Fourth Amendment.⁵⁴

Courts also look at the place of the search and the conditions of the search to see if the prisoner's privacy rights were violated.⁵⁵ In *Cornwell v. Dahlberg*, the Sixth Circuit held that a male prisoner who was strip searched outdoors after a prison riot in front of several female correctional officers raised a valid Fourth Amendment claim because the search could have occurred in a more private place.⁵⁶ In *Hodges v. Stanley*, a prisoner complained that a prison official had physically attacked him and then stripped searched him. The prisoner claimed that these actions were unconstitutional.⁵⁷ The prisoner alleged that he had been searched twice in a row, and he questioned the need for a second search. The Second Circuit said that the first search, a mandatory procedure when prisoners were put in administrative detention, was proper. However, the court found that Hodges stated a constitutional claim because the second search was unnecessary.⁵⁸

typically found in such searches); *Goff v. Nix*, 803 F.2d 358, 366–71 (8th Cir. 1986) (upholding visual body cavity searches on prisoners before and after trips to hospital, visits to prison infirmary, other such contacts with people outside the prison, and exercise period for prisoners in segregation; noting the high level of deference accorded to prison administrators' decisions about such searches); *Thompson v. Souza*, 111 F.3d 694, 700 (9th Cir. 1997) (upholding visual strip searches to search for drugs, even though this was not an "intended" purpose contained in a written plan to search for drugs); *Roberts v. Rhode Island*, 239 F.3d 107, 112 (1st Cir. 2001) (noting that prisons have discretion to base searches on the type of crime for which a prisoner is convicted, such as justifying a search on the fact that the prisoner was charged with a violent felony); *Brown v. Blaine*, 185 F. App'x 166, 169 (3d Cir. 2006) (finding visual strip searches appropriate when conducted under institutional policy that mandated strip searches upon reentry to the restricted housing unit).

51. See *Harris v. Ostrout*, 65 F.3d 912, 916 (11th Cir. 1995) (stating that if strip searches "are devoid of penological merit and imposed simply to inflict pain, the federal courts should intervene," and that strip searches may not be used to retaliate against First Amendment protected activity, such as your constitutional right of access to the courts); *Peckham v. Wis. Dep't. of Corr.*, 141 F.3d 694, 697 (7th Cir. 1998) (stating that the Eighth Amendment's prohibition against cruel and unusual punishment protects prisoners from strip searches intended to punish and harass); see also *Whitman v. Nestic*, 368 F.3d 931, 934 (7th Cir. 2004) (noting that a search must be "calculated harassment unrelated to prison needs" in order to be unconstitutional (citing *Meriwether v. Faulkner*, 821 F.2d 408, 418 (7th Cir. 1987))).

52. See, e.g., *Shain v. Ellison*, 273 F.3d 56, 66 (2d Cir. 2001) (holding that "persons charged with a misdemeanor and remanded to a local correctional facility...have a right to be free of a strip search absent reasonable suspicion that they are carrying contraband or weapons").

53. *Arruda v. Fair*, 710 F.2d 886, 886–88 (1st Cir. 1983).

54. *Roberts v. State of Rhode Island*, 239 F.3d 107, 113 (1st Cir. 2001).

55. See, e.g., *Evans v. Stephens*, 407 F.3d 1272, 1281 (11th Cir. 2005) (en banc) (holding that searches conducted with little respect for arrestees' privacy, without sanitary precautions, and that included threatening and racist language were unreasonable searches). But see *Franklin v. Lockhart*, 883 F.2d 654, 656 (8th Cir. 1989) (noting that a search conducted in front of other detainees may not be an unreasonable violation of detainee's privacy if there are security concerns that outweigh the intrusiveness of the searches); *Mills v. White*, 364 F. App'x 308, 309 (8th Cir. 2010) (limiting *Lockhart's* holding to the specific facts of that case).

56. *Cornwell v. Dahlberg*, 963 F.2d 912, 916–17 (6th Cir. 1992).

57. *Hodges v. Stanley*, 712 F.2d 34, 35 (2d Cir. 1983).

58. *Hodges v. Stanley*, 712 F.2d 34, 35–36 (2d Cir. 1983); see also *Iqbal v. Hasty*, 490 F.3d 143, 172 (2d Cir. 2007) (finding that detainee stated a Fourth Amendment claim when he alleged that he was subjected to multiple consecutive strip searches and repeated strip and body cavity searches that might be understood to be punishment and not related to legitimate government purposes).

(c) Strip Frisk

“Strip frisk” means a visual search of a prisoner’s clothes and body, including body cavities.⁵⁹ For a male, this may involve one or more of the following procedures:

- (1) Opening his mouth and moving his tongue up and down and from side to side,
- (2) Removing any dentures,
- (3) Running his hands through his hair,
- (4) Allowing his ears to be visually examined,
- (5) Lifting his arms to expose his armpits,
- (6) Bending over and/or spreading his buttocks to expose his anus to the frisking officer, or
- (7) Spreading his testicles to expose the area behind his testicles.

For females the procedures are the same, except females may also be required to squat to show the vagina.⁶⁰ It is important to remember courts sometimes use the terms “strip frisk search” and “visual body cavity search” to mean the same thing.

Because strip frisks invade prisoners’ privacy more than strip searches, courts usually require prison officials to be suspicious of that particular prisoner before strip frisks or body cavity searches are justified.⁶¹ However, some courts now allow random strip frisk searches. For example, the Second Circuit in *Covino v. Patrissi* held that routine strip frisk searches were reasonable and should not be limited to searching prisoners after contact visits.⁶² Using the reasonableness standard, the court in *Covino* found that a regulation allowing random visual body cavity searches (which required the prisoner to remove his clothing, lift his genitals, and spread his buttocks for a visual examination) was not unreasonable, because the prisoners were very dangerous and the prison needed to prevent contraband. Therefore, the prison officials’ need to conduct these searches was more important than the prisoners’ privacy.⁶³

When prison officials conduct strip frisk searches to control a dangerous situation, courts usually do not find any constitutional violation.⁶⁴ The Eighth Circuit in *Franklin v. Lockhart* held that a policy requiring visual body cavity searches of prisoners on punitive status, in administrative segregation, or in need of protection was justified by security concerns.⁶⁵ The Fifth Circuit in *Elliott v. Lynn* held that a visual body cavity search of a prisoner in front of other prisoners and non-searching officers was justified as part of a prison-wide shakedown following an increase in murders.⁶⁶ The Ninth Circuit in *Thompson v. Souza* held that a visual strip search of a prisoner’s body cavities was reasonably related to the prison’s legitimate need to keep drugs out of the prison and therefore did not violate the Fourth Amendment.⁶⁷ The court reached

59. *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 132 S. Ct. 1510, 1525, 182 L. Ed. 2d 566, 566 (2012) (Breyer, J., dissenting). Prison officials only *look* at your body cavities in a strip frisk search. If officials *touch* any body cavity, they are conducting a body cavity search.

60. *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 132 S. Ct. 1510, 1525, 182 L. Ed. 2d 566, 566 (2012) (Breyer, J., dissenting).

61. *See, e.g., Vaughan v. Ricketts*, 950 F.2d 1464, 1468–69, 21 Fed. R. Serv. 3d (West) 959 (9th Cir. 1991) (requiring “reasonable cause” to justify digital rectal searches), *overruled on other grounds by Koch v. Ricketts*, 68 F.3d 1191 (9th Cir. 1995); *see also, Hartline v. Gallo*, 546 F.3d 95, 100 (2d Cir. 2008) (requiring individualized, reasonable suspicion that the arrestee is “secreting contraband on [his or] her person” prior to allowing a strip-frisk search).

62. *Covino v. Patrissi*, 967 F.2d 73, 79 n.5 (2d Cir. 1992).

63. *Covino v. Patrissi*, 967 F.2d 73, 79 (2d Cir. 1992).

64. *See, e.g., Goff v. Nix*, 803 F.2d 358, 367–68 (8th Cir. 1986) (holding visual body cavity searches by prison officials did not violate the Fourth Amendment, and prison administrators’ decision to conduct such searches as a condition of any movement outside segregation unit or confines of prison was entitled to deference); *Serna v. Goodno*, 567 F.3d 944, 953 (8th Cir. 2009) (holding that a body cavity search for a possible cellphone in a treatment facility for sex offenders did not violate the Fourth Amendment, but marked the outer limit of things a prison can do without violating the constitutional rights of prisoners. “Cell phones and their potential to grant access to past or future victims for illegal purposes or to procure sexually explicit material also have the potential to negatively interfere with the Program’s treatment goals.”).

65. *Franklin v. Lockhart*, 883 F.2d 654, 656 (8th Cir. 1989); *cf. Hill v. McKinley*, 311 F.3d 899, 911 (8th Cir. 2002) (holding that a strip search of an arrested woman in front of others of the opposite sex was a violation of her Fourth Amendment right to privacy).

66. *Elliot v. Lynn*, 38 F.3d 188, 191 (5th Cir. 1994); *cf. Moore v. Carwell*, 168 F.3d 234, 236 (5th Cir. 1999) (holding that in the absence of emergency or extraordinary circumstances, body cavity searches by an officer of the opposite sex in view of other officers may be a violation of the prisoner’s constitutional rights).

67. *Thompson v. Souza*, 111 F.3d 694, 700–01 (9th Cir. 1997); *cf. Byrd v. Maricopa Cnty. Sheriff’s Dep’t.*, 629 F.3d 1135 (9th Cir. 2011) (holding that a strip search of a male prisoner by a female officer violated the Fourth

this conclusion even though the search happened in front of other prisoners, the search went beyond prison guidelines and the officials' search plan, and the prisoner was told to run his fingers around his gums after touching his genitalia Courts will therefore probably not find it difficult to hold that a prison's safety concerns override your privacy rights in a strip frisk situation.⁶⁸

(d) Body Cavity Search

A "body cavity search" (or "digital search") is an actual physical examination of the prisoner's anal and/or genital cavities conducted by a professional member of the health services staff.⁶⁹ During a digital body cavity search, a guard or prison official places his or her fingers into a prisoner's nose, mouth, anus, and/or vagina. The test for deciding whether digital body cavity searches are reasonable is stricter than the test for any other type of search because body cavity searches are much more intrusive. The Ninth Circuit has established three requirements that must be satisfied in order for a digital body cavity search to be constitutional under the Fourth Amendment:⁷⁰

- (1) Prison officials must have reasonable cause to search the inmate⁷¹ (but this standard is less strict than probable cause);⁷²
- (2) The search must serve a valid penological (prison management) need;⁷³ and
- (3) The search must be "conducted in a reasonable manner," which means the court will look at whether trained staff performed the search in private and under hygienic (clean) conditions.⁷⁴

The Seventh Circuit in *Bruscino v. Carlson* held that a policy requiring rectal searches of prisoners returning to cells was reasonable because guards found a lot of contraband, including knives and hacksaw blades, through those searches.⁷⁵ Furthermore, prison violence had decreased since the searches began.⁷⁶ Please note, however, that *Bruscino v. Carlson* involved the U.S. Penitentiary in Marion, Illinois, "the only prison in the U.S. currently designed to hold the most violent and dangerous prisoners in the federal system," which may explain why the court allowed these invasive searches to occur frequently.⁷⁷ As part of this search, prisoners returning to their cells were often subjected to a rectal search, where a paramedic inserted a gloved finger into the prisoner's rectum and felt around for contraband.⁷⁸

Courts also often approve body cavity searches performed by X-ray.⁷⁹ For example, in *People v. Pifer* the court held an X-ray search, which discovered a hypodermic syringe in the prisoner's rectal cavity, was

Amendment, where an officer touched the prisoner's thighs, buttocks, and genital area with her latex gloved hand through very thin boxer shorts, ten to fifteen non-participating officers watched the search, and at least one person videotaped the search).

68. See *Thompson v. Souza*, 111 F.3d 694, 700–01 (9th Cir. 1997).

69. See 28 C.F.R. § 552.11 (2016) (defining "digital or simple instrument search" as an "inspection for contraband or any other foreign item in a body cavity of an inmate by use of fingers or simple instruments, such as an otoscope, tongue blade, short nasal speculum, and simple forceps," but declaring that the search may "may be conducted only by designated qualified health personnel").

70. *Wiley v. Serrano*, 37 F. App'x 252, 253 (9th Cir. 2002).

71. *Vaughan v. Ricketts*, 859 F.2d 736, 739–40 (9th Cir. 1988) (holding that reasonable cause is required but declining to rule on whether it existed in that case), *overruled on other grounds* by *Koch v. Ricketts*, 68 F.3d 1191 (9th Cir. 1995).

72. *Bell v. Wolfish*, 441 U.S. 520, 560, 99 S. Ct. 1861, 1885, 60 L. Ed. 2d 447 (1979) ("Balancing the significant and legitimate security interests of [prisons] against the privacy interests of the inmates, we conclude that [digital cavity searches] can [be conducted on less than probable cause]").

73. *Tribble v. Gardner*, 860 F.2d 321, 325 (9th Cir. 1988) (holding that if rectal searches were conducted whenever a prisoner is moved into a secure housing unit within a maximum security prison and for purposes unrelated to security considerations, the searches would violate the Fourth Amendment); see also *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987) (holding that legislation that impinges on prisoners' constitutional rights must be reasonably related to a legitimate penological interest).

74. *Vaughan v. Ricketts*, 859 F.2d 736, 739–40 (9th Cir. 1988) (holding rectal searches in open hall on an unsanitary table were unreasonable).

75. *Bruscino v. Carlson*, 854 F.2d 162, 164–65 (7th Cir. 1988).

76. *Bruscino v. Carlson*, 854 F.2d 162, 164–65 (7th Cir. 1988).

77. *Bruscino v. Carlson*, 854 F.2d 162, 163 (7th Cir. 1988).

78. *Bruscino v. Carlson*, 854 F.2d 162, 164 (7th Cir. 1988).

79. *People v. Collins*, 8 Cal. Rptr. 3d 731, 743–44 (Cal. App. 2004) (upholding an intended visual body cavity search of a prisoner; noting that X-ray searches are often reasonable and, when conducted by a specialized technician, are not harmful or uncomfortable); *Thompson v. Cnty. of Cook*, 412 F. Supp. 2d 881, 893 (N.D. Ill. 2005) (denying summary judgment for prison on the question of whether visual body cavity searches, X-rays, and urethral swabbing for

reasonable.⁸⁰ The court found the prison had significant and legitimate security interests more important than the prisoner's rights. The court said "an X-ray is far less humiliating, degrading, invasive, annoying and physically uncomfortable than a physical viewing of the anal cavity or physical invasion of the rectal cavity."⁸¹

The New York Department of Corrections and Community Supervision (DOCCS) rules say that body cavity searches may only be done "once all other means have been exhausted" and "when there is imminent danger to an inmate's health or facility safety."⁸² A doctor must explain the process to the prisoner before performing a body cavity search.⁸³ The prisoner should have the opportunity to give up the contraband at this time.⁸⁴ A corrections officer of the same sex as the prisoner should be present during the entire exam.⁸⁵

Note that in New York, an X-ray search using the Body Orifice Scanning System ("the BOSS" or "the BOSS chair") is sometimes also called a metal detector search.⁸⁶ Whenever you are searched with the BOSS chair, you are allowed to be fully clothed.⁸⁷ Even if the X-ray search is being used after a strip search or a strip frisk, prison officials must let you put your underclothes back on first.⁸⁸ See Part C(5) of this Chapter for more information about these New York State specific prison rules.

(e) Cross-Gender Body Searches

This Subsection explains your right to not be searched by prison officials of the opposite sex. Part B of this Chapter, "Involuntary Exposure," explained your right not to be seen by prison officials of the opposite sex. You should read both sections because the laws are very similar.

Courts have held that prisoners do, in some situations, have the right to not be searched by guards of the opposite sex.⁸⁹ However, courts have generally found that prisoners' legitimate expectations of privacy from persons of the opposite sex are very limited.⁹⁰ In deciding whether a cross-gender search is a violation of a prisoner's rights, courts must balance the prisoner's limited right to be free from invasions of privacy by

all incoming prisoners were proper).

80. *People v. Pifer*, 265 Cal. Rptr. 237, 240–41, 216 Cal. App. 3d 956, 962–63 (Cal. Ct. App. 1989) (finding that routine X-ray searches of all prisoners being transferred from one prison facility to another were reasonable).

81. *People v. Pifer*, 265 Cal. Rptr. 237, 242, 216 Cal. App. 3d 956, 961 (Cal. Ct. App. 1989).

82. State of New York, Dep't. of Corr. and Cmty. Supervision, Directive No. 4910, Control of and Search for Contraband, at 20 (2001) (*as revised* Dec. 11, 2006).

83. State of New York, Dep't. of Corr. and Cmty. Supervision, Directive No. 4910, Control of and Search for Contraband 20 (2001) (*as revised* Dec. 11, 2006).

84. State of New York, Dep't. of Corr. and Cmty. Supervision, Directive No. 4910, Control of and Search for Contraband 20 (2001) (*as revised* Dec. 11, 2006).

85. State of New York, Dep't. of Corr. and Cmty. Supervision, Directive No. 4910, Control of and Search for Contraband 20 (2001) (*as revised* Dec. 11, 2006).

86. State of New York, Dep't. of Corr. and Cmty. Supervision, Directive No. 4910, Control of and Search for Contraband 20 (2001) (*as revised* Dec. 11, 2006).

87. State of New York, Dep't. of Corr. and Cmty. Supervision, Directive No. 4910, Control of and Search for Contraband 20 (2001) (*as revised* Dec. 11, 2006).

88. State of New York, Dep't. of Corr. and Cmty. Supervision, Directive No. 4910, Control of and Search for Contraband 20 (2001) (*as revised* Dec. 11, 2006) (stating that underclothes means "undershorts for males and bras and panties for females").

89. *See, e.g., Mills v. City of Barboursville*, 389 F.3d 568, 579 (6th Cir. 2004) ("[W]e have recognized that a prison policy forcing prisoners to be searched by members of the opposite sex or to be exposed to regular surveillance by officers of the opposite sex while naked...would provide the basis of a claim on which relief could be granted."); *Hayes v. Marriott*, 70 F.3d 1144, 1147 (10th Cir. 1995) (holding that summary judgment was inappropriate for defendants because plaintiff was subjected to a body cavity search "in the presence of over 100 people, including female secretaries and case managers"); *Moore v. Carwell*, 168 F.3d 234, 237 (5th Cir. 1999) (holding that an allegation of a strip and body cavity search performed by an officer of the opposite sex, absent an emergency or unavailability of a same sex officer, was not frivolous for purposes of the Fourth Amendment).

90. *See, e.g., Michenfelder v. Sumner*, 860 F.2d 328, 334 (9th Cir. 1988) (holding that strip searches of male prisoners that occasionally occurred in view of female guards do not violate the Fourth Amendment); *Grummett v. Rushen*, 779 F.2d 491, 495 (9th Cir. 1985) (finding that a pat-down search of a male prisoner, including his groin area, by female guards does not violate the Fourth Amendment). *But see, Byrd v. Maricopa Cnty. Sheriff's Dep't.*, 629 F.3d 1135, 1147 (9th Cir. 2011), *cert. denied*, 131 S. Ct. 2964, 180 L. Ed. 2d 246 (U.S. 2011) (holding that "the cross-gender strip search performed on [plaintiff] was unreasonable as a matter of law...and violated [plaintiff's] rights under the Fourth Amendment to be free from unreasonable searches," where a non-uniformed female guard conducted a body cavity search on a male prisoner in front of ten to fifteen non-participating officers).

members of the opposite sex against the state's interests in maintaining the security of the prison⁹¹ and in avoiding sex discrimination in prison employment.⁹² Because a majority of prisoners are male, if the courts held that female guards could never search male prisoners it might make it harder for women ever to be hired as security guards (since conducting searches is an important duty of security guards), resulting in possible employment discrimination. Therefore, the state has to balance this interest in not discriminating against female security guards with the particular rights of prisoners not to be searched by a guard of the opposite sex. In summary, most cases addressing cross-gender searches in prisons focus first on the prisoner's right to privacy and then try to balance this right against the government interests in maintaining security and in not discriminating against women. (Note also that even if a court finds that a search by a prison guard of the opposite sex was a violation of the prisoner's Fourth Amendment privacy rights, the guard may still be entitled to qualified immunity.)⁹³

This balancing test is difficult, so different cases and courts produce different outcomes. Usually, the focus is on the specific facts of each case. For example, even though the Ninth Circuit has said that "it is highly questionable... whether prison inmates have a Fourth Amendment right to be free from routine unclothed searches by officials of the opposite sex,"⁹⁴ it declared a search "unreasonable as a matter of law" under the Fourth Amendment in another case.⁹⁵ Similarly, the Seventh Circuit has said specifically that not *all* cross-gender searches are permissible.⁹⁶ It stated that prisons should respect a prisoner's constitutional privacy where it is reasonable, taking into account prison security and equal employment for female guards.⁹⁷

Your state may also have laws protecting female prisoners or regulating searches by opposite-sex guards. For example, California law requires that all California prisoners be searched "in a professional manner."⁹⁸ Routine clothed searches of male prisoners may be performed by prison officials of either sex, but searches of clothed female prisoners should be performed only by female employees—except in emergency

91. *Hudson v. Palmer*, 468 U.S. 517, 527, 104 S. Ct. 3194, 3201–02, 82 L. Ed. 2d 393, 403–04 (1984) ("Determining whether [a prisoner's] expectation of privacy is 'legitimate' or 'unreasonable' necessarily entails a balancing of interests. The two interests here are the interest of society in the security of its penal institutions and the interest of the prisoner in privacy within his cell.")

92. *See, e.g., Smith v. Fairman*, 678 F.2d 52, 53–55 (7th Cir. 1982) (per curiam) (considering the state's "strong interest in avoiding sex discrimination in its hiring practices at the prison" and holding that "requiring plaintiff to submit to a limited frisk-type search by a female guard infringes upon no right guaranteed by the Constitution" where the "limited frisk" did not include the genital area); *Timm v. Gunter*, 917 F.2d 1093, 1102 (8th Cir. 1990) (holding that it was not unreasonable for a prison to authorize female guards to conduct surveillance of all areas, including shower and toilet facilities, and to pat search male prisoners on the same basis as male guards, given the prison's interest in protecting the equal employment rights of prison guards); *Berl v. Cnty. of Westchester*, 849 F.2d 712, 716 (2d Cir. 1988) (finding county liable for employment discrimination under Title VII for refusing to consider two male guards for promotion to female unit of prison), *rev'd on other grounds by Price Waterhouse v. Hopkins*, 490 U.S. 228, 238 n.2, 109 S. Ct. 1775, 1784 n.2, 104 L. Ed. 2d 268, 280 n.2 (1989); *Bagley v. Watson*, 579 F. Supp. 1099, 1104–05 (D. Or. 1983) (holding that female corrections officers cannot be excluded from positions which involve performing pat-down frisk searches of clothed male prisoners and visual observations of male prisoners in various states of undress); *Griffin v. Mich. Dep't. of Corr.*, 654 F. Supp. 690, 702–03 (E.D. Mich. 1982) (finding gender an unacceptable occupational qualification for corrections officers). *See* Part B of this Chapter for a discussion of similar issues concerning involuntary exposure.

93. *See, e.g., Lay v. Forker*, 371 F. Supp. 2d 1159, 1166–67 (C.D. Cal. 2004) (finding that a strip search of a male prisoner in the presence of a female officer violated the Fourth Amendment but that the officer was entitled to qualified immunity).

94. *Somers v. Thurman*, 109 F.3d 614, 622 (9th Cir. 1997).

95. *Byrd v. Maricopa Cnty. Sheriff's Dep't.*, 629 F.3d 1135, 1147 (9th Cir. 2011) (holding that "the cross-gender strip search performed on [plaintiff] was unreasonable as a matter of law...and violated [plaintiff's] rights under the Fourth Amendment to be free from unreasonable searches," where a non-uniformed female guard conducted a body cavity search on a male prisoner in front of 10–15 non-participating officers).

96. *Canedy v. Boardman*, 16 F.3d 183, 188 (7th Cir. 1994).

97. *Canedy v. Boardman*, 16 F.3d 183, 188 (7th Cir. 1994) (finding that male prisoner did have a cause of action against strip searches by female guards, because "where it *is* reasonable—taking account of a state's interests in prison security and in providing equal employment opportunity for female guards—to respect an inmate's constitutional privacy interests, doing so...is a constitutional mandate").

98. CAL. CODE REGS. tit. 15, § 3287(b) (requiring that all searches of prisoners "be conducted in a professional manner which avoids embarrassment or indignity to the inmate. Whenever possible, unclothed body inspections of inmates shall be conducted outside the view of others"). Title 15 of the California Codes and Regulations (Crime Prevention and Corrections) contains the provisions concerning prisoner body searches.

situations.⁹⁹ California prohibits opposite-sex guards (other than qualified medical staff) from performing unclothed body inspections “except under emergency conditions with life or death consequences.”¹⁰⁰

In New York, DOCCS allows female correction officers to routinely pat frisk most male prisoners.¹⁰¹ For New York State female prisoners, however, DOCCS requires that, “whenever possible,” female guards should pat frisk female prisoners.¹⁰² For more information on New York DOCCS requirements, see Part C(2)(f)(1) of this Chapter.

(i) Searches of Female Prisoners by Male Guards¹⁰³

While all prisoners’ rights to privacy are limited because of the nature of prison and incarceration,¹⁰⁴ courts are sometimes more sympathetic to female prisoners. Some courts recognize that women have a greater privacy interest in certain situations because female prisoners are particularly vulnerable to sexual abuse by correctional personnel. As a result, some courts have found searches of female prisoners by male guards to be unconstitutional, even if the same searches of male prisoners by female guards would be allowed under the same circumstances.

For example, in *Jordan v. Gardner*, the Ninth Circuit held that past sexual and physical abuse experienced by female prisoners may affect the way they react to searches by male prison guards.¹⁰⁵ Because of this, the court found that female prisoners have a greater privacy interest than males.¹⁰⁶ The court held that random, non-emergency, clothed body searches on female prisoners were cruel and unusual punishment, violating the Eighth Amendment.¹⁰⁷ In *Jordan*, the prison policy allowed both male and female guards to randomly and routinely search clothed female prisoners.¹⁰⁸ During the searches, the guards rubbed, stroked, squeezed, and kneaded the women’s bodies, including their covered breasts, buttocks, inner thighs, and crotches.¹⁰⁹ The policy required guards to “push inward and upward when searching the crotch and upper thighs” of the prisoners and to check the crease in their buttocks with a downward motion with the edge of the hand.¹¹⁰ Many of the female prisoners had been sexually or physically abused by men in the

99. CAL. CODE REGS. tit. 15, § 3287(b)(2)–(3).

100. CAL. CODE REGS. tit. 15, § 3287(b)(1). The California Department of Corrections and Rehabilitation Department Operations Manual (the DOM) reflects the same policies. California Department of Corrections & Rehabilitation, Operations Manual § 52050.16.5 (updated through Jan. 1, 2017), available at http://www.cdcr.ca.gov/Regulations/Adult_Operations/DOM_TOC.html (last visited Mar. 13, 2017).

101. State of New York, Dep’t. of Corr. and Cmty. Supervision, Directive 4910, Control of and Search for Contraband 3 (2001) (*as revised* Dec. 11, 2006) (“Pat frisks [of male prisoners] will be performed by officers regardless of sex,” although male Muslim prisoners may request a male officer under certain circumstances). In general, cross-gender pat-down searches of male prisoners by female prison guards are constitutionally permissible. *See* Grummett v. Rushen, 779 F.2d 491, 495 (9th Cir. 1985) (permitting routine cross-gender pat-downs because “these searches do not involve intimate contact with an inmate’s body”); *Smith v. Fairman*, 678 F.2d 52, 53–54 (7th Cir. 1982) (holding female guards may conduct pat-down searches without violating a male prisoner’s constitutional right to privacy).

102. State of New York, Dep’t. of Corr. and Cmty. Supervision, Directive 4910, Control of and Search for Contraband 3 (2001) (*as revised* Dec. 11, 2006).

103. It is very important that you read *all* of Part C of this Chapter, not just this Section. Courts will use the general rules explained in Part C to decide if a search was legal. This Section only explains some additional protections female prisoners have against searches by male prison guards.

104. *See Hudson v. Palmer*, 468 U.S. 517, 527, 104 S. Ct. 3194, 3201, 82 L. Ed. 2d 393, 404 (1984) (stating that the “right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of prisoners and their cells”).

105. *Jordan v. Gardner*, 986 F.2d 1521, 1539–40 (9th Cir. 1993).

106. *Jordan v. Gardner*, 986 F.2d 1521, 1526 (9th Cir. 1993).

107. *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993). Whether the doctrine of this case will be adopted by other circuits or the Supreme Court is questionable. *See Hovater v. Robinson*, 1 F.3d 1063, 1068 (10th Cir. 1993) (finding that the plaintiff could not prove that a prison policy allowing male guards to conduct searches of female prisoners disregards a known or obvious risk that is very likely to result in the violation of a prisoner’s constitutional rights). The *Jordan* court’s decision was fact-specific to the particular prison in the case, and other courts have indicated that the case did not create a *per se* constitutional violation. *See Carl v. Angelone*, 883 F. Supp. 1433, 1440 (D. Nev. 1995) (finding that although prison director transferred male correction officers out of female prisons based on *Jordan*, there was no *per se* rule of unconstitutionality for cross-gender searches; thus, prisons could not be forced to transfer the men based on their sex).

108. *Jordan v. Gardner*, 986 F.2d 1521, 1523 (9th Cir. 1993).

109. *Jordan v. Gardner*, 986 F.2d 1521, 1523 (9th Cir. 1993).

110. *Jordan v. Gardner*, 986 F.2d 1521, 1523, 1532 (9th Cir. 1993) (Reinhardt, J., concurring).

past, and one woman, after being searched, suffered severe distress.¹¹¹ The court found that prison officials knew of the risks of mental trauma and acted with deliberate indifference to the harm that the cross-gender clothed body searches were likely to cause.¹¹² The court said the policy violated the Eighth Amendment because it was “unnecessary” for male guards to search the women (since female guards could do the searches) and “wanton,” meaning the searches were malicious and unjustifiable.¹¹³ Other courts have also recognized that female prisoners are entitled to greater privacy protection, though with some limitations.¹¹⁴

In general, male prison officials are allowed to conduct clothed body frisks of women prisoners (where the outer garments of the prisoner are searched),¹¹⁵ cell searches,¹¹⁶ and visual body cavity or strip searches (where prisoners take off their clothes and are visually inspected by a guard).¹¹⁷ Some states require that only medical personnel, not correctional personnel, may conduct body cavity searches that involve physical intrusion or extraction of a foreign object from a body cavity.¹¹⁸ Similarly, body cavity searches requiring the use of one’s fingers, called a “digital body search,” are unreasonable unless medical personnel do these searches in a hygienic manner in a private area.¹¹⁹ The presence of male officers is also an aggravating circumstance that might make a digital body search unreasonable.¹²⁰ A woman’s pregnancy may justify even stricter standards for cavity searches.¹²¹

111. *Jordan v. Gardner*, 986 F.2d 1521, 1523 (9th Cir. 1993).

112. *Jordan v. Gardner*, 986 F.2d 1521, 1528–29 (9th Cir. 1993).

113. *Jordan v. Gardner*, 986 F.2d 1521, 1527–28 (9th Cir. 1993) (Reinhardt, J., concurring); *see also Berry v. City of Muskogee*, 900 F.2d 1489, 1498 (10th Cir. 1990) (stating knowledge of risk of harm and failure to act to prevent the harm constitute deliberate indifference to a known or obvious risk that is very likely to result in the violation of a prisoner’s constitutional rights).

114. *See, e.g., Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992) (denying qualified immunity to a male parole officer who walked in on a female parolee urinating as part of a required drug test); *Torres v. Wis. Dep’t. of Health & Soc. Services*, 838 F.2d 944, 953 (7th Cir. 1988), *rev’d in part*, 859 F.2d 1523, 1524–25 (7th Cir. 1988) (suggesting that to protect female prisoners’ privacy, prisons could provide them with appropriate sleepwear and allow them to cover their windows while dressing or using the toilet); *Forts v. Ward*, 621 F.2d 1210, 1213 (2d Cir. 1980) (allowing female prisoners to cover the window of their cells for privacy for 15 minute intervals). *But see Carlin v. Manu*, 72 F. Supp. 2d 1177, 1180 (D. Or. 1999) (holding that observation by male guards during strip searches of female prisoners made by female guards was acceptable during an emergency removal to a male prison since the male guards were not touching the female prisoners).

115. *See Smith v. Fairman*, 678 F.2d 52, 53–54 (7th Cir. 1982) (holding that the “limited touching [of a prisoner in a pat frisk] by a person of the opposite sex” does not constitute a Fourth Amendment violation); *see also Bell v. Wolfish*, 441 U.S. 520, 558, 99 S. Ct. 1861, 1884, 60 L. Ed. 2d 447, 481 (1979) (upholding visual body cavity searches of prisoners against Fourth Amendment challenge; the gender of the guards assigned to conduct the searches is not mentioned).

116. *See Hudson v. Palmer*, 468 U.S. 517, 525–26, 104 S. Ct. 3194, 3199–3200, 82 L. Ed. 2d 393, 402–03 (1984) (holding that prisoner has no reasonable expectation of privacy in his cell and that “the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell”); *Martin v. Lane*, 766 F. Supp. 641, 646 (N.D. Ill. 1991) (applying *Hudson* to deny relief under the Fourth Amendment to a prisoner whose cell was searched during a lockdown).

117. *See Lee v. Downs*, 641 F.2d 1117, 1120–21 (4th Cir. 1981) (finding that the presence of male guards during the body cavity search of a female prisoner by a female nurse was reasonably necessary to restrain the prisoner and therefore did not violate her Fourth Amendment rights).

118. *See, e.g., DaVee v. Mathis*, 812 S.W.2d 816, 824–26 (Mo. Ct. App. 1991) (concluding that while searches involving physical intrusion and removal of foreign objects must be conducted by medical personnel, the search in question did not involve physical contact and was thus reasonably conducted by non-medical personnel); *U.S. ex rel. Guy v. McCauley*, 385 F. Supp. 193, 199 (E.D. Wis. 1974) (“The intrusion of either the vaginal or anal cavities must be made by skilled medical technicians.”).

119. *See Bonitz v. Fair*, 804 F.2d 164, 172–73 (1st Cir. 1986) (holding that digital body searches of female prisoners were unreasonable and in violation of the Fourth Amendment because non-medical personnel performed the searches in a non-hygienic manner and in the presence of male personnel), *overruled on other grounds by Unwin v. Campbell*, 863 F.2d 124, 128 (1st Cir. 1988); *U.S. ex rel. Guy v. McCauley*, 385 F. Supp. 193, 198 (E.D. Wis. 1974) (finding that a search “abused common conceptions of decency and civilized conduct” and violated the 5th Amendment even though it was done in a sanitary manner by female officers, because it involved forcing a pregnant woman to bend over painfully, the police officers conducting the search were not medically trained, and the search was not conducted in a medical environment). *But see Rodriguez v. Furtado*, 950 F.2d 805, 811 (1st Cir. 1991) (holding that a body cavity search of a female patient by a doctor in a hygienic and private setting pursuant to a search warrant was reasonable). Some states specifically require medical personnel by statute to perform body cavity searches of prisoners. *See, e.g., MICH. COMP. LAWS ANN. § 764.25b(5)* (West 2000).

120. *See Bonitz v. Fair*, 804 F.2d 164, 172–73 (1st Cir. 1986) (searching female prisoners in the presence of male prisoners is one factor that the court considered in finding the search to be unreasonable).

121. *See U.S. ex rel. Guy v. McCauley*, 385 F. Supp. 193, 198 (E.D. Wis. 1974) (holding that a visual vaginal search

Your state may have specific laws to protect you or to regulate searches by opposite-sex guards. California, for instance, prohibits opposite-sex guards from performing unclothed body inspections in non-emergency situations.¹²² In New York, DOCCS policy requires that, whenever possible, female guards—not male guards—should pat frisk female prisoners.¹²³ If a male officer has to perform a non-emergency pat frisk search of a female prisoner (because, for example, a female officer is not available), he must try to search the prisoner in a public location. In New York, if more than fifty percent of all officers on duty are women, then male guards cannot perform non-emergency pat frisks, unless the pat frisk is based upon a justifiable suspicion that the female prisoner possesses contraband and a female officer is not present and available at the pat frisk location. Women prisoners who have been diagnosed with Post Traumatic Stress Disorder may also request a “Cross Gender Pat Frisk Exemption,” which prevents male officers from routinely pat frisking them. However, male guards may still search them under emergency situations, when specifically directed to do so by a supervisor, or when the officer has an articulable basis to believe the female prisoner possesses contraband and a female officer is not available.¹²⁴

Some prisons have tried to hire female prison officers for certain jobs in women’s prisons.¹²⁵ But the prisons may be sued for employment discrimination, since federal law prohibits employment discrimination based on sex,¹²⁶ and courts have held that hiring only female employees for female correctional facilities violates this law.¹²⁷ The state’s interest in equal employment opportunities for correctional officers is strong compared to a prisoner’s privacy interest in her body, as long as the cross-gender interactions are not offensive, disrespectful, or unprofessional.¹²⁸ Therefore, prisons have not been as successful as they could have been in ensuring that there are enough women employees to search the female prisoners, so male employees are allowed to search you.

of woman who is seven-months pregnant “abuses common conceptions of decency and civilized conduct” when the search is conducted in a non-medical environment by non-medical officers, and it was painful for the woman to bend over).

122. Cal. Code Regs. tit. 15, § 3287(b)(1). The California Department of Corrections and Rehabilitation Department Operations Manual (the DOM) reflects the same policies. California Department of Corrections & Rehabilitation, Operations Manual § 52050.16.5 (updated through Jan. 1, 2017), available at http://www.cdcr.ca.gov/Regulations/Adult_Operations/DOM_TOC.html (last visited Mar. 13, 2017).

123. State of New York, Dep’t. of Corr. and Cmty. Supervision, Directive 4910, Control of and Search for Contraband, at 2–3 (2001) (*as revised* Dec. 11, 2006). Pat frisks are required when prisoners are entering the visiting room, when an entire area of the institution is being searched, when an officer has an articulable basis to suspect a prisoner possesses contraband, or as directed by supervisory staff. Pat frisks are also allowed when a prisoner is going or returning to housing, program, and recreation areas and outside work details. *See also* Hamilton v. Goord, No. 97-CV-1363 (S.D.N.Y. June 5, 2000) (order granting stay of litigation so DOCCS could take action relating to pat frisks of female prisoners).

124. State of New York, Dep’t. of Corr. and Cmty. Supervision, Directive 4910, Control of and Search for Contraband, at 3 (2001) (*as revised* Dec. 11, 2006). These policies are the result of a 1998 lawsuit against DOCCS by women prisoners who claimed cross-gender pat frisks violated their constitutional rights; the lawsuit settled. *See* Hamilton v. Goord, No. 97-CV-1363 (S.D.N.Y. June 5, 2000) (granting stay of litigation so DOCCS could address psychological issues around cross-gender pat frisks).

125. *See, e.g.*, IND. CODE ANN. § 36-8-10-5 (LexisNexis 2009) (requiring a “prison matron” to be appointed for female prisons). California protects all prisoners from room searches by officers of the opposite sex and ensures that a trained female staff member is available and accessible for the supervision of female prisoners. CAL. PENAL CODE § 4021 (West 2011). Michigan provides that if prisoners are subject to body cavity searches by a person of the opposite sex, another person of the same sex must also be present. MICH. COMP. LAWS ANN. § 764.25b(5) (West 2000).

126. 42 U.S.C. § 2000e-2(a)–(d) (2012) (“Title VII”).

127. *See* Henry v. Milwaukee Cnty., 539 F.3d 573, 581 (7th Cir. 2008) (finding that a prison policy which required staff overtime shifts to be staffed by same-sex guards and so reduced the number of shifts available to women was not reasonably necessary to achieve the goals of rehabilitation, security, and privacy); *see also* Forts v. Ward, 621 F.2d 1210, 1216 (2d Cir. 1980) (holding that male prison guards could not be excluded from night shifts in a women’s prison because other measures to ensure prisoner privacy were available). *But see* Robino v. Iranon, 145 F.3d 1109, 1111 (9th Cir. 1998) (upholding policy excluding male prison guards from certain posts in order to accommodate the privacy of female prisoners and reduce risk of sexual conduct between guards and prisoners when male prison guards still had many other employment opportunities in the system).

128. *See* Grummett v. Rushen, 779 F.2d 491, 496 (9th Cir. 1985) (finding prison policy which allowed female guards to view nude or partially nude male prisoners during searches was not a violation of the prisoners’ privacy when “the searches are performed by the female guards in a professional manner and with respect for the inmates”); *see also* Robins v. Centinela State Prison, 19 F. App’x. 549, 550–51 (9th Cir. 2001) (while generally the search of male prisoners by female officers may not violate the Fourth Amendment, a search that is “completely unprofessional and offensive” may be such a violation).

In sum, courts will balance the invasive nature of the search against the prison's concerns of security and equal employment opportunities. But prison officials must still try to provide privacy to prisoners if reasonable, and they should also train prison employees to carry out searches professionally, without being unnecessarily intrusive.¹²⁹

3. Eighth Amendment Limitations

Chapter 24 of the *JLM*, "Your Right to Be Free From Assault," explains your rights under the Eighth Amendment, which prohibits cruel and unusual punishment. As this Chapter explains, courts usually view illegal search claims as possible violations of the Fourth Amendment. Sometimes, however, a court may believe a search was so unreasonable that it violates the Eighth Amendment's prohibition against cruel and unusual punishment.¹³⁰ Some illegal searches may also be considered assault and battery.¹³¹

There is no clear standard about how much pain and suffering is unconstitutional. Courts usually say "the unnecessary and wanton infliction of pain" violates the Eighth Amendment.¹³² Whether a search is considered an "unnecessary and wanton infliction of pain" depends on the circumstances, because it may be necessary for prison officials to use more force in certain situations. In general, however, infliction of pain is considered "unnecessary and wanton" when the prison official is acting in bad faith and for no other reason but to cause harm.¹³³ Prison officials' behavior must meet this standard before a court will find a constitutional violation. But if the official acts only to further some legitimate penological interest and if the pain suffered is not the main purpose of the search, then courts will probably say that your constitutional rights were not violated.¹³⁴ If you believe your Eighth Amendment rights were violated by an illegal search, you should read *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," as well as Chapter 24, "Your Right To Be Free From Assault," for more information.

With regard to body searches, the Eighth Amendment is most often triggered by the manner in which the searches happen and, at times, because of the purpose of the searches. In *Meriwether v. Faulkner*, the prisoner had a sex change operation and said that guards made her strip to harass her and to see her

129. See *Timm v. Gunter*, 917 F.2d 1093, 1100 (8th Cir. 1990) (upholding cross-gender pat searches when female guards are trained to perform pat searches of male prisoners in a professional manner); *Torres v. Wisconsin Dep't. of Health & Soc. Servs.*, 859 F.2d 1523, 1524 (7th Cir. 1988) (noting procedures in place to minimize intrusions on the privacy of prisoners). But see *Cameron v. Hendricks*, 942 F. Supp. 499, 503 (D. Kan. 1996) (stating that the availability of less intrusive measures is only one factor in determining the reasonableness of a search and that officials are not required to perform the "least intrusive" search).

130. See, e.g., *Jordan v. Gardner*, 986 F.2d 1521, 1524–31 (9th Cir. 1993) (en banc) (finding that a policy allowing male corrections officers to conduct random, non-emergency, suspicion-less clothed body searches on female prisoners violated the Eighth Amendment); *Tribble v. Gardner*, 860 F.2d 321, 325–26 (9th Cir. 1988) (finding that a rectal probe may have violated the Eighth Amendment if it was conducted for purposes unrelated to security considerations, where a prisoner's clothing, hair, hands, and other body cavities were not searched and prisoner's recent X-ray revealed no contraband in his rectum).

131. See, e.g., *Hammond v. Gordon Cnty.*, 316 F. Supp. 2d 1262, 1293 (N.D. Ga. 2002) (holding that a female prisoner presented enough evidence to support a claim of assault and battery by alleging that a guard inserted his fingers into her vagina).

132. See *Hudson v. McMillian*, 503 U.S. 1, 5–10, 112 S. Ct. 995, 998–1000, 117 L. Ed. 2d 156, 165–68 (1992) (stating that although "unnecessary and wonton infliction of pain" constitutes a violation of the Eighth Amendment, the Eighth Amendment also allows some use of force and allows force that is in proportion to the need to keep order); *Gregg v. Georgia*, 428 U.S. 153, 173, 965 S. Ct. 2909, 2925, 49 L. Ed. 2d 859, 874 (1976) (holding that a court must determine whether a punishment involves unnecessary and wanton infliction of pain and whether the punishment is grossly out of proportion to the severity of the crime); see also *Baze v. Rees*, 553 U.S. 35, 128 S. Ct. 1520, 1531–32, 170 L. Ed. 2d 420, 432–33 (2008) (upholding the three-drug lethal injection protocol on the grounds that neither the risk of improper administration of the first drug nor the failure to adopt more humane alternatives constitute cruel and unusual punishment).

134. See *Whitley v. Albers*, 475 U.S. 312, 319, 106 S. Ct. 1078, 1084, 89 L. Ed. 2d 251 (1986) (holding that a prisoner's Eighth Amendment rights were not violated when a prison officer shot a prisoner in the leg in the course of a prison riot).

134. See *Del Raine v. Williford*, 32 F.3d 1024, 1038–42 (7th Cir. 1994) (finding that while rectal searches may inflict pain, if the official has a legitimate reason to conduct them, they do not violate the Eighth Amendment); see also *Gillis v. Litscher*, 468 F.3d 488, 494 (7th Cir. 2006) (finding that a behavioral modification program imposed on a prisoner for breaking a rule may have deprived him of essential necessities such as food and warmth, where the prison officials disregarded a substantial risk of serious harm to him in violation of his Eighth Amendment rights).

body parts.¹³⁵ She also said that there were no security reasons to search her.¹³⁶ The court said that such searches might violate the Eighth Amendment. In addition, in *McRorie v. Shimoda*, the court sustained an Eighth Amendment claim against a prison guard who stuck his baton into the anus of a prisoner during a strip search.¹³⁷

The Seventh Circuit in *Isby v. Duckworth* held that an anal search conducted in a private room by a doctor, who put a gloved and lubricated finger into the prisoner's anus to check for a weapon, was not abusive because it was not an unreasonable precaution after hearing a gunshot. This was even though the doctor laughed before doing the search while guards held the prisoner down.¹³⁸ Similarly, the Ninth Circuit in *Somers v. Thurman* held that a male prisoner did not state an Eighth Amendment claim based on allegations that female guards pointed and joked amongst themselves while observing him showering and while conducting a body cavity search of him.¹³⁹ However, the Ninth Circuit in *Dockery v. Bass* held that a prisoner may have an Eighth Amendment claim when officials strip searched him twice, causing him pain from handcuff use and forcing a tube up his anus.¹⁴⁰

4. DNA Testing

Prisoners can be forced to give DNA samples by state or federal law.¹⁴¹ Forced DNA testing of prisoners generally does not violate the Fourth Amendment.¹⁴² It is unclear so far if all prisoners can be forced to give DNA samples, not just prisoners convicted of certain types of crimes¹⁴³ like sex offenses.¹⁴⁴ Some courts have found that laws requiring DNA sampling of all convicted felons do not violate the Fourth Amendment because the state's interest is more important than the bodily intrusion.¹⁴⁵ See Chapter 11 of the *JLM*,

135. *Meriwether v. Faulkner*, 821 F.2d 408, 411 (7th Cir. 1987).

136. *Meriwether v. Faulkner*, 821 F.2d 408, 418 (7th Cir. 1987).

137. *McRorie v. Shimoda*, 795 F.2d 780, 783 (9th Cir. 1986).

138. *Isby v. Duckworth*, No. 97-3705, 175 F.3d 1020 (7th Cir. Mar. 11, 1999) (*unpublished*).

139. *Somers v. Thurman*, 109 F.3d 614, 624 (9th Cir. 1997).

140. *Dockery v. Bass*, No. 95-17250, 133 F.3d 926 (9th Cir. Dec. 15, 1997) (*unpublished*).

141. See, e.g., *United States v. Weikert*, 504 F.3d 1, 3 (1st Cir. 2007) (holding that requiring a prisoner on supervised release to give a blood sample did not violate the Fourth Amendment); *United States v. Kincade*, 379 F.3d 813, 832, 839 (9th Cir. 2004) (holding that compulsory DNA profiling of specified federal offenders was reasonable under the totality of the circumstances, which included the probationer's reduced expectations of privacy, the minimal intrusion occasioned by blood sampling, and the significant societal interests furthered by the collection of DNA information from convicted offenders); *Velasquez v. Woods*, 329 F.3d 420, 421 (5th Cir. 2003) (per curiam) (noting that every circuit court which has considered whether statutes compelling collection of DNA samples from felons were violations of the Fourth Amendment has held that they are not); *State v. Martin*, 955 A.2d 1144, 1144 (Vt. 2008) (upholding a state law requiring a blood draw from convicted nonviolent felons).

142. *Groceman v. U.S. Dep't. of Justice*, 354 F.3d 411, 413–14 (5th Cir. 2004) (per curiam) (“[A]lthough collection of DNA samples from prisoners implicates Fourth Amendment concerns, such collections are reasonable in light of an inmates diminished privacy rights, the minimal intrusion involved, and the legitimate government interest in using DNA to investigate crime...persons incarcerated after conviction retain no constitutional privacy interest against their correct identification.”); *United States v. Hugs*, 384 F.3d 762, 769 (9th Cir. 2004) (finding that a supervised release condition requiring the defendant, a “qualified felon,” to cooperate in the collection of DNA does not violate the Fourth Amendment).

143. See *Groceman v. U.S. Dep't. of Justice*, 354 F.3d 411, 413 n.2 (per curiam) (5th Cir. 2004) (noting that in the Tenth and Second Circuits, prisoner DNA samples must be taken in accordance with the DNA Act, possibly requiring individualized suspicion or a proven special government need; however, in the Fourth Circuit, prisoners have no Fourth Amendment right to be free from DNA searches); *Roe v. Marcotte*, 193 F.3d 72, 81–82 (2d Cir. 1999) (upholding statute requiring sex offenders to submit to collection of DNA samples, but rejecting rationale that would extend to all offenses). But see *Nicholas v. Goord*, 430 F.3d 652, 671 (2d Cir. 2005) (upholding statute requiring those found guilty of assault, homicide, rape, incest, escape, attempted murder, kidnapping, arson, and burglary to submit to DNA collection, and suggesting its rationale applies to all convicted felons); *United States v. Amerson*, 483 F.3d 73, 83–84 (2d Cir. 2007) (extending the applicability of the DNA collection statute to non-violent probationers under the two-pronged special needs test used in the Circuit when there was a strong governmental interest in rapidly and accurately solving crimes).

144. See, e.g., *Boling v. Romer*, 101 F.3d 1336, 1340 (10th Cir. 1996) (upholding requirement that prisoners convicted of sexual assault provide DNA samples).

145. *Padgett v. Ferrero*, 294 F. Supp. 2d 1338, 1342 (N.D. Ga. 2003) (finding that felony convictions justified searches, including DNA sampling, and so satisfied the Fourth Amendment requirement that the search be reasonable); *United States v. Stegman*, 295 F. Supp. 2d 542, 550 (D. Md. 2003) (finding that compelling a person to provide a DNA sample while on supervised release was not an unreasonable search or seizure); *United States v. Amerson*, 483 F.3d 73, 83–84 (2d Cir. 2007) (extending the applicability of the DNA collection statute to non-violent probationers under the two-

“Using Post-Conviction DNA Testing to Attack Your Conviction or Sentence,” and Chapter 32, “Special Considerations for Sex Offenders,” for more information.

5. Statutory Privacy Rights

You may also have privacy rights under state statutes and regulations, in addition to your federal constitutional rights.¹⁴⁶ For example, New York State law requires prisons to give prisoners certain clothing, and to follow specific procedures when giving prisoners urine tests or searching prisoners' religious items.

(a) Clothing

New York State law gives all prisoners the right to the same amount of “facility-issue clothing.”¹⁴⁷ Look in your prison library for the New York DOCCS Directives (specific prison rules) for more specific information about clothing. Prison officials in New York *cannot* take clothing away as punishment.¹⁴⁸ But they can take clothing away if they think it is dangerous to the prison and/or yourself by being a threat “to the safety, security or good order” of the facility.¹⁴⁹ If officials want to take away some clothing from you because they think it is dangerous for you to have, they must follow specific procedures.¹⁵⁰ A deprivation order—an order that takes away a specific item, privilege or service—must be authorized by the officer of the day, the deputy superintendent for security services, or a higher official. You must receive a written copy of the order within twenty-four hours.¹⁵¹ The copy must include the reasons for the order and explain how you can challenge the order.¹⁵² The prison superintendent must also receive a copy.¹⁵³ The deprivation order must be reviewed on a daily basis. If the order is still in effect after seven days, you and the superintendent will be notified in writing of the order's renewal on that day, and will continue to receive written notice of renewal each week for as long as the order remains in effect.¹⁵⁴

(b) Urine Tests

Forcing people to take urine tests or give samples of other bodily fluids is considered a “search”¹⁵⁵ under the Fourth Amendment, and the procedures for urine tests are held to the same rules and standards as other searches. Prison officials may make prisoners give urine samples for drug testing either with reasonable cause or under a program designed to prevent selective enforcement of prison rules or harassment of prisoners.¹⁵⁶ New York has state regulations about privacy when you take a urinalysis test.¹⁵⁷

pronged special needs test used in the Circuit when there was a strong governmental interest and minimal intrusion into and invasion of the privacy of the probationers).

146. Prisoners should become familiar with the penal codes of their respective states, as well as the employee manual of their prisons, if possible. The employee manuals will tell you what procedures the guards must follow and may help you challenge the guards' behavior through internal prison grievance procedures.

147. N.Y. COMP. CODES R. & REGS. tit. 9, § 7005.7. For men, this includes one shirt and one pair of pants. Women receive one shirt and one skirt, smock, dress, or pair of pants. Both men and women should receive two pairs of socks, two sets of underwear, one pair of shoes, and one sweater or jacket for cold weather. Women prisoners are allowed to wear brassieres.

148. N.Y. COMP. CODES R. & REGS. tit. 9, § 7612.6.

149. N.Y. COMP. CODES R. & REGS. tit. 9, § 7612.6(d).

150. N.Y. COMP. CODES R. & REGS. tit. 7, § 305.2.

151. N.Y. COMP. CODES R. & REGS. tit. 7, § 305.2(b).

152. N.Y. COMP. CODES R. & REGS. tit. 7, § 305.2(d).

153. N.Y. COMP. CODES R. & REGS. tit. 7, § 305.2(b).

154. N.Y. COMP. CODES R. & REGS. tit. 7, § 305.2(c).

155. *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 617, 109 S. Ct. 1402, 1413, 103 L. Ed. 639, 660 (1989) (holding that the Federal Railroad Administration's policies of drug testing by collecting and testing urine samples and samples of other bodily fluids are “searches” under the Fourth Amendment).

156. *See, e.g.,* *Louis v. Dep't. of Corr. Servs. of Neb.*, 437 F.3d 697, 700 (8th Cir. 2006) (holding in a 42 U.S.C. § 1983 action that prisons requiring urine tests do not need to allow prisoners to sign and seal their own urine specimens and do not have to conduct a confirmatory test where the test shows a positive result but prisoner denies using drugs); *Lucero v. Gunter*, 17 F.3d 1347, 1350 (10th Cir. 1994) (upholding random tests as reasonable means of combating unauthorized use of narcotics); *Forbes v. Trigg*, 976 F.2d 308, 314–15 (7th Cir. 1992) (upholding urinalysis of all prisoners in jobs that allowed them potential access to contraband from outsiders); *Hurd v. Scribner*, No. 06CV0412, 2007 U.S. Dist. Lexis 32651, at *9 (S.D. Cal. May 02, 2007) (*unpublished*) (upholding, in response to habeas petition, discipline taken against a prisoner who refused a drug test); *see also* *Thompson v. Souza*, 111 F.3d 694, 702 (9th Cir. 1997) (holding that urine tests must be random so that correctional officials cannot harass particular inmates by

The rules have a specific procedure for urine tests. You will be pat-frisked before giving the sample, and someone will watch you give the sample. The person who watches you must be from the security or medical staff, and the person has to be the same sex as you. You should be in a private place where no other prisoners or staff can see you.¹⁵⁸

(c) Searches of Religious Items

In New York, religious items such as a Native American prisoner's medicine bag can only be inspected in a manner that respects its religious significance. However, a medicine bag may be scanned at any time with a metal or other electronic detector. A prisoner must also hold the medicine bag open for prison officials to look inside if the official has reason to believe that it may contain contraband.¹⁵⁹ See *JLM*, Chapter 27, "Religious Freedom in Prison," for more information on religious rights in prison.

6. Departmental Directives and Privacy Rights

The New York DOCCS Directives have specific rules for each state prison. Look in your prison library for a copy of these directives.

These directives have additional rules for searches that may be stricter than the court rules. For example, the directives say that only a physician under the supervision of Central Office physician guidance can conduct body cavity searches.¹⁶⁰ The body cavity search must take place in the examining room. The official must use professional, hygienic techniques and explain the procedure to you. The physician must also give you a chance to give up contraband voluntarily. One corrections officer of your sex must be present to witness the examination.¹⁶¹ These rules are intended to make sure that no one, including health officials, humiliates or harasses you. If anyone does harass you, you may bring a complaint alleging violation of the professional standards set out in the directives.

The New York Directives also say that when you are transferred from one DOCCS facility to another, you will be strip frisked and subjected to a metal detector search at the facility from which you are being transferred, but you will not be strip searched or strip frisked at the receiving facility. You may have to go through a metal detector search at the receiving facility, though. The same policy applies when you are transferred from one Special Housing Unit to another Special Housing Unit. However, there is an exception if an officer has "probable cause" to believe that you are carrying contraband.¹⁶²

When you are strip searched or strip frisked, prison officials must make sure you have some privacy. Only the prison official doing the search should be there, although a supervisor may watch.¹⁶³ Additional corrections officers should be present only if there are major disturbances or if it is likely that you will resist the search, and prisoners may be searched in groups if there is a major disturbance at the facility. The prison should limit traffic as much as possible where strip searches are conducted. Officers of the same sex as you must conduct your strip searches and strip frisks.¹⁶⁴

subjecting them to repeated drug tests); *Storms v. Coughlin*, 600 F. Supp. 1214, 1224 (S.D.N.Y. 1984) (holding that the prisoners must be chosen for urine tests, through a system of selection in which the prisoners to be tested are chosen blindly). *But see* *Thompson v. Souza*, 111 F.3d 694, 702–03 (9th Cir. 1997) (upholding nonrandom urine testing of group of 124 prisoners).

157. N.Y. COMP. CODES R. & REGS. tit. 7, § 1020.4.

158. N.Y. COMP. CODES R. & REGS. tit. 7, § 1020.4 (stating the rules and procedure for urinalysis); *see also* State of New York, Dep't. of Corr. and Cmty. Supervision, Directive 4937, Urinalysis Testing 2 (2015), *available at* <http://www.doccs.ny.gov/Directives/4937.pdf> (last visited Mar. 13, 2017).

159. State of New York, Dep't. of Corr. and Cmty. Supervision, Directive 4910, Control of & Search for Contraband 8 (2016) *available at* <http://www.doccs.ny.gov/Directives/4910.pdf> (last visited Mar. 13, 2017).

160. State of New York, Dep't. of Corr. and Cmty. Supervision, Directive 4910, Control of & Search for Contraband 8 (2016) *available at* <http://www.doccs.ny.gov/Directives/4910.pdf> (last visited Mar. 13, 2017).

161. State of New York, Dep't. of Corr. and Cmty. Supervision, Directive 4910, Control of & Search for Contraband 8 (2016) *available at* <http://www.doccs.ny.gov/Directives/4910.pdf> (last visited Mar. 13, 2017).

162. State of New York, Dep't. of Corr. and Cmty. Supervision, Directive 4910, Control of & Search for Contraband 8 (2016) *available at* <http://www.doccs.ny.gov/Directives/4910.pdf> (last visited Mar. 13, 2017).

163. State of New York, Dep't. of Corr. and Cmty. Supervision, Directive 4910, Control of & Search for Contraband 8 (2016) *available at* <http://www.doccs.ny.gov/Directives/4910.pdf> (last visited Mar. 13, 2017).

164. State of New York, Dep't. of Corr. and Cmty. Supervision, Directive 4910, Control of & Search for Contraband 8 (2016) *available at* <http://www.doccs.ny.gov/Directives/4910.pdf> (last visited Mar. 13, 2017).

A very important rule about strip searches in New York is that officers must always act professionally. They have to be aware of the sensitive nature of searches and must “conduct such searches in a manner least degrading to all involved.”¹⁶⁵ Typically, if you cooperate in a non-body cavity search, the officer may not touch you, except to run fingers through your hair, if necessary.¹⁶⁶ If you believe that a search is conducted improperly, you can use the New York Inmate Grievance Program or an Article 78 proceeding to seek a remedy.¹⁶⁷ If you believe the search also violated your constitutional rights, then you can use the legal remedies described in Part E of this Chapter. If you are incarcerated in another state, it is likely that there are similar regulations to protect your rights. See Chapter 2 of the *JLM*, “Introduction to Legal Research,” for more information on legal research so that you can find the laws and regulations of the state where you are incarcerated.

D. Why You Should Not Resist an Illegal Body Search

If you are searched in a way that you believe is illegal or against a prison regulation, it is best to allow the search to take place. (Prison officials can use force to make you obey orders, even if those orders may be illegal, so resisting is often not possible.) Courts have held that prisoners must follow orders so that prison rules can be administered safely and in an orderly way.¹⁶⁸ Even if you believe that an order violates your constitutional rights, courts say that you do not have the right to resist the order.¹⁶⁹

It is safest for you *not* to resist the prison official, because if you resist you probably will be disciplined and you may be injured. You can later file a lawsuit to help prevent future violations of your rights and to punish the official. Any disciplinary action taken against you for resisting the search will be added to your record, affecting your good-time credit and your chances of parole. If you resist a search and then bring a lawsuit, winning the suit may mean the court will clear your disciplinary record after finding the search violated prison rules.¹⁷⁰ However, that is not always the case. Resisting a search—even if it is obviously illegal—is likely to lead to a permanent mark on your disciplinary record, because courts rarely order a disciplinary record to be changed. It is unlikely that a permanent mark due to your resisting an illegal search will ever be eliminated.¹⁷¹ Courts want prisoners to challenge violations of their rights in courts, instead of refusing to obey orders from prison officials.¹⁷² Do not count on the courts to clear your record, especially if the order you disobey is not clearly contrary to a prison’s own rules.

165. State of New York, Dep’t. of Corr. and Cmty. Supervision, Directive 4910, Control of & Search for Contraband 8 (2016) available at <http://www.doccs.ny.gov/Directives/4910.pdf> (last visited Mar. 13, 2017).

166. State of New York, Dep’t. of Corr. and Cmty. Supervision, Directive 4910, Control of & Search for Contraband 8 (2016) available at <http://www.doccs.ny.gov/Directives/4910.pdf> (last visited Mar. 13, 2017).

167. See *JLM*, Chapter 15, “Inmate Grievance Procedures,” and Chapter 22, “How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules,” for more information on inmate grievance procedures and Article 78 proceedings.

168. *Griffin v. Comm’r of Pa. Prisons*, No. 90-5284, 1990 U.S. Dist. LEXIS 17951, at *11 (E.D. Pa. Dec. 10, 1991) (*unpublished*), *aff’d*, 961 F.2d 208 (3d Cir. 1992) (“Even if plaintiff considered the order illegal, plaintiff should not have refused to follow it because it is critical to the orderly administration of a prison that prisoners follow orders.”); see also *Eccleston v. Oregon ex rel. Or. Dept. of Corr.*, 168 F. App’x 760, 761 (9th Cir. 2006) (finding that prison official’s use of chemical agent on prisoner who repeatedly refused to follow orders to leave his cell was not cruel and unusual punishment); *Williams v. Delo*, 49 F.3d 442, 446 (8th Cir. 1995) (finding that prisoner’s refusal to follow the orders of corrections officials posed a threat to institutional security).

169. *Pressly v. Gregory*, 831 F.2d 514, 518 n.3 (4th Cir. 1987) (citing *Wright v. Bailey*, 544 F.2d 737 (4th Cir. 1976), for the legal fact that you cannot resist arrest by stating that the arrest is illegal unless the illegality is clear at the time of the arrest); *Jackson v. Allen*, 376 F. Supp. 1393, 1394–95 (E.D. Ark. 1974) (holding that, because of the discipline structure of prisons, prisoners do not have the right to resist an unconstitutional order or punishment unless resistance is necessary to prevent one’s own permanent physical or mental damage or death); *but see Purcell v. Pa. Dept. of Corr.*, No. 95-6720, 1998 U.S. Dist. LEXIS 105, at *26–27 (E.D. Pa. Jan. 9, 1998) (*unpublished*) (finding that, because prisoner might have suffered injury by following an order and had medical authorization that led him to believe that he did not have to obey the order, the prisoner could proceed with action against prison officials).

170. See *Dunne v. Reid*, 93 Misc. 2d 50, 52, 402 N.Y.S.2d 923, 923 (Sup. Ct. Dutchess County 1978) (ordering prisoner’s disciplinary record from resisting search cleared after finding prison officials acted in violation of prison regulations when they tried to search the prisoner in front of other people, despite prison rules that said searches must respect prisoners’ privacy).

171. See, e.g., *Mahogany v. Stalder*, 242 F. App’x 261, 263 (5th Cir. 2007) (dismissing prisoner’s claim seeking restoration of good-time credits and removal of disciplinary proceedings from his record, despite allowing his § 1983 claim for “deprivation of civil rights” to proceed).

172. See *Rivera v. Smith*, 63 N.Y.2d 501, 515, 472 N.E.2d 1015, 1022, 483 N.Y.S.2d 187, 194 (N.Y. 1984) (“[T]he

E. Legal Remedies

If you believe your rights have been violated, remember you *must* first file an administrative grievance at your institution. See Chapter 15 of the *JLM*, “Inmate Grievance Procedures,” for further information.¹⁷³ You can then file a Section 1983 lawsuit if you believe prison officials or other government employees (including police officers) have violated any of your constitutional rights. In addition, you can file a class action law suit, which involves a group of people, called plaintiffs, bringing a lawsuit together.

If you think that prison officials have violated your Eighth or Fourth Amendment rights, you may sue the officials or guards using 42 U.S.C. § 1983. Section 1983 is a federal law that allows you to sue state officials who have violated your constitutional rights while acting “under color of state law,” which means while acting with authority from the state.¹⁷⁴ You can sue federal officials in a similar suit, called a *Bivens* action.¹⁷⁵

You can also use Section 1983 to sue local officials as long as you can show that they too acted under “color of state law.” But note that you can only sue municipalities (towns, cities, or counties) under 42 U.S.C. § 1983 if your injury happened because of an official municipal policy or custom.¹⁷⁶ To sue a city or a county, then, you will have to show that the “execution of [the] government’s policy or custom . . . inflict[ed] the injury.”¹⁷⁷ In other words, a local government will be held liable only if an injury can be shown to be a direct result of the local government’s official policy, either express or implied.¹⁷⁸ Therefore, a local government is not at fault, or “liable,” under Section 1983, “for an injury inflicted solely by its employees or agents” who were not following official local policy,¹⁷⁹ even though the local officials may be individually liable under Section 1983. You should read *JLM*, Chapter 16, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law,” to learn more about Section 1983 claims.

There have also been successful class actions challenging official municipal policies under 42 U.S.C. § 1983. Class actions are a type of lawsuit where many plaintiffs sue together for similar violations of their rights.¹⁸⁰ Most successful class action cases challenging prison search policies have been brought on behalf of non-violent, non-drug misdemeanor arrestees, not convicted prisoners.¹⁸¹

recognition and enforcement even of constitutional rights may have to await resolution in administrative or judicial proceedings; self-help by the inmate cannot be recognized as an acceptable remedy.”); *but see also* *Sanchez v. Scully*, 143 Misc. 2d 889, 889, 542 N.Y.S.2d 920, 920 (Sup. Ct. Dutchess County 1989) (holding that, given the existence of unambiguous statutory language in support of prisoner’s refusal to work in excess of eight hours per day, the record of the subsequent disciplinary proceeding should be expunged, or removed, from the inmate’s record); *Dunne v. Reid*, 93 Misc. 2d 50, 52, 402 N.Y.S.2d 923, 923 (Sup. Ct. Dutchess County 1978) (finding disciplinary action inappropriate where the prisoner resisted a search that violated the prison’s own regulations).

173. *See, e.g.*, *Johnson v. Johnson*, 385 F.3d 503, 515–23 (5th Cir. 2004) (describing in detail the requirement that a prisoner exhaust administrative remedies before filing a lawsuit).

174. 42 U.S.C. § 1983 (2012).

175. Prisoners can make constitutional claims against federal officials in federal court under 28 U.S.C. § 1331 by using *Bivens* actions. See Part E(1) of Chapter 16 of the *JLM*, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law,” for more information on *Bivens* actions.

176. *See, e.g.*, *Williams v. Kaufman County*, 352 F.3d 994, 1013–14 (5th Cir. 2003) (holding that the municipality could be held liable for unlawful searches of detainees because the policy was authorized by the sheriff, the relevant policymaker).

177. *Irwin v. City of Hemet*, 22 Cal. App. 4th 507, 525–27 Cal. Rptr.2d 433, 442–43 (Cal. Ct. App. 1994) (finding that a complaint alleging that City of Hemet’s adoption of a policy or custom not to train its jailers in suicide screening and prevention was the proximate cause of a prisoner’s suicide may not be summarily dismissed without finding out whether or not the city adopted a policy or custom to inadequately train jailers (quoting *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 690, 98 S. Ct. 2018, 2035, 56 L. Ed. 2d 611, 635 (1978))). For an example of such a municipal policy or custom, see *Blihovde v. St. Croix County*, 219 F.R.D. 607, 612 (W.D. Wis. 2003) (describing a county’s strip search policy, and concluding that the plaintiffs fairly alleged that the county-wide policy or custom of conducting strip searches could have been the cause of the plaintiffs’ injury).

178. *Blihovde v. St. Croix County*, 219 F.R.D. 607, 618 (W.D. Wis. 2003) (“Even when there is no express policy, a municipality may be liable when there is a ‘custom’ of unconstitutional conduct.” (citing *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 691, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611, 635 (1978))); *see* *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 124–27 (2d Cir. 2004) (reviewing the law of municipal liability in a damage suit for excessive force).

179. *Irwin v. City of Hemet*, 22 Cal. App. 4th 507, 525, 27 Cal. Rptr.2d 433, 442 (Cal. Ct. App. 1994).

180. See Chapter 5 of the *JLM*, “Choosing a Court and Lawsuit” for information on class actions in general and Part D(1) of Chapter 16 of the *JLM*, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law,” for information on § 1983 class actions.

181. *See, e.g.*, *Bynum v. District of Columbia*, 217 F.R.D. 43, 45–49 (D.D.C. 2003) (certifying a § 1983 class action

It is important to remember different laws apply in state and federal prisons. If you are in a federal prison, it does not matter what state the prison is in. Federal prisons only use federal law. If you are in a state prison, you can use both state and federal laws. But, remember that each state creates its own laws. You must research the laws of your particular state and how prisoners in your state file suits in that state's courts. Federal constitutional rights are protected regardless of whether you are in state or federal prison, but the way you present your case—what legal claims you make and how you make them—will differ.

F. Conclusion

In conclusion, although your rights against involuntary exposure and body searches are substantially limited in prison, it is possible for your rights to be violated under the Fourth Amendment, Eighth Amendment, or under certain state statutory provisions. Whether your rights have been violated will depend in large part on the reasonableness behind the search, or behind the policy leading to the involuntary exposure. It will also depend on what kind of search or exposure is at issue. The more cases you can find with facts similar to your own situation where the prison was found to have violated the law, the better your chances of showing that your rights were violated.

claiming 4th and 5th Amendment violations, where plaintiffs challenged prison policy of conducting suspicionless strip searches of prisoners returning from court with orders for their release). *Bynum* later settled for \$12 million and the District of Columbia agreed to “no longer strip search [detainees] who are entitled to release.” *Bynum v. District of Columbia*, 384 F. Supp. 2d 342, 358–359 (D.D.C. 2005). *See also Tardiff v. Knox County*, 365 F.3d 1, 7 (1st Cir. 2004) (affirming class certification for non-violent, non-drug offense arrestees challenging policy of blanket, routine strip searches without reasonable suspicion); *Blihovde v. St. Croix County*, 219 F.R.D. 607, 613–21 (W.D. Wis. 2003) (affirming amended class definition in a § 1983 class action, alleging plaintiffs, all misdemeanor non-drug, non-violent arrestees, were subjected to strip searches without reasonable suspicion according to a county prison policy in violation of the Fourth and Fourteenth Amendments). *Nilsen v. York County*, 382 F. Supp. 2d 206, 209–13 (D. Me. 2005), approved a \$3.3 million settlement in a § 1983 class action over strip searches of non-drug, non-weapon, and non-violent arrestees at county jail; plaintiffs alleged the strip searches were conducted pursuant to county jail policy, without individualized reasonable suspicion in violation of the Fourth Amendment. The settlement also required the county to maintain a written policy prohibiting the challenged strip searches.