CHAPTER 16

USING 42 U.S.C. § 1983 TO OBTAIN RELIEF FROM VIOLATIONS OF FEDERAL LAW*

A. Introduction

1. Overview

The U.S. Constitution and federal law provide you with numerous individual rights that you can use to protect yourself from unfair government actions. For example, the Eighth Amendment protects your right to be free from cruel and unusual punishment, while the First Amendment protects your right to practice your religion.[1] Incarcerated people may bring lawsuits challenging violations of either their constitutional or federal statutory rights using the Civil Rights Act of 1871 ("Section 1983").[2] Section 1983 allows you to sue state and local officials, and to challenge state prison rules and regulations, that violate your constitutional and statutory rights.[3] For example, you can use Section 1983 to challenge prison rules that violate your practice of religion, or to challenge prison officers who assault you in prison. (For more information on your right to practice religion and your right to be free from assault, see Chapter 24, "Your Right to Be Free from Assault by Prison Guards and Incarcerated People" and Chapter 27, "Religious Freedom in Prisons" of the *JLM*.)[4]

Section 1983 does not allow you to sue federal officials. However, there are lawsuits called "*Bivens*" actions which allow you to sue federal officials.[5] *Bivens* actions often rely on case law (law based on

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1. U.S. CONST. amend. VIII.; U.S. CONST. amend. I. See Figure 1 of this Chapter for a list of other important rights granted to you by the Constitution.

2. *Constitutional rights* are rights guaranteed by the U.S. Constitution. Section 1983 may allow you to sue someone who violates your constitutional rights if that person is acting "under color of law," meaning that person was acting under the state's authority. Section 1983 cases usually involve constitutional rights found in the first ten amendments to the Constitution (also called the Bill of Rights) or in the 14th Amendment. The Bill of Rights originally limited only the power of the *federal* government. Using the legal theory of "incorporation" and the Due Process Clause of the 14th Amendment, the Supreme Court has ruled that most of its guarantees also protect citizens against *state* governments. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 673 n.42, 97 S. Ct. 1401, 1413 n.42, 51 L. Ed. 2d 711, 731 n.42 (1977) (noting that the 4th Amendment was incorporated against the states by the 14th Amendment). This means that state actors have to respect most of the rights found in the Bill of Rights as well. See Part B(2) of this Chapter for more information about constitutional rights and Section 1983. *Federal statutory rights* are those rights created by federal laws passed by Congress. Many federal statutes include their own "enforcement provisions," which means that the statute gives you a particular right and allows you to sue someone for violating that right. If a federal statute has its own enforcement provision, you must use that statute rather than Section 1983 to bring your lawsuit. See Part B(3) of this Chapter for more information about statutory rights and Section 1983.

3. 42 U.S.C. § 1983. See Part B(1) of this Chapter for the full text of the statute. *See* Monroe v. Pape, 365 U.S. 167, 172–174, 81 S. Ct. 473, 476–477, 5 L. Ed. 2d 492, 497–498 (1961) (explaining that Section 1983 gives a federal remedy to parties deprived of constitutional rights, privileges, and immunities by an official's abuse of his position), *overruled in part on other grounds by* Monell v. Dept. of Soc. Servs., 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). If an official deprives you of constitutional or federal statutory rights, you may also be able to sue that official under state law. However, Section 1983 allows you to sue that official under federal law even if there is no state remedy is available. Monroe v. Pape, 365 U.S. 167, 183, 81 S. Ct. 473, 482, 5 L. Ed. 2d 492, 503 (1961) (noting that Section 1983 provides an alternative to state remedies).

4. *See, e.g.*, Chapter 27 of the *JLM*, "Religious Freedom in Prison"; Chapter 24,"Your Right to Be Free from Assault by Prison Guards and Other Prisoners."

5. *Bivens* actions are named after Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397, 91 S. Ct. 1999, 2005, 29 L. Ed. 2d. 619, 627 (1971) (holding that an implied cause of action may

prior judicial decisions) that interprets Section 1983. Although *Bivens* actions are similar to Section 1983 claims, the Supreme Court has recently said that you can only bring *Bivens* actions in three specific situations.[6] These specific situations will be discussed in Part E of this Chapter.

This Chapter focuses only on 1983 claims for people who have been officially convicted of a crime (either through a guilty verdict at trial or by pleading guilty). If you are a pretrial detainee, please see Chapter 34 of the *JLM*, "The Rights of Pretrial Detainees".[7] This Chapter is organized into several Parts. This Part, Part A, is the introduction, and includes seven essential tips to follow when bringing Section 1983 claims. Part B explains how to use Section 1983 to challenge state prison conditions and other practices that violate your constitutional or federal statutory rights. Part C explains what you can sue for (the types of relief, like money damages, injunctions, etc.), whom to sue, typical defense arguments you will have to defeat, when to sue, where to sue, and how to proceed with your Section 1983 suit. Part D describes other ways to bring lawsuits, including class actions and state court lawsuits. Part E explains *Bivens* actions against federal officials. Remember, *Bivens* actions closely rely on case law that interprets Section 1983, so you should still read this entire Chapter if you want to bring a *Bivens* action. Finally, the Appendices to this Chapter have sample forms that you can use as examples when preparing your case.

2. Seven Essential Tips for Bringing Section 1983 and *Bivens* Actions

(a) It Is VERY Important That You Read Chapter 14 of the JLM, "The Prison Litigation Reform Act," Before You Begin Your Section 1983 Claim.

The Prison Litigation Reform Act ("PLRA") is a federal law that significantly affects Section 1983 cases.[8] You should be aware of the PLRA's "three strikes" rule.[9] This rule gives you a "strike" whenever you have a case dismissed as frivolous, malicious, or failing to state a valid legal claim. If you have three cases dismissed as "strikes," you will not be able to use the *in forma pauperis* procedure (which allows you to file a lawsuit as a "poor person" without having to pay the normal court fees or costs) unless you are under imminent danger of serious physical injury, or you may lose good time credit.[10] So, you must be sure that you meet all of the PLRA requirements before you begin any lawsuit. In particular, you should be careful about the PLRA requirement that you need to exhaust (use up) all your administrative remedies—such as prison grievance procedures and appeals—*before* you go to court. In other words, you need to figure out what procedures exist within your prison to protest your situation and use all of those procedures before you file a lawsuit.[11] Although some courts used to require that you describe what you have done already to exhaust your remedies in your complaint, the Supreme Court recently said that such requirements are not allowed.[12] The complaint only begins the lawsuit, however. You will still have to describe what you have done to exhaust administrative remedies at some point. Many incarcerated people's Section 1983 complaints are dismissed because they did not exhaust their prison's administrative remedies.[13]

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exist where an individual's 4th Amendment right to be free from unreasonable searches and seizures has been violated by federal agents).

6. Ziglar v. Abbasi, 137 S. Ct. 1843, 1855, 198 L. Ed. 2d 290, 306 (2017) (explaining that the Supreme Court has only allowed individuals to sue over constitutional violations without an explicit statutory cause of action in three cases).

7. *See generally* Chapter 34 of the *JLM*, "The Rights of Pretrial Detainees."

8. 42 U.S.C. § 1997e.

9. U.S.C. § 1915(g).

10. *See* Stephen Michael Sheppard, *In Forma Pauperis (I.F.P or IFP), in* THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk ed., 2012); 28 U.S.C. § 1932.

11. *See* Chapter 15 of the *JLM*, "Inmate Grievance Procedures."

12. Jones v. Bock, 549 U.S. 199, 215–216, 127 S. Ct. 910, 921–922, 166 L. Ed. 2d 798, 813–814 (2007) (holding that an incarcerated person is not required to plead or demonstrate exhaustion in his complaint).

13. *See, e.g.*, Booth v. Churner, 532 U.S. 731, 741, 121 S. Ct. 1819, 1825, 149 L. Ed. 958, 967 (2001) (affirming dismissal of prisoner's Section 1983 complaint for failure to exhaust all available administrative remedies because prisoner did not appeal an unfavorable administrative decision to the highest level of review).

(b) Your Constitutional Rights Are Not Absolute.

In most cases, your constitutional rights will be balanced against the state or federal government's interest in maintaining a secure prison environment. In many situations, your constitutional rights may be outweighed by the government's interest in prison security. For most constitutional claims, courts use a test established in a case called *Turner v. Safley* to determine whether your constitutional rights have been violated.[14] This test is discussed in detail in Part B(2)(a) of this Chapter.

(c) Do NOT Use Section 1983 to Challenge Your Original Criminal Conviction, Your Sentence, Loss of Good Time, or Denial of Parole.

You cannot use Section 1983 to claim that your constitutional rights were violated based on the fact that you were convicted or based on the length of your sentence, except in very limited circumstances.[15] Instead of using Section 1983, you can challenge your conviction or sentence by appealing or, if your appeal is denied, by filing for a writ of habeas corpus or other post-conviction relief.[16] You also cannot use Section 1983 to challenge a loss of good time credit, a parole denial, or other official actions that *directly* affect how much time you spend in prison.[17] You should use state procedures to challenge these losses. For example, in New York, incarcerated people can challenge the loss of good time credit or denial of parole through an Article 78 proceeding.[18] For information about Article 78 proceedings, see Chapter 22 of the *JLM,* "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules".

However, you can usually use Section 1983 to challenge administrative decisions that do not *directly* affect the length of your sentence.[19] This Chapter mostly focuses on how you can use a Section 1983 suit if government officials have abused or denied your constitutional or federal statutory rights while you have been in prison. Again, you should not use Section 1983 to challenge the amount of time to be spent in prison.

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14. Turner v. Safley, 482 U.S. 78, 89–90, 107 S. Ct. 2254, 2261–2262, 96 L. Ed. 2d 64, 79–80 (1987); *Turner* does not apply to claimed violations of the 8th Amendment's prohibition on "cruel and unusual punishment." Johnson v. California, 543 U.S. 499, 510–511, 125 S. Ct. 1141, 1149–1150, 160 L. Ed. 2d 949, 961–962 (2005). See Part B(2)(a) of this Chapter for more information about *Turner*. Remember that you may have a better claim under a different federal statute than under Section 1983 and *Turner*.

15. *See* Heck v. Humphrey, 512 U.S. 477, 486–487, 114 S. Ct. 2364, 2372, 129 L. Ed. 2d 383, 393–394 (1994) (holding that Section 1983 suits are not available if the outcome of the suit would imply that a prisoner's conviction or sentence is invalid, unless he proves that his "conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such [a] determination, or called into question by a federal court's issuance of writ of habeas corpus").

16. *See* Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence"; Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence"; Chapter 13, "Federal Habeas Corpus"; and Chapter 21, "State Habeas Corpus: Florida, New York, and Texas," and state-specific habeas Chapters in the upcoming State Supplements for more information on post-conviction relief.

17. *See* Edwards v. Balisok, 520 U.S. 641, 648, 117 S. Ct. 1584, 1589, 137 L. Ed. 2d 906, 915 (1997) (holding that a Section 1983 claim alleging that the incarcerated person was deprived of good time credits without procedural due process could not go forward, because if successful it would imply that the deprivation of good time credits was invalid).

18. If you are an incarcerated person in New York and your prison is not following its own rules or policies, you can file an Article 78 petition. For more information, see Chapter 22 of the *JLM*, "How To Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules."

19. *See* Wilkinson v. Dotson, 544 U.S. 74, 82, 125 S. Ct. 1242, 1248, 161 L. Ed. 253, 262–263 (2005) (allowing incarcerated people to use Section 1983 to challenge parole procedures to request new reviews of parole eligibility, where winning the lawsuit would not necessarily result in their obtaining earlier parole); Muhammad v. Close, 540 U.S. 749, 754–755, 124 S. Ct. 1303, 1306, 158 L. Ed. 2d 32, 38 (2004) (holding that a Section 1983 claim may challenge an administrative decision as long as it does not dispute the validity of the underlying conviction); Leamer v. Fauver, 288 F.3d 532, 543 (3d Cir. 2002) (finding valid a Section 1983 claim that challenged a disciplinary action which could affect the granting of parole, but would not directly affect length of sentence); Jenkins v. Haubert, 179 F.3d 19, 27 (2d Cir. 1999) (holding that Section 1983 may be used to challenge an incarcerated person's term of disciplinary segregation, which did not implicate the length of confinement).

(d) Be Sure That All Defendants in Your Section 1983 Lawsuit Had Personal Involvement in the Violation of Your Rights.[20]

Pro se litigants (people who file a suit without a lawyer) often want to include everybody they can think of as defendants, including supervisory prison officials like wardens or the head of the state department of corrections. You may want to do this too, but naming everybody is often not a good idea. Courts usually dismiss all claims against supervisory officials unless you provide enough facts in your complaint to show that the supervisory officials you name were personally involved in violating your rights.[21] If you make claims against defendants that the court quickly dismisses because they were not personally involved, the judge may be less likely to trust the rest of your claims. Try your best to find out which officials were personally involved.

(e) Explain the Facts of Your Case in as Much Detail as Possible.

The most common mistake made by *pro se* litigants is not stating the facts clearly and adequately. Remember, the court already knows something about the law, but it knows *nothing* about the facts of your claim. Make sure that you tell the court exactly *what* happened to you, *when* and *where* it happened, *who* was involved, and *how* it happened. If you know *why* your rights were violated, you should explain that too. More than anything else, the facts of your case will determine the success of your claim. For an example of a written complaint, see Appendix A-29 of this Chapter.

Here's an example. Imagine that you are claiming that your access to the prison law library has been unfairly restricted. The court will want to know the details. When did you want to get into the library? Why did you need access to the library? Are there any set rules in your prison for library access? Exactly how did the denial of access hurt you? Were you unable to meet a filing deadline or respond to a legal argument? Did you have a case pending or a court date? What research were you trying to do? Who stopped you? How many times did this happen, and when? Include as much of this information as possible in your complaint. Of course, the kinds of questions you will want to ask yourself and answer for the court depends on your claim. Give as much relevant detail as possible.[22]

If possible, try to get sworn, written statements—also known as affidavits or declarations—from witnesses who saw your rights being violated.[23] Try to get as much proof as possible that supports the factual claims you are making in your case.

(f) Confirm the Information in This or Any Other Chapter of the *JLM* Through Library Research.

Remember that the cases discussed in this Chapter are only examples to use as starting points in your research. There are many court decisions relating to Section 1983 claims. It is essential that you research and make sure the courts still follow the cases in the footnotes of this Chapter.[24] Although we have tried to make the *JLM* as up-to-date as possible, some cases may not be good law anymore if a higher court has made a different decision.[25]

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20. Part B(1)(a) of this Chapter explains how you can prove a defendant official was personally involved in violating your rights.

21. *See* Monell v. Dept. of Soc. Servs., 436 U.S. 658, 663 n.7, 98 S. Ct. 2018, 2022 n.7, 56 L. Ed. 2d 611, 619 n.7 (1978) (holding that supervisory officials are not automatically responsible for the actions of their employees). However, sometimes you can name supervisory officials as defendants even if they were not directly involved in violating your rights. *See* Part C(2)(b) of this Chapter ("Supervisor Liability").

22. *Relevance* is a legal idea. Evidence is "relevant" where it "has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining [your claim]." FED. R. EVID. 401. Basically, relevant evidence is anything that helps to prove your story or your legal claim.

23. *See* Chapter 6 of the *JLM*, "An Introduction to Legal Documents."

24. *See* Chapter 1 of the *JLM*, "How to Use the *JLM*," and Chapter 2, "Introduction to Legal Research," for more information.

25. It is very important that you read the full cases contained in these footnotes. You should also try to read any cases cited in those cases. If possible, look up 42 U.S.C. § 1983 in the United States Code Annotated (U.S.C.A.) or United States Code Service (U.S.C.S.). The U.S.C.A. and U.S.C.S. are commercial publications of

(g) *Bivens* Actions Against Federal Officials Are Similar to Section 1983 Claims Against State or Local Officials, but the Grounds on Which These Lawsuits May Be Brought Are Much More Limited.

If you want to sue federal officials, you cannot use Section 1983. Instead, you can bring a type of lawsuit based on case law which is called a *Bivens* action. Most federal incarcerated people bring *Bivens* actions, which are described in Part E of this Chapter. *Bivens* actions are very similar to Section 1983 claims, so you should still read Parts B and C of this Chapter discussing Section 1983 claims. However, since 2017 the grounds on which you can bring *Bivens* actions have been limited to three types of situations, which are described in Part E of this Chapter.

B. Using 42 U.S.C. § 1983 to Challenge State or Local Government Action

1. Essential Requirements for Obtaining Relief Under Section 1983

Section 1983 states:

> Every *person* who, *under color of* any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the *deprivation of any rights, privileges, or immunities secured by the Constitution and laws*, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.][26]

The words and phrases in italics state the three essential requirements (also known as elements) that you must fulfill when bringing a lawsuit under Section 1983. In your complaint, you need to show that *all three* elements of Section 1983 are met.

(a) First Requirement: *Person*

Section 1983's first requirement is that you show your rights were violated by a "person." The legal definition of "person" for Section 1983 claims includes more than actual people (prison wardens, guards, etc.). A city, county, or municipality can also be a "person" under Section 1983.[27] The definition of "person," however, does not include *state* governments or their agencies.[28] For example, you cannot sue the State of New York or the New York State Department of Corrections and Community Supervision under Section 1983.[29] Thus, while *officials* (actual people) at any level of government (including state government) may be sued under Section 1983, only *non-state governments* and their agencies (such as cities, counties, local agencies, and private corporations) may be sued as a "person"

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the United States Code that include the federal statutes and summaries of cases interpreting those statutes. You should also look at the Federal Practice Digest and other digests that have case summaries organized by subject matter. The process of making sure a case is up-to-date—that the decision is still valid and another court has not overruled it—is called "Shepardizing." See Chapter 2 of the *JLM*, "Introduction to Legal Research," for more information on how to Shepardize a case.

26. 42 U.S.C. § 1983 (emphasis and alteration added).

27. *See* Monell v. Dept. of Soc. Servs., 436 U.S. 658, 690, 98 S. Ct. 2018, 2035–2036, 56 L. Ed. 2d 611, 635 (1978) (holding that municipalities and local government units are considered "persons" under Section 1983).

28. *See* Will v. Mich. Dept. of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45, 58 (1989) (holding that states may not be sued under Section 1983).

29. You may, however, be able to sue states and state agencies under other federal laws, such as the Americans with Disabilities Act. *See* United States v. Georgia, 546 U.S. 151, 159, 126 S. Ct. 877, 882 163 L. Ed. 2d 650, 660 (2006) (holding that the Americans with Disabilities Act creates a right to sue states for damages from violations of the 14th Amendment); Pennsylvania Dept. of Corr. v. Yeskey, 524 U.S. 206, 213 118 S. Ct. 1952, 1956 141 L. Ed. 2d 215, 221 (1998) (holding that the protections of the Americans with Disabilities Act extend to state incarcerated people). *See generally* 42 U.S.C. §§ 12101–12213. For information on the rights of incarcerated people with disabilities, see the Rehabilitation Act of 1973, 29 U.S.C. § 701 and Chapter 28 of the *JLM*, "Rights of Prisoners with Disabilities."

under Section 1983.[30] See Part C(2) of this Chapter, "Whom to Name as Defendants" for more information on whom you can sue using Section 1983.

You should name all "persons" who violated your rights as defendants. This includes individuals, local government agencies, or both. You may name as many defendants as you choose, as long as *each* of them is *personally involved* in violating your rights. Courts consider officials and local government agencies to be personally involved if they:

(1) Directly participated in the wrong; or
(2) Was told about the wrong but did not try to stop or fix it; or
(3) Failed to oversee the people who caused the wrong, for example by hiring unqualified people or failing to adequately train their staff; or
(4) Deliberately failed to act on information showing that a wrong was happening; or
(5) Created a policy or custom that allowed the wrong to occur.[31]

The situations listed in (1), (2), (3), and (4) are most common in cases where you are challenging defendants' specific behavior or failure to act. The fifth situation occurs when you challenge general rules of the prison.

An example of a type (1) situation could be a guard refusing to get help for an injured incarcerated person who asks him for medical care. An example of a type (2) situation could be when, after receiving reports that a person in a prison had been attacked by other detainees and that there was a hit on their life, a warden or other official fails to do anything to protect that individual from the threat on their life. In a type (3) situation, prison officials may be held liable for hiring unqualified people or failing to properly train or supervise their staff.[32] An example of a type (4) situation could be a guard seeing an incarcerated person being attacked by other incarcerated people and not trying to stop the attack.

Finally, in a type (5) situation, prison officials can be liable for creating rules, policies, or customs that violate your rights. These rules and policies can be written or unwritten.[33] You should always be specific about what kind of rule or practice you are challenging and who was responsible for creating

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30. *See* Hafer v. Melo, 502 U.S. 21, 31, 112 S. Ct. 358, 365, 116 L. Ed. 2d 301, 313 (1991) (finding state officials, sued in their individual capacities, to be "persons" within the meaning of Section 1983, and not absolutely immune from personal liability or barred from being sued under the 11th Amendment).

31. *See* Littlejohn v. City of New York, 795 F.3d 297, 314 (2d Cir. 2015) (noting the ways that a plaintiff can establish that officials and local government agencies were personally involved in their U.S.C. § 1983 violation).

32. *See* Bd. of the Cty. Comm'rs v. Brown, 520 U.S. 397, 411, 117 S. Ct. 1382, 1392, 137 L. Ed. 2d 626, 644 (1997) (holding that a municipality may be liable for hiring decisions under a deliberate indifference standard if adequate screening of the employee alleged to have violated the plaintiff's rights would have made it clear to a reasonable policymaker that hiring the employee was highly likely to result in the particular type of constitutional violation alleged by the plaintiff). *See* City of Canton v. Harris, 489 U.S. 378, 388–389, 109 S. Ct. 1197, 1204–1205, 103 L. Ed. 2d 412, 426–427 (1989) (holding that a city could be held liable under Section 1983 for failing to train employees if the failure amounted to deliberate indifference to the constitutional rights of persons coming into contact with those employees).

33. *See, e.g.*, Shain v. Ellison, 273 F.3d 56, 66 (2d Cir. 2001) (holding that a prison's written policy of strip searching all persons arrested for misdemeanors without requiring reasonable suspicion was unconstitutional); Barrett v. Coplan, 292 F. Supp. 2d 281, 287 (D. N.H. 2003) (allowing an incarcerated person who suffered from gender identity disorder to proceed with a claim that a prison's written policy of refusing to consider surgical or hormonal treatment for any incarcerated person regardless of medical condition violated her 8th Amendment right to adequate medical care). *See, e.g.*, Fairley v. Luman, 281 F.3d 913, 918 (9th Cir. 2002) (holding that city's failure to have procedures in place to verify warrants was an unwritten policy that violated right to due process of plaintiff who was mistakenly held on outstanding warrants for the arrest of his twin brother); Garrett v. Unified Gov't of Athens-Clarke Cty., 246 F. Supp. 2d 1262, 1279–1280 (M.D. Ga. 2003) (noting that even when there is no formal written policy, supervisors can be held liable where there is enough use of an unconstitutional practice that it becomes an unconstitutional custom), *rev'd on other grounds sub nom.*, Garrett v. Athens-Clarke Cty., 378 F.3d 1274 (11th Cir. 2004) (*per curiam*); Gonzalez v. City of Schenectady, 141 F. Supp. 2d 304, 307 (N.D.N.Y. 2001) (holding that an unwritten city policy of strip searching all detainees prior to court action was unconstitutional).

the rule or practice (if you know). If you are arguing that an unwritten policy or custom violated your rights, you need to gather as much evidence as possible to show that it is widely followed in your jail or prison. This will show the court that it is an actual policy or custom.[34] An example of a type (5) situation could be guards making sure that incarcerated people who violate a prison rule do not receive medical care for a month, even if they are sick or injured.

Sometimes, several people or agencies will be involved in violating your rights, and they will all be involved in different ways. For example, if a prison guard assaults you, you can sue that guard because he violated your rights. If another guard sees the assault but does not try to stop it, you can sue that guard as well, because he did not try to stop or fix the wrong. If you complain to the warden that this guard has assaulted you several times, and the warden does nothing, you might also be able to sue the warden. If you can show there is an informal prison policy of allowing guards to assault incarcerated people, or if you find out that the guard had a history of assaulting incarcerated people at his previous job, then you might be able to sue the local department of corrections for creating an unconstitutional policy or hiring an unqualified guard. In this situation, it is probably obvious to you that the guard who assaulted you and the guard who watched the assault were personally involved in violating your rights. However, it is much more difficult to figure out whether the warden and/or the local department of corrections were personally involved. Remember, if you cannot give specific facts showing that a defendant was personally involved, the judge will dismiss your claims against the defendant. For more about showing personal involvement, see Part C(2)(b) of this Chapter, "Supervisor Liability," and Part C(2)(c) of this Chapter, "Municipal or Local Government Liability."

(b) Second Requirement: Under Color of State Law

The second requirement for suing under Section 1983 is that the person who violated your rights must have been acting "under color of state law." This means that the person you sue must be someone who was acting under the state's authority. States have authority over their own agencies and employees. They also have authority over cities, counties, and municipalities, as well as over the employees of cities, counties, and municipalities. In prison, persons acting under color of state law include:

(1) Employees of state or local prisons or jails, like prison doctors and guards; and

(2) Private parties who make contracts with the state to perform services.[35]

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34. *See, e.g.*, Henry v. Farmer City State Bank, 808 F.2d 1228, 1237 (7th Cir. 1986) (explaining that if there is no formal written policy, "the plaintiff must allege a specific pattern or series of incidents that support the general allegation of a custom or policy; alleging one specific incident in which the plaintiff suffered a deprivation will not suffice."); Gailor v. Armstrong, 187 F. Supp. 2d 729, 734 (W.D. Ky. 2001) (holding that one incident of failure to follow a jail's excessive force policy plus thirty to forty other instances of excessive force over a ten-year period for which officers were punished was not enough to show a custom of failing to follow the excessive force policy).

35. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 71 n.5, 122 S. Ct. 515, 522 n.5, 151 L. Ed. 2d 456, 466 n.5 (2001) (noting that people incarcerated in state prisons may sue private prison corporations under Section 1983); West v. Atkins, 487 U.S. 42, 54–57, 108 S. Ct. 2250, 2258–60, 101 L. Ed. 2d 40, 53–57 (1988) (holding that a private doctor under contract with a state to provide medical services to people incarcerated at a state prison hospital on a part-time basis acts under color of state law within the meaning of Section 1983); Rosborough v. Mgmt. & Training Corp., 350 F.3d 459, 461 (5th Cir. 2003) (holding that private prison-management corporations and their employees may be sued under Section 1983); Conner v. Donnelly, 42 F.3d 220, 223 (4th Cir. 1994) (holding that "a physician who treats a prisoner acts under color of state law even though there was no contractual relationship between the prison and the physician."); Skelton v. Pri-Cor, Inc., 963 F.2d 100, 102 (6th Cir. 1991) (holding that private corporation under contract with the state to operate its prisons may be sued under Section 1983); Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 703 (11th Cir. 1985) (noting that employees of Prison Health Services, a private company providing medical care to incarcerated people, were clearly state actors); Christy v. Robinson, 216 F. Supp. 2d 398, 412 (D.N.J. 2002) (holding that doctors employed by a private medical association that contracts with the state to provide medical services to incarcerated people acted under color of state law); Mauldin v. Burnette, 89 F. Supp. 2d 1371, 1376–1377 (M.D. Ga. 2000) (holding that a private individual who was responsible for signing an incarcerated person in and out of prison and supervising him on work release

Be aware that a person may act under color of state law even though the person does something that is illegal under state law. In other words, for something to be done under color of state law, it does not have to be legal to do it. For example, state law forbids a prison guard from assaulting you. But, if a prison guard assaults you, he is acting under color of state law because the guard carries a "badge of authority" from the state.[36] Thus, "under color of state law" loosely means "as a representative of the state."

(c) Third Requirement: Deprivation of Federal Right

The third and final requirement is that each person you sue must have deprived you of a right, privilege, or immunity you have under the Constitution or federal laws. In simpler terms, the person must have violated one of your constitutional or federal statutory rights. Section 1983 does not itself create any *substantive* right; instead, it creates the *procedural* right to sue for the violation of a substantive violation of federal law. Part B(2) of this Chapter explains the general rules for determining whether the constitutional rights of incarcerated people have been violated. It also gives examples of violations of constitutional rights. Part B(3) of this Chapter discusses Section 1983 claims for violations of rights that have been created by federal statutes.

2. Constitutional Bases for Section 1983 Claims

Not every violation of state law or prison regulations is a constitutional violation that you can challenge using Section 1983. For example, a prison may have a regulation stating that all persons in the general population are allowed five phone calls each week. This "right to five phone calls" is not a constitutional right. If the prison suddenly allows only one call each week, you won't be able to sue using Section 1983. Instead, you may want to challenge that change in privileges through your prison's grievance system or in a state court.[37]

Similarly, if a prison guard harms you or your property by acting negligently (carelessly), you won't be able to sue using Section 1983. Instead, you may be able to sue using state tort law.[38] For example, the Supreme Court has said that in a case where an incarcerated person's mail was lost because a prison official negligently failed to follow proper mail procedures, the official's action wasn't enough for a Section 1983 claim. The Court ruled that this wasn't a failure of the state's procedures but rather one person's failure.[39] Instead, the Court said that the incarcerated person should sue through state tort law, because the state already had a process that covered situations like this where state actors carelessly did something that resulted in an incarcerated person losing property.[40] The Supreme Court has also held that where a person was injured because he slipped on a pillow that a sheriff's deputy

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acted under color of state law). However, some courts have found that independent contractors were not acting under color of state law. *See, e.g.*, Black v. Ind. Area Sch. Dist., 985 F.2d 707 (3d Cir. 1993) (affirming that a bus company and its driver employee that contracted with the school district to transport children were not state actors because they were independent contractors, and thus could not be liable in a Section 1983 action); Nunez v. Horn, 72 F. Supp. 2d 24, 27 (N.D.N.Y. 1999) (holding that a doctor who treated the incarcerated person was not acting under color of state law because the treatment was provided at a non-prison hospital and the doctor was not under contract with the state or Bureau of Prisons to treat incarcerated people).

36. *See* Monroe v. Pape, 365 U.S. 167, 172, 81 S. Ct. 473, 476, 5 L. Ed. 2d 492, 497 (1961) (holding that officials who violate constitutional rights act under color of state law for the purposes of Section 1983, whether they act in accordance with their authority, abuse their authority, or act illegally), *overruled in part on other grounds by* Monell v. Dept. of Soc. Servs., 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

37. If a New York state prison is not following its own rules or policies, incarcerated people can also file an Article 78 petition. See Chapter 22 of the *JLM*, "How To Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules," for information on filing Article 78 petitions.

38. See Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," for information on bringing a tort claim.

39. Parratt v. Taylor, 451 U.S. 527, 543, 101 S. Ct. 1908, 1917, 68 L. Ed. 2d 420, 433–434 (1981), *overruled in part on other grounds by* Daniels v. Williams, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).

40. Parratt v. Taylor, 451 U.S. 527, 543–544, 101 S. Ct. 1908, 1917, 68 L. Ed. 2d 420, 433–434 (1981), *overruled by* Daniels v. Williams, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).

carelessly left on a stairway, this was not a constitutional violation that could lead to a Section 1983 case, but rather a case that was better left to state tort law.[41] On the other hand, if a prison guard were to intentionally or recklessly push you down the stairs, or you could prove that the guards in a prison had an unofficial game of intentionally leaving objects on stairs to injure people and you were injured as a result, you might be able to bring a Section 1983 claim in that case.[42]

The next part of this Section begins with a general discussion of incarcerated people's constitutional rights and the "reasonably related" test (*Turner* test). Parts B(2)(b) and B(2)(c) of this Chapter explain two specific constitutional rights that incarcerated people have and which specific constitutional amendments give them those rights. Make sure you read the other chapters of the *JLM* that also talk about these particular rights. Also, remember that your claim might involve violations of more than one constitutional right. Think about your situation from as many different angles as possible.

(a) General Framework for Constitutional Rights in Prison

As discussed earlier, keep in mind that your constitutional rights are not absolute. *The government is allowed to take away some of your rights in order to run the prison more safely or smoothly.* When you sue government officials or agencies for violating your rights, the officials or agencies must explain to the court why they acted that way. The reasons they give must have some reasonable relationship to the violation of your rights. The court then balances your constitutional rights against the reasons given by the defendants for taking away some of those rights. Most of the time, courts accept the prison officials' explanation for the violation and rule against the incarcerated person.

In your claim, you should emphasize why your right is important and reasonable and why the prison officials' actions were unnecessary or unreasonable. Just saying that your rights were violated is usually not enough. You must try to expect and respond to the arguments that the prison will make about the need for security or order.

One of the leading Supreme Court cases dealing with constitutional rights in prison is *Turner v. Safley*.[43] In *Turner*, the Supreme Court held that when a prison regulation has an impact on constitutional rights, the regulation is still valid if it is "reasonably related to legitimate penological interests."[44] A penological interest is legitimate if it is a valid and justifiable concern for the prison and/or the officials operating the prison. "Legitimate penological interests" may include concerns for safety, discipline, effective punishment, and other management issues. Under the *Turner* test (also called the "reasonably related" test), a court will compare the importance of the state's valid penological interests to the impact of the state's actions on your rights.

The *Turner* test has been used in cases challenging both formal and informal prison policies and practices. It has also been used in cases challenging individual actions.[45] The test applies both to prison regulations and to actions taken by prison officials. Note that *Turner* does not apply to claims of racial

41. Daniels v. Williams, 474 U.S. 327, 335–336, 106 S. Ct. 662, 667, 88 L. Ed. 2d 662, 671 (1986).

42. *See* Smith v. Wade, 461 U.S. 30, 51, 103 S. Ct. 1625, 1637, 75 L. Ed. 2d 632, 648 (1983) (upholding a jury award for an incarcerated person's Section 1983 claim that a prison guard recklessly placed him in a cell with other incarcerated people who were likely to assault him and rejecting the argument that the incarcerated person needed to show that the prison guard knew that he was likely to be assaulted by his cellmates).

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

44. Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987).

45. *See, e.g.*, Allah v. Al-Hafeez, 208 F. Supp. 2d 520, 529–531 (E.D. Pa. 2002) (applying the *Turner* test to a chaplain's decision to exclude an incarcerated person from religious services after the person disrupted the service); Youngbear v. Thalacker, 174 F. Supp. 2d 902, 914 (N.D. Iowa 2001) (applying the *Turner* test to an administrative decision resulting in a yearlong delay in building a sweat lodge).

discrimination,[46] Eighth Amendment violations,[47] restrictions on private religious exercise,[48] or some procedural due process claims.[49]

To use the *Turner* test, courts ask if a regulation (or action) is "reasonably related" to the government's interests. They do this by looking at four factors:

(1) Whether there is a valid, rational connection between the regulation and the government's reason for it;[50]

(2) Whether you still have other ways of exercising your constitutional right despite the regulation;[51]

(3) Whether there will be a "ripple effect"[52] on the rights of others if you are allowed to exercise the right;[53] and

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46. Johnson v. California, 543 U.S. 499, 509–511, 125 S. Ct. 1141, 1148–1149, 160 L. Ed. 2d 949, 961–962 (2005) (holding that the *Turner* test could not be used to evaluate the prison policy of assigning new incarcerated people cellmates of the same race, and noting that *Turner* has never been applied to racial classifications). For more information on equal protection rights in prison, including the right against racial discrimination, see Part B(2)(c) of this Chapter.

47. *See, e.g.*, Jordan v. Gardner, 986 F.2d 1521, 1530 (9th Cir. 1993) (refusing to apply the *Turner* test to an incarcerated person's 8th Amendment claim and noting that the Supreme Court has never used *Turner* for an 8th Amendment claim); Austin v. Hopper, 15 F. Supp. 2d 1210, 1255 (M.D. Ala. 1998) (refusing to apply the *Turner* test to an incarcerated person's 8th Amendment claim). For information on 8th Amendment claims for "cruel and unusual punishment," see Part B(2)(b) of this Chapter.

48. The Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc–2000cc-5 (2018), increased the protection for religious freedoms of incarcerated people and people in other institutions. Under RLUIPA, when the government limits the exercise of religion in institutions like prisons, it must show that those restrictions serve a "compelling government interest" and are the "least restrictive means" of achieving that interest. This is a higher standard than *Turner's* "legitimate penological interest" test for restrictions on constitutional rights. *See* Warsoldier v. Woodford, 418 F.3d 989, 994 (9th Cir. 2005).

49. *See* Washington v. Harper, 494 U.S. 210, 223–225, 228–229, 110 S. Ct. 1028, 1037–1038, 1040–1041, 108 L. Ed. 2d 178, 199–200, 202–203 (1990) (using the *Turner* test to analyze an incarcerated person's substantive due process claim but not applying it to the individual's procedural due process claim). For further discussion of your procedural due process rights, see Chapter 18 of the *JLM*, "Your Rights at Prison Disciplinary Proceedings."

50. Turner v. Safley, 482 U.S. 78, 89–90, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79 (1987) ("[T]here must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it.") (quoting Block v. Rutherford, 486 U.S. 576, 586, 104 S. Ct. 3227, 3232, 82 L. Ed. 2d 438, 447 (1984)).

51. Turner v. Safley, 482 U.S. 78, 90, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79 (1987) (explaining that "[w]here 'other avenues' remain available for the exercise of the asserted right, courts should be particularly conscious" of giving weight to prison officials' decisions (citation omitted)). For example, in McRoy v. Cook Cty. Dept. of Corr., 366 F. Supp. 2d 662, 676–677 (N.D. Ill. 2005), a court upheld a prison's cancellation of Muslim services on certain occasions, in part because the court found that the prison had provided other opportunities for an incarcerated person to observe his religion, such as allowing him to keep religious materials and allowing incarcerated people to pray together in community rooms.

52. A "ripple effect" means that your exercise of this right could affect the use of prison resources, affect the safety of guards, affect other incarcerated people, etc. For example, if a large group of incarcerated people are allowed to pray in the chapel while everyone else is on lockdown, this might either mean that too many guards have to be there to watch the chapel and leave other parts of the prison unguarded, or that the prison would have groups of unguarded incarcerated people in violation of safety procedures. This in turn might make the non-religious incarcerated people who do have to be in lockdown resentful and demand that they also be allowed special privileges, potentially causing a domino effect.

53. Turner v. Safley, 482 U.S. 78, 90, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79–80 (1987) ("A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally. . . .When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials.").

(4) Whether there is an easy way to meet the regulation's goal without limiting your constitutional right.[54]

In most cases challenging prison regulations, the government wins. This is because the *Turner* test only requires the government to have a rational explanation (one that makes sense) for the regulation. Now when you are outside of a prison setting, if the government creates a law or policy that affects your rights, different tests are used. For instance, if the government is controlled by one political party and they create a law saying that you cannot publicly support candidates from the opposite party, that would affect your fundamental right to free speech. Since free speech is a fundamental right, a court would only allow this policy to stay in place if it passes a test called "strict scrutiny". To pass this test, the government would have to show the court that this law has both a compelling interest and that the law is narrowly tailored to achieve that interest (which means that there cannot be another policy option available that is less restrictive).[55] However, if the government passes a law for the purposes of protecting people's lives (such as wearing a mask when outside to prevent you from getting a life threatening disease), then the law will most likely have to pass a test called the "rational basis" review. The rational basis test states that when the government has a valid interest—such as public safety or health concerns—it may create laws that are related to protecting that interest even if those laws only minimally relate (or bear very little relation) to those valid interests of the government.[56] Like the rational basis test, the *Turner* test is not a very high standard for the government to meet.

With the *Turner* test, the government needs to show that there is a connection between the regulation you are challenging and the purpose that it is supposed to accomplish.[57] However, the government does not need to show that the regulation is better than other regulations that would be less restrictive. This means that even if there are other potential regulations that would help the government achieve its goals without impacting incarcerated people's rights, the government can still pass the *Turner* test.

In the *Turner* case, the Court applied this test to a prison regulation banning incarcerated people from sending or receiving letters from persons incarcerated at other prisons (not including family members). The prison argued that letters between incarcerated people could be used to plan escapes or assaults. Looking at factor (1), the Court first found that preventing escapes and assaults was a valid government interest, and that banning letters between incarcerated people was a rational way to help prevent escapes and assaults. As for factor (2), the Court noted that incarcerated people still had other ways to exercise their First Amendment rights to express themselves, since incarcerated

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54. Turner v. Safley, 482 U.S. 78, 90–91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 80 (1987) ("[T]he absence of ready alternatives is evidence of the reasonableness of a prison regulation. . . . By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns."). A prison that is able to meet a goal by using one of several different rules is not required to choose the rule that has the least impact on your rights. However, the fact that there are other rules that accomplish the same goals may be considered evidence that the rule you are challenging is unreasonable, especially if the alternative rules do not have additional drawbacks. Turner v. Safley, 482 U.S. 78, 90–91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 80 (1987).

55. *See* Citizens United v. FEC, 558 U.S. 310, 340, 130 S. Ct. 876, 898, 175 L. Ed. 2d 753, 782 (2010).

56. Heller v. Doe, 509 U.S. 312, 320, 113 S. Ct. 2637, 2642, 125 L. Ed. 2d 257, 270 (1993).

57. *See* Walker v. Sumner, 917 F.2d 382, 385–387 (9th Cir. 1990) (holding that prison officials must provide support for the justifications of their regulations; assertions made without explanation or factual support are not enough); Hunafa v. Murphy, 907 F.2d 46, 48 (7th Cir. 1990) (finding the factual record provided by the prison was too "skimpy" to determine whether the prison's refusal to provide a pork-free meal to an incarcerated person was reasonably related to a legitimate penological interest). *But see* Whitmire v. Arizona, 298 F.3d 1134, 1136 (9th Cir. 2002) (noting that a plaintiff's case should not be dismissed unless the prison has provided evidence supporting a rational relationship between a policy and the policy's justification, or unless there is a "common-sense connection" between the policy and the prison's penological interests); Austin v. Hopper, 15 F. Supp. 2d 1210, 1235 (M.D. Ala. 1998) (refusing to require "evidence demonstrating a valid, rational connection" between the claimed goals of a policy and the policy itself, and instead using a "common sense" approach to whether a policy is reasonably related to legitimate correctional interests).

people could write to and receive letters from anyone besides other incarcerated people. Under factor (3), the Court found that allowing people who are incarcerated to communicate with other incarcerated people would have a significant "ripple effect" on others, because it might threaten the safety of other incarcerated people and prison guards. Finally, looking at factor (4), the Court found that there was no simple other way of ensuring that escapes and assaults were not planned through letters between incarcerated people. After going through the four factors, the Court held that the regulation was "reasonably related" to legitimate interests in security. As a result, the Court held that the prison could keep the rule in place even though it interfered with incarcerated people First Amendment rights to free expression and communication.[58]

However, *Turner* also decided that a regulation preventing incarcerated people from marrying unless the superintendent found "compelling circumstances" was not "reasonably related" to legitimate security concerns.[59] The prison had claimed that the regulation was justified because "love triangles" among incarcerated people might lead to violence. The Court stated that there was no reasonable relationship between preventing marriage and preventing violence, since "love triangles" were just as likely when incarcerated people were unmarried. The Court also mentioned that a marriage was generally a private decision that would not have a "ripple effect" on others. The Court said that less restrictive regulations on prison marriages, such as those used at many other prisons, would still meet the concerns of prison officials.

As you can see from these examples, you need to carefully consider how to argue your claim in terms of the four factors. You have a better chance of success if a regulation *completely* deprives you of the ability to exercise your right, since such a regulation fails factor (2). In these cases, you should suggest other rules that could accomplish the same prison goal without completely violating your rights. Comparing the bad practices of your prison with the better practices of other prisons may also be helpful.

Figure 1 below explains your rights, the source of these rights, and which chapters of the *JLM* you should read if you think one of these rights has been violated.

Types of Constitutional Rights	Source of Constitutional Rights[60]	*JLM* Chapter
Rights to Freedom of Expression and Communication: includes the right to mail, visitation, telephone use, and other communications, as well as the right to express yourself	*First Amendment*	Chapter 19: "Your Right to Communicate with the Outside World"

58. Turner v. Safley, 482 U.S. 78, 93, 107 S. Ct. 2254, 2264, 96 L. Ed. 2d 64, 82 (1987) ("The prohibition on correspondence is reasonably related to valid corrections goals. The rule is content neutral, it logically advances the goals of institutional security and safety . . . and it is not an exaggerated response to those objectives."). *But see* Allen v. Coughlin, 64 F.3d 77, 81 (2d Cir. 1995) (holding that a prison had not established a valid reason for a regulation banning newspaper clippings sent through the mail).

59. Turner v. Safley, 482 U.S. 78, 97–98, 107 S. Ct. 2254, 2266, 96 L. Ed. 2d 64, 84 (1987) ("The Missouri prison regulation . . . [restricting prisoner marriage] represents an exaggerated response to . . . security objectives. There are obvious, easy alternatives to the Missouri regulation that accommodate the right to marry while imposing a [minimal] burden on the pursuit of security objectives."). Although the right to marry comes from the substantive due process part of the 14th Amendment, and not from the 1st Amendment, the analysis on how to balance the rights is the same.

60. This chart is only a simple outline for what parts of the Constitution establish these rights. Some of these rights may also be protected by federal statutes. Your case will depend on your particular facts, so you should use this chart to begin your research, not end it.

Types of Constitutional Rights	Source of Constitutional Rights[60]	*JLM* Chapter
Religious practices[61]	*First Amendment*	Chapter 27: "Religious Freedom in Prison"
Freedom from unreasonably intrusive body searches[62]	*Fourth Amendment*	Chapter 25: "Your Right to Be Free from Illegal Body Searches"[63]
Prison conditions: overcrowding, cleanliness, etc.	*Eighth Amendment*	Chapter 16 (This Chapter)
Medical care	*Eighth Amendment*	Chapter 23: "Your Right to Adequate Medical Care"
Assault/failure to protect	*Eighth Amendment & Fourteenth Amendment*	Chapter 24: "Your Right to Be Free from Assault by Prison Guards and Other Incarcerated people
Privacy of medical information	*Fourteenth Amendment*	Chapter 26: "Infectious Diseases: AIDS, Hepatitis, Tuberculosis, and MRSA in Prisons" & Chapter 23: "Your Right to Adequate Medical Care"

61. If your religious rights are being violated, instead of bringing a Section 1983 claim, you may want to sue under the Religious Freedom Restoration Act. 42 U.S.C. § 2000bb-1 (2018). You may not bring a lawsuit against state governments or officials under RFRA. You can only sue federal officials and agencies. *See* City of Boerne v. Flores, 521 U.S. 507, 534–536, 117 S. Ct. 2157, 2171–2172, 138 L. Ed. 2d 624, 648–649 (1997) (holding RFRA's application to state governments and state officials unconstitutional); *see also* O'Bryan v. Bureau of Prisons, 349 F.3d 399, 401 (7th Cir. 2003) (finding that RFRA could constitutionally be applied to federal officers and agencies). Also, if the agency that operates your prison receives federal funding you can sue under another law called the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). 42 U.S.C. § 2000cc-1 (2018). Prisons also have a harder time defending these suits. *See* Warsoldier v. Woodford, 418 F.3d 989, 998 (9th Cir. 2005) (noting that RLUIPA was designed to enhance protection of incarcerated people's religious freedom by replacing the *Turner* "legitimate public interest" test with a "compelling interest" test).

62. *See, e.g.,* Hurley v. Ward, 584 F.2d 609, 611 (2d Cir. 1978) (holding that invasive anal and genital searches of an incarcerated person, without probable cause, outweighed the prison's security justifications).

63. Note that in most cases, this does not apply to cell searches. *See* Hudson v. Palmer, 468 U.S. 517, 526, 104 S. Ct. 3194, 3200, 82 L. Ed. 2d 393, 402–403 (1984) (holding that the 4th Amendment prohibition against unreasonable searches does not apply to prison cells because "[t]he recognition of privacy rights for incarcerated people in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions"); Willis v. Artuz, 301 F.3d 65, 68–69 (2d Cir. 2002) (holding that incarcerated people are not protected from cell searches initiated by prosecutors or police even when such searches are not related to prison security).

Types of Constitutional Rights	Source of Constitutional Rights[60]	*JLM* Chapter
Due Process in disciplinary hearings[64]	*Due Process Clause of the Fifth & Fourteenth Amendments*[65]	Chapter 18: "Your Rights at Prison Disciplinary Proceedings"
Discrimination on the basis of race, ethnicity, etc.	*Equal Protection Clause of the Fourteenth Amendment*	Chapter 16 (This Chapter)
Discrimination on the basis of gender	*Equal Protection Clause of the Fourteenth Amendment*	Chapter 16 (This Chapter)
Rights of persons with mental illness	*Eighth & Fourteenth Amendments*	Chapter 29, "Special Issues for Incarcerated people with Mental Illness"
Discrimination on the basis of disability	*Equal Protection Clause of the Fourteenth Amendment*	Chapter 28, "Rights of Incarcerated people with Disabilities"
Discrimination on the basis of sexual orientation or gender identity	*Equal Protection Clause of the Fourteenth Amendment*	Chapter 30: "Special Information for Lesbian, Gay, Bisexual, and Transgender Incarcerated people"
Access to courts—law libraries or legal assistance	*First, Sixth, & Fourteenth Amendments*	Chapter 3: "Your Right to Learn the Law and Go to Court"

Since Eighth Amendment claims are some of the most common Section 1983 claims (as well as *Bivens* Actions) brought by people incarcerated in federal prisons, Part B(2)(b) of this Chapter goes into those claims in more detail. Additionally, B(2)(c) of this Chapter addresses discrimination claims on the basis of race, ethnicity, and gender. Sometimes these rights relate to one another, so make sure you read any other relevant *JLM* chapters.

(b) Eighth Amendment Claims

The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*."[66] Most prison cases brought under the Eighth

64. The Due Process Clause of the 14th Amendment says that the state cannot "deprive any person of life, liberty, or property, without due process of law." *See* U.S. CONST. amend. XIV, §1. The right to liberty includes some rights you keep if you are in prison. However, the government only violates these rights when it acts in a way that is not related to a legitimate goal. Whether a government action reasonably relates to a legitimate goal is determined using the *Turner* test, described in Part B(2)(a) of this Chapter.

65. The government cannot deprive you of life, liberty, or property without going through certain procedures. This right is created by the 5th and 14th Amendments. The 14th Amendment applies to state government action. The 5th Amendment contains an identical prohibition: "No person shall be … deprived of life, liberty, or property, without due process of law" and applies to the federal government. U.S. CONST. amend. V. People incarcerated in federal prisons therefore usually use the 5th Amendment instead of the 14th Amendment to challenge due process violations. As mentioned in Figure 1, see Chapter 18 of the *JLM* for more details about your due process rights.

66. U.S. CONST. amend. VIII (emphasis added).

Amendment relate to "cruel and unusual punishment." There are several types of claims that courts will consider under the cruel and unusual punishment part of the Eighth Amendment. These claims can include harm resulting from prison conditions, inadequate medical care, and assault. The cases below provide some specific examples of Eighth Amendment claims that courts have recognized.

Note that you should read Chapter 14 of the *JLM*, "The Prison Litigation Reform Act" ("PLRA"), if you plan to file a claim for cruel and unusual punishment under the Eighth Amendment. Under the PLRA, incarcerated people may not seek compensatory damages for mental or emotional injury without an accompanying physical injury, with limited exceptions.[67]

A claim that prison conditions or practices constitute cruel and unusual punishment must satisfy two tests. These tests are referred to as the "objective" and "subjective" tests:

(1) The *objective test* requires proof that prison conditions were bad enough to be considered cruel and unusual. Conditions must amount to "unquestioned and serious deprivations of basic human needs" or deprivation of the "minimal civilized measure of life's necessities," or they must include the "wanton and unnecessary infliction of pain."[68] Supreme Court cases have emphasized that, in general, prison conditions must pose serious threats to health and safety.[69] However, under some circumstances, conditions do not need to inflict or threaten serious injury to meet the objective test. For example, cell searches causing "calculated harassment unrelated to prison needs" may be considered cruel and unusual punishment.[70] Similarly, excessive force may violate the Eighth Amendment if it is "repugnant to the conscience of mankind"[71] (even if it inflicts little physical injury). It is possible that other conditions that do not actually cause physical injury (like sexually

67. Compensatory damages are awarded to make you "whole" by putting you back in the same position you were in before you suffered the wrong. An example of compensatory damages would be the cost of medical bills. They are different from punitive damages, which are meant to punish a wrongdoer rather than compensate you for your injuries. See Part C(1)(a) of this Chapter for a more complete explanation of compensatory damages. 42 U.S.C. § 1997e(e) (2018) (The statute states that "[n]o Federal civil action may be brought by an incarcerated person 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[.]"). Courts have held that the statute only prohibits compensatory damages for mental or emotional injury, so incarcerated people can still claim other forms of damages or injunctive relief for mental or emotional injuries. *See, e.g.*, White v. Holmes, 21 F.3d 277, 281 (8th Cir. 1994) (finding that ". . .some actual injury is required in order to state an 8th Amendment violation."). Courts are split on the applicability of Section 1997e(e) to 1st Amendment claims. *Compare* Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir.1998) ("The deprivation of [1st] Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred."), *and* Siggers-El v. Barlow, 433 F. Supp. 2d 811, 816 (E.D. Mich. 2006) (holding that Section 1997e(e) of the PLRA is unconstitutional as applied to 1st Amendment claims to the extent that it bars recovery of damages for emotional harms without physical injury), *with* Searles v. Van Bebber, 251 F.3d 869, 876 (10th Cir. 2001) ("The plain language of the statute does not permit alteration of its clear damages restrictions on the basis of the underlying rights being asserted.").

68. Rhodes v. Chapman, 452 U.S. 337, 347–348, 101 S. Ct. 2392, 2399–2400, 69 L. Ed. 2d 59, 69–70 (1981) (finding that a practice of placing two incarcerated people in a single cell did not violate the 8th Amendment, when the practice was necessary due to an increase in prison population and the practice did not cause "unnecessary and wanton pain").

69. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) (finding that knowing disregard of excessive risk to inmate health and safety—whether for reasons unique to one incarcerated person or to all in his situation—could qualify as a violation of the 8th Amendment).

70. Hudson v. Palmer, 468 U.S. 517, 530, 104 S. Ct. 3194, 3202, 82 L. Ed. 2d 393, 405 (1984). Note that the court in *Hudson* did not find the conduct by prison guards rose to the level of calculated harassment.

71. Hudson v. McMillian, 503 U.S. 1, 10, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 168 (1992) (allowing the claim to go forward even where there was no significant injury or need for medical attention).

intrusive searches,[72] credible threats of immediate harm that are not acted upon,[73] conditions that "pose an unreasonable risk of serious damage to . . . future health,"[74] and psychological torture[75] may also be considered cruel and unusual punishment.

(2) The *subjective test* requires that prison officials had a certain state of mind when they created the conditions you are challenging. In most prison conditions cases, the standard is "deliberate indifference," which means that the officials must have had actual knowledge that they were subjecting you to an excessive risk of harm or other unconstitutional conditions.[76] In use of force cases, however, the test is harder to meet than the "deliberate indifference" test. Instead, you must show that the official who used force against you acted "maliciously and sadistically" in order to cause harm.[77]

Under the objective test, as mentioned above, if your complaint is about the conditions of your imprisonment, you have to show that, "alone or in combination," the conditions deprived you of "the minimal civilized measure of life's necessities."[78] Life's necessities (or basic human needs) include "food, clothing, shelter, medical care, and reasonable safety," [79] warmth,[80] exercise,[81] and the "basic elements of hygiene."[82] If you are trying to show that several conditions combined to deprive you of a

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72. *See, e.g.*, Jordan v. Gardner, 986 F.2d 1521, 1522, 1530–1531 (9th Cir. 1993) (*en banc*) (holding that a policy of "random, non-emergency, suspicionless clothed body searches on female prisoners" by male guards violated the 8th Amendment).

73. *See, e.g.*, Northington v. Jackson, 973 F.2d 1518, 1524 (10th Cir. 1992) (holding that, if true, an allegation that a corrections officer brandished a gun and threatened to kill an incarcerated person could be an 8th Amendment violation); Burton v. Livingston, 791 F.2d 97, 100 (8th Cir. 1986) (holding that an incarcerated person has a right to be free from "the terror of instant and unexpected death at the whim of his allegedly bigoted custodians").

74. Helling v. McKinney, 509 U.S. 25, 33, 35–36, 113 S. Ct. 2475, 2480–2482, 125 L. Ed. 2d 22, 31, 33 (1993) (explaining "[w]e have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year" and allowing an incarcerated person assigned a cellmate who smoked five packs of cigarettes a day to make a claim of future harm from secondhand smoke).

75. *See, e.g.*, Parrish v. Johnson, 800 F.2d 600, 605 (6th Cir. 1986) (finding that a paraplegic incarcerated person who was threatened with a knife, denied requests for medical attention, and continuously and aggressively taunted by a guard could claim a violation of the 8th Amendment).

76. Farmer v. Brennan, 511 U.S. 825, 839–843, 114 S. Ct. 1970, 1980–1982, 128 L. Ed. 2d 811, 826–829 (1994).

77. Hudson v. McMillian, 503 U.S. 1, 6–7, 112 S. Ct. 995, 998–999, 117 L. Ed. 2d 156, 165–166 (1992).

78. Rhodes v. Chapman, 452 U.S. 337, 347, 101 S. Ct. 2392, 2399, 69 L. Ed. 2d 59, 69 (1981).

79. Helling v. McKinney, 509 U.S. 25, 32, 113 S. Ct. 2475, 2480, 125 L. Ed. 2d 22, 31 (1993) (quoting DeShaney v. Winnebago Cty. Dept. of Soc. Servs., 489 U.S. 189, 199–200, 109 S. Ct. 998, 1005, 103 L. Ed. 2d 249, 261–262 (1989)).

80. Wilson v. Seiter, 501 U.S. 294, 304, 111 S. Ct. 2321, 2327, 115 L. Ed. 2d 271, 283 (1991); Palmer v. Johnson, 193 F.3d 346, 352–353 (5th Cir. 1999) (holding that overnight exposure to winds and cold with no means of keeping warm could violate the 8th Amendment). *But see* Bibbs v. Early, 541 F.3d 267, 272, 275 (5th Cir. 2008) (holding that only exposure to "extreme" cold could violate the 8th Amendment, and that an incarcerated person with two blankets and layers of clothes was not exposed to "extreme" cold, even in alleged 20-degree temperature).

81. Wilson v. Seiter, 501 U.S. 294, 304, 111 S. Ct. 2321, 2327, 115 L. Ed. 2d 271, 283 (1991); Perkins v. Kan. Dept. of Corr., 165 F.3d 803, 810 (10th Cir. 1999) (holding that an allegation of prolonged denial of outdoor exercise could violate the 8th Amendment).

82. Palmer v. Johnson, 193 F.3d 346, 352 (5th Cir. 1999) (quoting Novak v. Beto, 453 F.2d 661, 665 (5th Cir. 1971)) (holding that depriving 49 incarcerated people of toilet facilities in a small area could violate the 8th Amendment); *see also* Bradley v. Puckett, 157 F.3d 1022, 1025–1026 (5th Cir. 1998) (holding that the defendant who alleged an inability to bathe for several months—resulting in a fungal infection that required medical attention—stated an 8th Amendment claim). *But see* Davis v. Scott, 157 F.3d 1003, 1006 (5th Cir. 1998) (holding that confinement in a cell with blood on the floor and excrement on the wall was not unconstitutional because it was only for three days and cleaning supplies were available).

life necessity, keep in mind that the conditions must have a "mutually enforcing [(in other words, combined)] effect that [deprives you] of a single, identifiable human need such as food, warmth, or exercise."[83] For example, you may suffer cruel and unusual punishment if the inadequate heat in your cell-block, combined with the prison's failure to issue blankets, deprives you of warmth.[84]

The amount of harm that the court will require you to show also varies depending on the type of Eighth Amendment claim that you bring. For example, if you are complaining about prison guard brutality, you may not have to show that your injury was "serious." Instead, you may only have to show that it was more than minor and that the assault was unjustified under the circumstances.[85] On the other hand, if your claim is that you were deprived of medical care, you will have to show that your medical needs were sufficiently "serious" and that prison officials were "deliberately indifferen[t]" to them.[86] Ultimately, it is important to remember that you must show different things for different types of Eighth Amendment Claims. Parts B(2)(b)(i) through B(2)(b)(iv) of this Chapter provide more information on the different types of Eighth Amendment claims you can make.

(i) Prison Conditions

Poor prison conditions may amount to cruel and unusual punishment. If they do, then they violate the Eighth Amendment. Such conditions can include a lack of basic necessities or the presence of safety hazards, like poor fire prevention safety measures.[87] Excessively long confinement in a small cell and denial of outdoor exercise can also violate the Eighth Amendment.[88] Other conditions that may constitute cruel and unusual punishment include unsanitary facilities, overcrowding, and inadequate

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83. Wilson v. Seiter, 501 U.S. 294, 304, 111 S. Ct. 2321, 2327, 115 L. Ed. 2d. 271, 283 (1991) ("Some conditions of confinement may establish an [8th] Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets.").

84. *See, e.g.*, Wilson v. Schomig, 863 F. Supp. 789, 795–796 (N.D. Ill. 1994) (holding that lack of heat in prison cells may, combined with other circumstances such as cold temperatures, could be found to violate 8th Amendment principles).

85. *See, e.g.*, Hudson v. McMillian, 503 U.S. 1, 10–11, 112 S. Ct. 995, 1000–1001, 117 L. Ed. 2d 156, 168–169 (1992) (holding that an assault on an incarcerated person by prison guards resulting in a cracked dental plate and minor bruises and swelling was enough harm to constitute a valid 8th Amendment claim).

86. *See* Wilson v. Seiter, 501 U.S. 294, 297, 111 S. Ct. 2321, 2323, 115 L. Ed. 2d 271, 278 (1991) (holding that a claim of an 8th Amendment violation must show at least deliberate indifference to serious medical needs by prison officials). To bring a claim for inadequate medical care, see Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care."

87. *See, e.g.*, Newman v. Alabama, 559 F.2d 283, 291 (5th Cir. 1977) (holding that a state must provide "prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety so as to avoid the imposition of cruel and unusual punishment"), *rev'd on other grounds sub nom.* Alabama v. Pugh, 438 U.S. 781, 98 S. Ct. 3057, 57 L. Ed. 2d 1114 (1978) (*per curiam*); Nicholson v. Choctaw Cty., 498 F. Supp. 295, 308–312 (S.D. Ala. 1980) (finding that prison violated 8th Amendment rights through, among other things, the unsanitary conditions in the jail, the lack of adequate medical care, unsafe conditions, and the lack of religious services or instruction). *See, e.g.*, Hoptowit v. Spellman, 753 F.2d 779, 783–784 (9th Cir. 1985) (holding that a hazardous work environment including inadequate lighting, plumbing, fire safety, ventilation, and vermin infestation, could constitute inhumane conditions in violation of the 8th Amendment); Newman v. Alabama, 559 F.2d 283, 291 (5th Cir. 1977) (holding that a state must provide "prisoners with reasonably adequate . . . personal safety so as to avoid the imposition of cruel and unusual punishment"), *rev'd on other grounds sub nom.* Alabama v. Pugh, 438 U.S. 781, 98 S. Ct. 3057, 57 L. Ed. 2d 1114 (1978) (per curiam). *But cf.* Osolinski v. Kane, 92 F.3d 934, 938–939 (9th Cir. 1996) (finding that failure to repair a broken oven, without additional aggravating factors, cannot reasonably be said to violate the 8th Amendment).

88. *See* Perkins v. Kan. Dept. of Corr., 165 F.3d 803, 810 (10th Cir. 1999) (holding allegation of prolonged denial of outdoor exercise could violate the 8th Amendment); Spain v. Procunier, 600 F.2d 189, 199 (9th Cir. 1979) (stating that with the exception of "inclement weather, unusual circumstances, or disciplinary needs . . . [that make it] impossible," outdoor exercise is required when incarcerated people are otherwise confined to small cells 24 hours per day).

heating and ventilation.[89] Some courts have held that failing to protect incarcerated people from secondhand smoke may violate the Eighth Amendment.[90] However, secondhand smoke cases usually require incarcerated people to show that the secondhand smoke poses an unreasonable risk of future harm to their health.[91] For more information about addressing secondhand smoke exposure, see Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care." Although,

Overcrowding is not unconstitutional in itself,[92] but courts have found that it can violate the Eighth Amendment rights of people who are incarcerated when it leads to harmful consequences.[93] For example, successful lawsuits have been brought when a prison's failure to check newcomers for contagious diseases, combined with overcrowding, increased the risk of infection.[94] Since 2011, the Supreme Court has been more willing to consider overcrowding as a violation of the Eighth Amendment rights of people who are incarcerated. For example, in *Brown v. Plata*, the Supreme Court held that the number of people in prisons in California had to be capped at 137.5% of each prison's maximum capacity.[95] The Court found that there was enough evidence to support the fact that "crowding creates unsafe and unsanitary conditions that hamper effective delivery of medical and mental health care. It also promotes unrest and violence and can cause incarcerated people with latent mental illnesses to worsen and develop overt symptoms."[96] In *Plata*, the Court also said that overcrowding was the main reason for many constitutional violations.[97]

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89. *See, e.g.*, Palmer v. Johnson, 193 F.3d 346, 352–353 (5th Cir. 1999) (finding that the combined circumstances of overnight outdoor confinement without shelter, blanket, heating, or access to bathroom facilities were a denial of necessities in violation of the 8th Amendment); DeMallory v. Cullen, 855 F.2d 442, 445 (7th Cir. 1988) (finding that an incarcerated person stated sufficient 8th Amendment claim in Section 1983 complaint alleging unsanitary and dangerous conditions); French v. Owens, 777 F.2d 1250, 1252–1255, 1257–1258 (7th Cir. 1985) (holding that overcrowding, medical neglect, and failure to protect incarcerated people from threats to safety violated the 8th Amendment); Morales Feliciano v. Hernandez Colon, 697 F. Supp. 37, 40–45 (D.P.R. 1988) (ruling that overcrowding, vermin-infestation, and otherwise unsanitary conditions violated the 8th Amendment), *aff'd sub nom.* Morales-Feliciano v. Parole Bd., 887 F.2d 1 (1989); Toussaint v. McCarthy, 597 F. Supp. 1388, 1409–1411 (N.D. Cal. 1984) (finding constitutional violation due to certain conditions, including double-celling, insufficient ventilation and heating, and inadequate and unsanitary clothing and bedding supplies), *aff'd in part and rev'd in part*, 801 F.2d 1080 (9th Cir. 1986).

90. *See, e.g.*, Atkinson v. Taylor, 316 F.3d 257, 262–269 (3d Cir. 2003) (allowing an incarcerated person to go forward with 8th Amendment claim that exposure to secondhand smoke posed a substantial risk of future harm); Gill v. Smith, 283 F. Supp. 2d 763, 769 (N.D.N.Y. 2003) (allowing an incarcerated person with asthma to go forward with 8th Amendment claim that exposure to secondhand smoke posed an unreasonable risk of future harm to his health).

91. *See* Helling v. McKinney, 509 U.S. 25, 35–36, 113 S. Ct. 2475, 2482, 125 L. Ed. 2d 22, 33 (1993) (holding that exposure to extreme levels of tobacco smoke that pose an unreasonable risk to future health may be an 8th Amendment violation, and that the plaintiff did not need to wait until he was actually harmed to ask a court to correct unsafe conditions); Atkinson v. Taylor, 316 F.3d 257, 262–269 (3d Cir. 2003) (same); Gill v. Smith, 283 F. Supp. 2d 763, 769 (N.D.N.Y. 2003) (same).

92. *See* Rhodes v. Chapman, 452 U.S. 337, 348, 101 S. Ct. 2392, 2400, 69 L. Ed. 2d 59, 69–70 (1981) (finding no constitutional violation when double-celling "did not lead to deprivations of essential food, medical care, or sanitation" and did not "increase violence among inmates or create other conditions intolerable for prison confinement").

93. *See* Tillery v. Owens, 907 F.2d 418, 427–428 (3d Cir. 1990) (holding that double-celling due to overcrowding, in combination with other factors, such as the physical condition of the cell, violated the 8th Amendment); Mitchell v. Cuomo, 748 F.2d 804, 807–808 (2d Cir. 1984) (granting incarcerated people an injunction against the closing of a facility that would result in overcrowding in other prisons); Fisher v. Koehler, 692 F. Supp. 1519, 1561–1565 (S.D.N.Y. 1988) (holding that the level of both prisoner-prisoner violence and staff-prisoner violence resulting, in part, from overcrowding violated the 8th Amendment), *aff'd*, Fisher v. Koehler, 902 F.2d 2 (2d Cir. 1990).

94. *See* Lareau v. Manson, 651 F.2d 96, 109 (2d Cir. 1981) (finding failure to screen for diseases constituted inadequate medical practice that violated the 8th Amendment).

95. Brown v. Plata, 563 U.S. 493, 493, 131 S. Ct. 1910, 1917, 179 L. Ed. 2d 969, 976 (2011).

96. Brown v. Plata, 563 U.S. 493, 495, 131 S. Ct. 1910, 1919, 179 L. Ed. 2d 969, 978 (2011).

97. Brown v. Plata, 563 U.S. 493, 495, 131 S. Ct. 1910, 1919, 179 L. Ed. 2d 969, 978 (2011).

Some Section 1983 claims challenge prison housing arrangements. Courts have generally held that double-celling (placing two persons in each cell) is constitutional as long as both persons are provided with their basic needs, such as having enough space to sleep and a clean interior. Double-celling is not a constitutional violation by itself because incarcerated people may still exercise their rights and because prison officials have strong administrative concerns in providing housing for everyone in the prison population.[98] Similarly, administrative segregation does not violate a person's rights.[99] However, it is unconstitutional for prison officials to put you in administrative segregation in order to get back at you for filing a complaint or claim.[100] If you bring a case because you were administratively segregated, it must be brought as a procedural due process claim, not as an Eighth Amendment claim. For a discussion of procedural due process, see Chapter 18 of the *JLM*, "Your Rights at Prison Disciplinary Proceedings." Claims for inadequate cell assignments often overlap with Eighth Amendment claims for assault. If you think you have these claims, you should be sure to review the cases cited in this section and Chapter 24 of the *JLM*, "Your Right to Be Free from Assault by Prison Guards and Other Incarcerated people."

(ii) Inadequate Medical Care and Other Health Risks

Inadequate medical care can also violate the Eighth Amendment. As discussed above, the Court held in *Brown v. Plata* that unreasonable risks to your health may violate the Eighth Amendment even if you have not been harmed yet.[101] For information on your right to medical care, see Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care."

(iii) Assault

In at least one Section 1983 case, the Supreme Court has held that the infliction of pain by guards through practices such as handcuffing to hitching posts for prolonged periods of time violates the Eighth Amendment.[102] Further, many Section 1983 cases have claimed that prison officials' failure to protect incarcerated people from assaults violates the Eighth Amendment. For more detailed information, see Chapter 24 of the *JLM*, "Your Right to Be Free from Assault by Prison Guards and Other Incarcerated people."

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98. *See* Rhodes v. Chapman, 452 U.S. 337, 348, 101 S. Ct. 2392, 2400, 69 L. Ed. 2d 59, 69 (1981) (holding that double-celling did not violate the 8th Amendment since it did not lead to deprivations of basic needs, and did not "increase violence among inmates or create other conditions intolerable for prison confinement").

99. *See, e.g.*, Sealey v. Giltner, 197 F.3d 578, 589–590 (2d Cir. 1999) (finding that administrative confinement, after a required factual determination that plaintiff posed a threat to prison safety, was not an "atypical and significant hardship" when compared to the ordinary conditions of prison life). Note that *Sealey* is not an 8th Amendment case, but was brought under the Due Process Clause of the 14th Amendment.

100. *See* Allah v. Seiverling, 229 F.3d 220, 223–226 (3d Cir. 2000) (allowing an incarcerated person to go forward with a due process claim that he was kept in administrative segregation in retaliation for filing civil rights suits).

101. *See* Brown v. Plata, 563 U.S. 493, 495, 131 S. Ct. 1910, 1919, 179 L. Ed. 2d 969, 978 (2011); *see also* Helling v. McKinney, 509 U.S. 25, 34–36, 113 S. Ct. 2475, 2481–2482, 125 L. Ed. 2d 22, 32–33 (1993) (holding that exposure to extreme levels of environmental tobacco smoke that pose an unreasonable risk to future health may be an 8th Amendment violation, and that the plaintiff did not need to wait until he was actually harmed to ask a court to correct unsafe conditions). *But see* Glick v. Henderson, 855 F.2d 536, 538–540 (8th Cir. 1988) (denying an incarcerated person's 8th Amendment claim based on exposure to HIV in prison, because it was based on an "unsubstantiated fear").

102. *See* Hope v. Pelzer, 536 U.S. 730, 738, 745–746, 122 S. Ct. 2508, 2514–2515, 2518, 153 L. Ed. 2d 666, 677–678, 682 (2002) (reversing judgment that guards were entitled to qualified immunity and holding that defendants could be liable under Section 1983 for violating an incarcerated person's 8th Amendment rights by handcuffing the incarcerated person to a hitching post for seven hours in extreme heat, and without bathroom breaks or an adequate supply of drinking water).

(iv) Exercise, Work, and Education

Eighth Amendment claims challenging deprivations of exercise and recreation have had mixed results. Whether a right to exercise has been violated depends on whether you have been deprived of your basic needs. Because prison officials are constitutionally required to provide for your health, they must generally allow you to have certain minimum levels of exercise.[103] However, this right has been found to be violated only if a person's movement is so restricted that his muscles are allowed to waste or his health is threatened.[104] Most courts will not find that a deprivation of recreation time violates constitutional rights, since general *recreation*, unlike *exercise*, does not necessarily affect health.

Eighth Amendment claims challenging deprivations of meaningful work or educational programs have not been very successful. The Supreme Court has said that limited work hours or delays in accessing education do not cause pain and are not punishments, and that therefore the Eighth Amendment does not generally protect against deprivations like these.[105]

(c) Fourteenth Amendment Claims: The Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment guarantees every person in the United States, including those who are incarcerated, "the equal protection of the laws."[106] This means that the state may not treat you differently (discriminate against you) because you belong to a particular group or "class" of people. In general, when you are incarcerated, you must meet two requirements to make a claim under the Equal Protection Clause.[107] First, your claim must state that you were treated differently from others who were in a similar situation or similar circumstances.[108] Second, your claim

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103. *See* Davenport v. DeRobertis, 844 F.2d 1310, 1315 (7th Cir. 1988) (finding an 8th Amendment violation where incarcerated people in a segregation unit were allowed only one hour each week of exercise outside of their cells); Spain v. Procunier, 408 F. Supp. 534, 547 (N.D. Cal. 1976) ("[T]he denial of fresh air and regular outdoor exercise and recreation constitutes cruel and unusual punishment. . ."), *aff'd in part and rev'd in part*, 600 F. 2d 189 (9th Cir. 1979). *But see* Anderson v. Coughlin, 757 F.2d 33, 36 (2d Cir. 1985) ("[N]either an occasional day without exercise when weather conditions preclude outdoor activity nor reliance on running, calisthenics, and isometric and aerobic exercises in lieu of games is cruel and unusual punishment."); French v. Owens, 777 F.2d 1250, 1255–1256 (7th Cir. 1985) (holding prison provided sufficient opportunity for exercise that did not rise to level of 8th Amendment violation).

104. *See* French v. Owens, 777 F.2d 1250, 1255–1256 (7th Cir. 1985) ("Lack of exercise may certainly rise to a constitutional violation. Where movement is denied and muscles are allowed to atrophy, the health of the individual is threatened and the state's constitutional obligation is compromised."); *see also* Mammana v. Fed. Bureau of Prisons, 934 F.3d 368, 373–374 (3d Cir. 2019) ("[A]lleged deprivations and exposure reflect more than the denial of a 'comfortable prison[ ],' but rather the denial of 'the minimal civilized measure of life's necessities,' in particular, warmth and sufficient sleep."); Mitchell v. Rice, 954 F.2d 187, 192 (4th Cir. 1992) (stating that prisons may restrict exercise only in exceptional circumstances, such as when an adult incarcerated person is in disciplinary segregation).

105. *See* Rhodes v. Chapman, 452 U.S. 337, 348, 101 S. Ct. 2392, 2400, 69 L. Ed. 2d 59, 70 (1981) ("[L]imited work hours and delay before receiving education do not inflict pain, much less unnecessary and wanton pain; deprivations of this kind simply are not punishments."); Granillo v. Corr. Corp. of Am., No. 99-5720, 2000 U.S. App. LEXIS 28037, at *2–3 (6th Cir. Nov. 6, 2000) (*unpublished*) (dismissing as frivolous a complaint where an incarcerated person claimed administrative detention deprived him of "goods, recreation, work opportunities, money, schooling, television, telephone, contact visitation, and a microwave to heat his cold meals"); Women Prisoners v. District of Columbia, 93 F.3d 910, 927 (D.C. Cir. 1996) (noting that an incarcerated person "has no constitutional right to work and educational opportunities"); Higgason v. Farley, 83 F.3d 807, 810 (7th Cir. 1996) (determining that reduction in privileges, including educational programs, "did not infringe on a protected liberty interest").

106. U.S. CONST. amend. XIV.

107. *See* Veney v. Wyche, 293 F.3d 726, 730–731 (4th Cir. 2002) (naming the two requirements that must be met for an incarcerated person to make an equal protection claim); Wilson v. Taylor, 515 F. Supp. 2d 469, 472 (D. Del. 2007) (same); Williams v. Manternach, 192 F. Supp. 2d 980, 990 (N.D. Iowa 2002) (same).

108. Klinger v. Dept. of Corr., 31 F.3d 727, 731 (8th Cir. 1994) (noting that the Equal Protection Clause

must state that the unequal treatment resulted from intentional or purposeful discrimination.[109] You are most likely to be able to make an equal protection claim if you have been discriminated against because of your race, gender, ethnicity, or disability.[110]

You may also have an equal protection claim if you are discriminated against because of your custodial status (e.g., the type of custody you are in, such as protective custody, or general population).[111] However, in practice, equal protection claims for discrimination based on custodial status are difficult to win. This is because treating incarcerated people in different ways is allowed as long as the prison has *some* reasonable explanation.[112]

The Supreme Court has also said that it may be possible to make an equal protection claim if you are singled out as an individual for "arbitrary and irrational treatment," meaning you were singled out for no apparent or logical reason, even if you are not being discriminated against as a member of

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requires the state to treat people alike when they are in similar situations).

109. McCleskey v. Kemp, 481 U.S. 279, 292, 107 S. Ct. 1756, 1767, 95 L. Ed. 2d 262, 278 (1987) (noting that a successful equal protection claim must prove that there was purposeful discrimination). This means that it is not enough to argue that you were treated differently, but that you must also argue that you were *intentionally* treated differently (treated differently on purpose).

110. *See* Johnson v. California, 543 U.S. 499, 512, 125 S. Ct. 1141, 1150, 160 L. Ed. 2d 949, 963 (2005) (finding that an incarcerated person's 14th Amendment rights to equal protection are violated if the prison discriminates on the basis of race, unless the prison can demonstrate that such discrimination is *necessary* to achieve a *compelling* government interest); Sockwell v. Phelps, 20 F.3d 187, 191–192 (5th Cir. 1994) (finding equal protection violations where incarcerated people were segregated by race in their cells, because a general fear of racial violence could not justify segregation); Santiago v. Miles, 774 F. Supp. 775, 777 (W.D.N.Y. 1991) (finding that plaintiffs had proven the existence of equal protection violations based on a pattern of racism affecting job placement, housing assignments, and discipline). *But see* Wilson v. Taylor, 515 F. Supp. 2d 469, 473 (D. Del. 2007) (dismissing equal protection claim based on race discrimination in prison discipline because the incarcerated person did not provide evidence that the discipline was racially motivated or that white incarcerated people who were similarly situated were treated differently); Hill v. Thalacker, 399 F. Supp. 2d 925, 929 (W.D. Wis. 2005) (dismissing incarcerated person's claim of race discrimination in promotion policy because he did not provide any evidence that the white incarcerated people who were promoted before him were similarly situated); Bass v. Becher, No. 04-C-033-C, 2004 U.S. Dist. LEXIS 2372, at *12 (W.D. Wis. Feb. 17, 2004) (*unpublished*) (dismissing claim of equal protection violation based on race because the plaintiff did not provide facts to show how his treatment was different from that of a white incarcerated person in the same position); Brown v. Byrd, No. 00-3118, 2000 U.S. Dist. LEXIS 17354, at *15–19 (E.D. Pa. Dec. 1, 2000) (*unpublished*) (finding that defendants' policy of assigning cells based on whether they thought incarcerated people would get along, even if shown to have a racial impact, did not violate the Equal Protection Clause because it was reasonably related to the prison's legitimate interests in safety and security); Giles v. Henry, 841 F. Supp. 270, 275 (S.D. Iowa 1993) (finding African-American plaintiff's argument that defendants treated similarly situated white incarcerated people more favorably than him to be unpersuasive because there was no clear pattern of discrimination in the evidence). For information on and cases regarding equal protection violations based on gender, see Chapter 41 of the *JLM*, "Special Issues of Women Prisoners." *See* Jean v. Nelson, 711 F.2d 1455, 1485 n.29 (11th Cir. 1983) (noting that "[a] claim of discrimination based on nationality does not differ from that based on race"), *vacated on other grounds en banc*, 727 F.2d 957 (11th Cir. 1984); Parisie v. Morris, 873 F. Supp. 1560, 1562–1563 (N.D. Ga. 1995) (finding that a plaintiff's claim that the parole board had impermissibly considered his ethnicity in denying him parole was valid). *See* Green v. McKaskle, 788 F.2d 1116, 1125 (5th Cir. 1986) (noting restrictions on movement and access based on disability may violate equal protection if no possible justification is shown). See Chapter 28 of the *JLM*, "Rights of Prisoners with Disabilities," for more information on disability discrimination.

111. Williams v. Manternach, 192 F. Supp. 2d 980, 989–992 (N.D. Iowa 2002) (finding that plaintiff made a valid equal protection claim by stating that, "as a lifer", he was treated differently with regard to jobs and classification). *But see* Gerber v. Hickman, 291 F.3d 617, 623 (9th Cir. 2002) (*en banc*) (finding no equal protection violation for a life incarcerated person barred from providing his wife with a sperm sample for the purposes of artificial insemination because keeping up with contacts outside of prison is not as important for incarcerated people who will never be released from prison).

112. *See, e.g.*, Little v. Terhune, 200 F. Supp. 2d 445, 452 (D.N.J. 2002) (rejecting plaintiff's equal protection claim because the lack of programming available to incarcerated people in administrative segregation compared with those in the general population was rationally related to the prison's security concerns and budgetary constraints).

a certain group.[113] However, like other constitutional rights, the right to equal protection is compared to the state's legitimate interests. One of these legitimate interests is keeping prisons safe and orderly.

3. Federal Statutory Bases for Section 1983 Claims

Sometimes, in addition to claims based on federal constitutional violations, you can bring a Section 1983 claim if a state actor has violated a right created by a federal statute.[114] However, only a few federal statutes can be enforced using Section 1983.

One example is a claim related to payment of veteran's benefits. At least one court has held that the statute dealing with this, 38 U.S.C. § 5301(a), permits a Section 1983 lawsuit to be brought to enforce the statute.[115]

You may also be able to bring a Section 1983 claim if a prison has violated your rights under certain international treaties. For example, a few courts have held that Article 36 of the Vienna Convention on Consular Relations ("VCCR") can be used as the basis for a Section 1983 claim. The VCCR describes foreign nationals' right to consular access.[116] Consular access means granting permission to contact your home nation's embassy in the United States. If you are a foreign national, and you are arrested or detained, the federal, state, or local law enforcement agency responsible for your arrest or detention must ask you whether you would like to notify your embassy of your arrest. If so, then they must notify a consular official from your embassy. They must also grant the consular official access to you.

Some federal statutes, such as provisions of the Americans with Disabilities Act, cannot be enforced through Section 1983 because they have their own enforcement provisions.[117]

Sometimes it is easier to show that your rights under a statute have been violated than it is to show a constitutional violation. If courts have already found that a particular statute can be used as

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113. Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 1074–1075, 145 L. Ed. 2d 1060, 1063 (2000) (finding that equal protection claims can be made by a "class of one" if the plaintiff has been arbitrarily and irrationally singled out and treated differently from others in similar situations and there is no rational basis for the difference in treatment).

114. Maine v. Thiboutot, 448 U.S. 1, 4, 100 S. Ct. 2502, 2504, 65 L. Ed. 2d 555, 559 (1980) (holding that Section 1983 may be used to sue for violations of a right created by a federal statute).

115. Higgins v. Beyer, 293 F.3d 683, 689–690 (3d Cir. 2002) (holding that 38 U.S.C. § 5301(a) which prohibits veterans benefits from being seized or attached, creates a right that can be enforced under Section 1983). In *Higgins*, an incarcerated person brought a Section 1983 claim against the New Jersey Department of Corrections and other defendants for taking a portion of the money from his veteran's disability check to pay a fine the incarcerated person owed to the Victims of Crime Compensation Board. Higgins v. Beyer, 293 F.3d 683, 685–687 (3d Cir. 2002).

116. Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 100, 596 U.N.T.S. 261, 292. Note that the federal courts disagree on whether Article 36 of the Vienna Convention on Consular Relations ("*VCCR*") creates a right enforceable by an individual who has been arrested. *Compare* Jogi v. Voges, 480 F.3d 822, 834 (7th Cir. 2007) (holding that Article 36 of the VCCR confers individual rights on detained nationals), *with* Gandara v. Bennett, 528 F.3d 823, 827–829 (11th Cir. 2008) (holding that Article 36 of the VCCR does not create individual rights), De Los Santos Mora v. New York, 524 F.3d 183, 209 (2d Cir. 2008) (holding same), *and* Cornejo v. County of San Diego, 504 F.3d 853, 855 (9th Cir. 2007) (holding same). The majority of federal courts that have addressed the issue have concluded that the Vienna Convention does *not* create enforceable individual rights. The Supreme Court has not yet addressed the issue of whether Article 36 can provide the basis for a Section 1983 claim. United States v. Perez-Sanchez, No. CR02-4065-MWB, 2006 WL 2949503, at *8 (N.D. Iowa Oct. 17, 2006) (*unpublished*) (noting that federal circuit courts have not agreed on the enforceability of VCCR Article 36 and that the Supreme Court has declined to decide the issue). For more information on consular access, see the Immigration and Consular Access Supplement to the *JLM*.

117. *See* Blessing v. Freestone, 520 U.S. 329, 341, 117 S. Ct. 1353, 1360, 137 L. Ed. 2d 569, 582 (1997) (quoting Smith v. Robinson, 468 U.S. 992, 1005, n. 9, 104 S. Ct. 3457, 3464 n.9, 82 L. Ed. 2d 746, 760 n.9 (1984)) ("[D]ismissal is proper if Congress 'specifically foreclosed a remedy under § 1983' . . . by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983."); Williams v. Pa. Human Relations Comm'n, 870 F.3d 294, 297–300 (3d Cir. 2017) (holding that provisions of the American with Disabilities Act (ADA) may not be enforced using Section 1983). For more about your rights under the ADA, see Chapter 28 of the *JLM*, "Rights of Prisoners with Disabilities." For more about your rights under RLUIPA, see Chapter 27 of the *JLM*, "Religious Freedom in Prison."

the basis for a Section 1983 claim, you should examine the cases interpreting that statute to see if your case is similar to them. You should pay special attention to which cases rely on Section 1983 and which do not.[118]

C. Procedural Requirements for Your Lawsuit

1. Types of Relief a Court May Grant

Whether your Section 1983 claim is based on a violation of constitutional or federal statutory rights, you may generally ask a federal district court for several types of relief. These types of relief include: damages (money payment), injunctive relief (an order from the court to the person you sued to do something or to stop doing something), and declaratory relief (a court statement of what your rights are). You may ask for more than one type of relief in your suit. However, the type of relief you can ask for may be different depending on whom you sue or name as defendants.[119]

(a) Money Damages

The court may require individual defendants (such as a warden, guard, or employee) to pay you money damages. You generally cannot get a judgment for money damages against states or state agencies like state prisons.[120] However, you can get a judgment for money damages against municipalities and private corporations. If you are suing for damages, either you or the defendant can demand a trial by jury.

There are three general categories of money damages: compensatory, punitive, and nominal damages. *Compensatory damages*, also known as actual damages, are awarded to make you "whole." This means that they are supposed to put you back in the same position you were in before you suffered the wrong. For example, imagine that an item of your property has been unlawfully damaged by a prison official and the property was worth seventy dollars. If you win your suit, you could receive seventy dollars in damages or a lesser amount that is enough to repair or restore the item to its original condition. Or, if you were physically injured by the defendant's conduct, a court or jury might award you enough money to cover your medical expenses or to compensate you for a resulting disability. In addition, compensatory damages may include pain and suffering damages. These try to compensate you financially for the physical pain and suffering you experienced because of the wrongful conduct. When you ask for compensatory damages, you must state and prove the nature, extent, and cause of your injuries in detail.

The second type of money damages is *punitive damages*. These are not awarded very often. The purpose of punitive damages is to punish the defendants for what they did, rather than just to compensate you for what happened. Punitive damages are available when the defendants acted with

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118. Courts generally decide on a case-by-case basis which statutes can be used as the basis for Section 1983 lawsuits, depending on how the court thinks that Congress intended the statute to work. *See* Blessing v. Freestone, 520 U.S. 329, 340–341, 117 S. Ct. 1353, 1359, 137 L. Ed. 2d 569, 581–582 (1997) (discussing how courts have traditionally determined whether federal statutes create rights that are enforceable using Section 1983). For example, courts have held that juvenile offenders who are illegally housed with adult offenders in adult prisons can use Section 1983 to enforce their right to be housed separately. *See* Hendrickson v. Griggs, 672 F. Supp. 1126, 1136–1137 (N.D. Iowa 1987) (holding that the Juvenile Justice and Delinquency Prevention Act, codified at 42 U.S.C. § 5633(a)(12)–(14), creates enforceable rights under Section 1983). However, if you are an adult whose criminal history is wrongfully disclosed, you cannot sue under Section 1983. *See* Polchowski v. Gorris, 714 F.2d 749, 751 (7th Cir. 1983) (holding that 42 U.S.C. § 3789g does not create enforceable rights under Section 1983). Sometimes, different courts do not agree on whether a particular statute can be used as the basis for a Section 1983 claim. You should research your jurisdiction's case law about bringing Section 1983 claims based on federal statutory rights.

119. For a list of the types of relief available from different defendants, see Figure 2 in Part C(3)(c) of this Chapter.

120. As a practical matter, it is often the case that if you sue state employees in their individual capacity (as opposed to the actual state or state agency), the state will voluntarily pay the damages for the employees. This is called "indemnification."

"evil motive or intent" or "reckless or callous indifference" to your federal rights.[121] A court cannot award punitive damages against governmental agencies, like a prison or a jail, but it can award them against individual officials or employees. [122]

The third type of money damages is *nominal damages*. Nominal damages are symbolic, and usually no more than one dollar.[123] You may be awarded nominal damages instead of compensatory damages if you prove that the defendants violated your rights, but did not cause you any harm.[124] If you are awarded nominal damages, you *may* be able to get punitive damages as well.[125]

However, if even if a court awards you money damages for your Section 1983 case, there are laws that might prevent you from receiving all of your award.

At least thirty-one states, and the federal government, have some type of "Son of Sam" statute.[126] The purpose of these statutes is to stop people who are convicted of a crime from profiting off of that crime. If you profit from that crime, "Son of Sam" statues allow the victims of that crime to sue for some, if not all, of those profits. For instance, if you are convicted of a crime and later on write a book or a movie based off of that crime, "Son of Sam" statutes could allow any victim of that crime to seek

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121. *See* Smith v. Wade, 461 U.S. 30, 56, 103 S. Ct. 1625, 1640, 75 L. Ed. 2d 632, 651 (1983) (holding that an incarcerated person may be awarded punitive damages for recklessness or serious indifference to his rights, as well as for "evil intent"); *see also* Reilly v. Grayson, 310 F.3d 519, 521 (6th Cir. 2002) (upholding punitive damages award against prison officials whose refusal to house asthmatic incarcerated person in smoke-free environment was found to be a reckless disregard for his rights); Blissett v. Coughlin, 66 F.3d 531, 535–536 (2d Cir. 1995) (upholding jury award of punitive damages against prison guards for assault and unlawful confinement of incarcerated person).

122. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271, 101 S. Ct. 2748, 2762, 69 L. Ed. 2d 616, 634–635 (1981) (holding that punitive damages are not available against a municipality in a Section 1983 suit); Ciraolo v. City of N.Y., 216 F.3d 236, 241–242 (2d Cir. 2000) (reversing an award of punitive damages against New York City in a Section 1983 action based on *City of Newport* and holding that municipal immunity from punitive damages is absolute, with no "outrageous conduct" exception).

123. Courts may award more than one dollar. *See, e.g.*, Hatch v. Yamauchi, 809 F. Supp. 59, 61 (E.D. Ark. 1992) (awarding nominal damages in the amount of ten dollars for violation of incarcerated person's right to access the courts, including access to the law library and trained legal assistance).

124. *See* Thompson v. Carter, 284 F.3d 411, 418 (2d Cir. 2002) (holding that under the Prison Litigation Reform Act ("PLRA") claims for constitutional violations without physical injury need not be dismissed outright, but recovery is limited to nominal and punitive damages (as well as injunctive and declaratory relief) because allowing compensatory damages without physical injuries would amount to recovery for mental or emotional injury, which the PLRA prohibits); *see also* Royal v. Kautzky, 375 F.3d 720, 722–723 (8th Cir. 2004) (holding that the compensatory damages limitation of the PLRA applies to all federal prisoner lawsuits, including those for 1st Amendment violations); Searles v. Van Bebber, 251 F.3d 869, 875–877 (10th Cir. 2001) (holding that an incarcerated person could not recover compensatory damages for the violation of his constitutional rights without first showing a physical injury). However, some courts do not require any showing of physical injury where the deprivation involves the 1st Amendment. *See* Williams v. Ollis, Nos. 99-2168/99-2234, 2000 U.S. App. LEXIS 23671, at *5–6 (6th Cir. Sept. 18, 2000) (*unpublished*) (stating that the plaintiff's 1st Amendment claim for money damages was not precluded by PLRA); Rowe v. Shake, 196 F.3d 778, 781–782 (7th Cir. 1999) (holding that "[a] deprivation of First Amendment rights standing alone is a cognizable injury," and therefore "[a] prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental, or emotional injury he may have sustained"); Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998) (holding that "[t]he deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show").

125. *See* Allah v. Al-Hafeez, 226 F.3d 247, 251–252 (3d Cir. 2000) (noting that in appropriate cases, both nominal and punitive damages may be awarded for a violation of constitutional rights without an accompanying injury). In the cited case, the plaintiff sought punitive damages for the alleged violation of his constitutional right to the free exercise of religion, but not for any emotional or mental distress that he may have suffered as a result of that violation. However, his claims for compensatory damages were barred by the court. *See* Allah v. Al-Hafeez, 226 F.3d 247, 250–251 (3d Cir. 2000).

126. Validity, construction, and application of "Son of Sam" laws regulating or prohibiting distribution of crime-related book, film, or comparable revenues to criminals, 60 A.L.R.4th 1210 (Originally published in 1988).

those profits.[127] However, many states like New York have expanded these statutes, and if you are convicted of a crime, the individuals who are considered victims of that crime may sue you for *any* funds that you might receive—which would include money damages from your §1983 case.[128] While many "Son of Sam" laws are similar to New York's, each law will likely have unique features. So, before seeking money damages in your Section 1983 suit it is important to consider the "Son of Sam" laws of that state in which you were convicted, as well as the federal "Son of Sam" law.

No matter which type of damages you ask for, you should read Chapter 14 of the *JLM*, "The Prison Litigation Reform Act." The PLRA limits the types of damages you can recover in different situations.[129]

(b) Injunctive Relief

Another type of relief the court can award in a Section 1983 action is an *injunction*. An injunction is an order to prison officials either *to take* or *not to take* certain actions. For example, a judge may order a prison to act to improve the conditions of your confinement. Or, a judge may order a prison to stop censoring your mail.[130] An injunction is often referred to as "equitable relief."

When you make the decision to ask a court for a *permanent injunction*, there are a few actions that you should take first. First, you might seek a temporary restraining order ("TRO"). Courts will only grant a TRO in exceptional and urgent situations. To get a TRO, you must show that you will suffer "immediate and irreparable injury, loss, or damage" if you have to wait for a hearing.[131]

If you believe you are eligible for a TRO, you must file an "Order to Show Cause and Temporary Restraining Order" with the court. See Appendix A-4 of this Chapter for an example. If possible, you must also notify the prison officials that you are requesting a TRO and send them copies of your request. You must also submit to the court an affidavit that describes your efforts to contact the prison officials, and a short memorandum stating the reasons why the court should grant your request for a TRO.[132] If you are granted a TRO, the court will set a date for a hearing as soon as possible. At this

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127. Validity, construction, and application of "Son of Sam" laws regulating or prohibiting distribution of crime-related book, film, or comparable revenues to criminals, 60 A.L.R.4th 1210 (Originally published in 1988).

128. N.Y. EXEC. LAW § 632-a (McKinney 2020); *see also* Validity, construction, and application of "Son of Sam" laws regulating or prohibiting distribution of crime-related book, film, or comparable revenues to criminals, 60 A.L.R.4th 1210 (Originally published in 1988).

129. *See* Harris v. Garner, 216 F.3d 970, 974 (11th Cir. 2000) (*en banc*) (holding that the PRLA's language stating that "[n]o action shall be brought" operates as a bar to an incarcerated person's entire suit absent physical injury). Note that Harris v. Garner was specifically about lawsuits that are filed while the plaintiff is in jail, prison, or some other correctional facility, but which are not decided until after he is released. *Compare* Davis v. District of Columbia, 158 F.3d 1342, 1349 (D.C. Cir. 1998) ("§ 1997e(e) precludes claims for emotional injury without any prior physical injury, regardless of the statutory or constitutional basis of the legal wrong."), *with* Rowe v. Shake, 196 F.3d 778, 781 (7th Cir. 1999) (citation omitted) ("§ 1997e(e) applies only to claims for mental or emotional injury. Claims for other types of injury do not implicate the statute."), *and* Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998) ("The deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred. Therefore, § 1997e(e) does not apply to First Amendment claims regardless of the form of relief sought.").

130. *See, e.g.*, Koch v. Lewis, 216 F. Supp. 2d 994, 1007 (D. Ariz. 2001) (ordering prison to release incarcerated person from segregation into the general population after finding that indefinite segregation based solely on gang membership was unconstitutional), *vacated on other grounds*, Koch v. Schriro, 399 F.3d 1099 (9th Cir. 2005); Northern v. Nelson, 315 F. Supp. 687, 688 (N.D. Cal. 1970) (ordering prison to allow Muslim incarcerated person to practice his religion), *aff'd*, 448 F.2d 1266 (9th Cir. 1971); Luparar v. Stoneman, 382 F. Supp. 495, 502 (D. Vt. 1974) (ordering prison to allow circulation of current issue of prison newspaper).

131. FED. R. CIV. P. 65(b).

132. There are no technical rules that you must follow in writing your supporting memorandum. Simply state your arguments as clearly as possible and stress what will happen if the court does not grant your request. Be sure to tell the court why you need action immediately and why you cannot wait for a hearing. Chapter 2 of the *JLM*, "Introduction to Legal Research," explains how to conduct research for a memorandum of law. Chapter 6 of the *JLM*, "An Introduction to Legal Documents," will also help you in writing your memorandum.

hearing, you must convince the court to convert the TRO into a preliminary injunction.[133] Additionally, If the court grants you a TRO, it may require you to provide money for assurance purposes. You can ask the court to waive this requirement. To take advantage of this waiver, you should file your TRO request *in forma pauperis*.[134] See Appendix A-5 of this Chapter for sample *in forma pauperis* documents.

Regardless of whether you are eligible for a TRO*,* before you seek a *permanent injunction* you should request what is known as a *preliminary injunction*. With a *preliminary* i*njunction*, if you can show that an injunction is necessary to protect your rights until the end of your trial, you may be able to get a temporary injunction before the end of the trial and even before it begins.[135] In order to get a *preliminary injunction*, you must follow the procedures described in Rule 65(a) of the Federal Rules of Civil Procedure. Most courts also require you to show that:

(1) You are likely to succeed on the merits of your claim,

(2) You are likely to suffer irreparable harm if the preliminary injunction is denied,

(3) If the injunction is denied, you will suffer more than the defendant would suffer if the injunction were to be granted, and

(4) Granting the preliminary injunction is consistent with the public interest.[136]

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133. FED. R. CIV. P. 65(b)–(c).

134. "*In forma pauperis*" is Latin for "in the manner of a pauper" — basically, in a poor person's manner. It means that you cannot afford the fee or costs and are asking the court to waive them. *See In Forma Pauperis,* BLACK'S LAW DICTIONARY (11th ed. 2019). Some states use the English "Poor Person Status" instead of the Latin term.

135. *See, e.g.*, Mitchell v. Cuomo, 748 F.2d 804, 808 (2d Cir. 1984) (upholding preliminary injunction that prohibited closing a prison where incarcerated people proved that if the prison were closed they would be moved to prisons that were already too crowded); Inmates of Attica Corr. Facility v. Rockefeller, 453 F.2d 12, 23–24 (2d Cir. 1971) (granting preliminary injunctive relief to incarcerated people after extended mistreatment by prison guards, where prison officials had not taken sufficient steps to ensure that such mistreatment would not continue during trial); Campos v. Coughlin, 854 F. Supp. 194, 214 (S.D.N.Y. 1994) (granting preliminary injunction requiring prison to allow incarcerated people to wear religious beads); Dean v. Coughlin, 623 F. Supp. 392, 405 (S.D.N.Y. 1985) (ordering prison officials to provide "adequate dental care to inmates with serious dental needs"). *But see* Parker v. State Bd. of Pardons & Paroles, 275 F.3d 1032, 1037 (11th Cir. 2001) (finding plaintiff was not entitled to a preliminary injunction since he was unable to show that there was a substantial likelihood of success on the merits of his claims); Espinal v. Goord, 180 F. Supp. 2d 532, 541 (S.D.N.Y. 2002) (denying plaintiff's motion for a temporary restraining order or preliminary injunction because plaintiff had not made a "substantial showing of likelihood of success on the merits of his due process claims").

136. Consistency with the public interest is the standard for a preliminary injunction in most federal courts. *See* Yolton v. El Paso Tenn. Pipeline Co., 435 F.3d 571, 578–581 (6th Cir. 2006) (affirming grant of preliminary injunction), *abrogated on other grounds by* M & G Polymers USA, LLC v. Tackett, 574 U.S. 427, 135 S. Ct. 926, 190 L. Ed. 2d 809 (2015); Joelner v. Village of Washington Park, 378 F.3d 613, 619 (7th Cir. 2004) (affirming and reversing grants and denials of various preliminary injunctions); Rodde v. Bonta, 357 F.3d 988, 999–1000 (9th Cir. 2004) (affirming grant of preliminary injunction); Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 130 (1st Cir. 2003) (affirming grant of preliminary injunction); Shire U.S., Inc. v. Barr Labs., Inc., 329 F.3d 348, 358–359 (3d Cir. 2003) (affirming denial of preliminary injunction); Newsom v. Albemarle Cty. Sch. Bd., 354 F.3d 249, 261 (4th Cir. 2003) (vacating denial of preliminary injunction and remanding for reconsideration); In re Sac & Fox Tribe, 340 F.3d 749, 758 (8th Cir. 2003) (affirming grant of preliminary injunction); Kikumura v. Hurley, 242 F.3d 950, 955, 963 (10th Cir. 2001) (affirming and reversing on preliminary injunction factors); Parker v. State Bd. of Pardons & Paroles, 275 F.3d 1032, 1035 (11th Cir. 2001) (affirming denial of preliminary injunction); Wenner v. Tex. Lottery Comm'n, 123 F.3d 321, 325 (5th Cir. 1997) (respecting grant of preliminary injunction by Pennsylvania district court). However, some courts modify the test slightly. Courts in the Second Circuit require you to show that: (1) you are likely to suffer irreparable harm if the preliminary injunction is denied, and (2) either (a) you are likely to succeed on the merits of your claim, or (b) your claim raises sufficiently serious questions to justify litigation and you will suffer more if the injunction is denied than the defendant will suffer if it is granted. *See* Mitchell v. Cuomo, 748 F.2d 804, 806–808 (2d Cir. 1984) (upholding preliminary injunction that prohibited the closing of a prison where incarcerated people proved that if the prison were closed they would be moved to prisons that were already too crowded).

In general, you can only receive a preliminary injunction *after* a hearing where your opponent has the opportunity to argue against the injunction.

Note though under 18 U.S.C. § 3626(a)(2) of the PLRA, any preliminary injunction that is granted will automatically expire after 90 days, unless the court finds that a permanent injunction should be granted and issues a final order for an injunction before the 90-day period is over.[137] It is often difficult or impossible for the parties to complete discovery and for the court to complete a trial and issue a decision within 90 days. However, the court can issue a new preliminary injunction if it finds that you still face the risk of irreparable (irreversible) harm if it is not granted.[138]

Now in order to get a *permanent injunction* you must meet a four-factor test. First, you must show that there is a likelihood of substantial, immediate, and irreparable (irreversible) injury without an injunction. To meet the irreparable injury requirement, you must show that your injury is likely to happen to you again in the foreseeable (likely) future, and that your injury was not the result of a single, isolated incident.[139] You can effectively show that you are likely to suffer future harm under a written policy. Or, you may show that the defendant is engaging in a pattern or custom of officially sanctioned behavior (behavior approved by officials).[140] You also have to prove that your injury is substantial and irreparable (irreversible.)[141] You can show that your injury is substantial (serious) by pointing out the specific ways that you are being harmed. Demonstrating that your injury is irreparable means showing that you are being harmed in a way that cannot be fixed in the future. Many courts say that the ongoing violation of a constitutional right causes substantial and irreparable harm.[142]

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137. *See* 18 U.S.C. § 3626(a)(2).

138. *See, e.g.*, Mayweathers v. Newland, 258 F.3d 930, 936 (9th Cir. 2001) (upholding a district court's second preliminary injunction allowing incarcerated people to attend religious services without being punished).

139. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 109, *103 S. Ct. 1660, 1669, 75 L. Ed. 2d 675, 688 (1983)* (holding that injunctive relief is unavailable where plaintiff has not shown that "he is realistically threatened by a repetition of [the violation]," where the plaintiff sought to enjoin the general use of chokeholds by police); Hague v. CIO, 307 U.S. 496, 518, *59 S. Ct. 954, 965, 83 L. Ed. 1423, 1438* (1939) (granting injunctive relief because the threat of continued police misconduct in the enforcement of a municipal ordinance made the threat of constitutional deprivations ongoing); Kritenbrink v. Crawford, 313 F. Supp. 2d 1043, 1053 (D. Nev. 2004) ("The mere fact that a plaintiff has suffered an injury in the past is not sufficient to allege standing for injunctive relief.").

140. *See* Armstrong v. Davis, 275 F.3d 849, 861 (9th Cir. 2001) (stating that a realistic threat of a repeating injury may arise from a written policy or a pattern of officially sanctioned behavior), *abrogated on other grounds by* Johnson v. California, 543 U.S. 499, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005).

141. *See* Williams v. Cozza-Rhodes, No. 12-CV-01580-BNB, 2012 U.S. Dist. LEXIS 159527, at *6 (D. Colo. Nov. 7, 2012) (*unpublished*) (denying an order enjoining prison guards from banging on incarcerated person's cell door at night and confiscating his property because the incarcerated person failed to "demonstrate that he will suffer substantial and irreparable harm if a preliminary injunction is not issued"); *see also* City of Los Angeles v. Lyons, 461 U.S. 95, 111, 103 S. Ct. 1660, 1670, 75 L. Ed. 2d 675, 690 (1983) (quoting O'Shea v. Littleton, 414 U.S. 488, 502, 94 S. Ct. 669, 679, 38 L. Ed. 2d 674, 687 (1974)) (finding injunction unavailable "where there is no showing of any real or immediate threat that the plaintiff will be wronged again—a 'likelihood of substantial and immediate irreparable injury'"); Heron v. City of Denver, 317 F.2d 309, 311 (10th Cir. 1963) (explaining that "the injury incurred or impending under the circumstances here existing must be substantial and irreparable; it must be clear and imminent").

142. *See, e.g.*, Jolly v. Coughlin, 76 F.3d 468, 482 (2d Cir. 1996) (stating that there is a "presumption of irreparable injury that flows from a violation of constitutional rights"); Nat'l People's Action v. Vill. of Wilmette, 914 F.2d 1008, 1013 (7th Cir. 1990) ("Even a temporary deprivation of [1st] amendment freedom of expression rights is generally sufficient to prove irreparable harm."); Ross v. Meese, 818 F.2d 1132, 1135 (4th Cir. 1987) (noting that deprivation of a constitutional right amounts to irreparable harm); Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984) (holding that a plaintiff need not show irreparable harm when an alleged violation of a constitutional right is shown). *But see* Wis. Cent. Ltd. v. Pub. Serv. Comm'n, 95 F.3d 1359, 1372 (7th Cir. 1996) (holding that where the only constitutional right at issue related to the procedures for receiving compensation for a governmental taking of property, irreparable harm was not shown because plaintiffs failed to avail themselves of the available procedures); Pinckney v. Bd. of Educ., 920 F. Supp. 393, 400 (E.D.N.Y. 1996) (noting that although courts will usually find irreparable harm when substantive constitutional rights are violated, when procedural

Second, you must show that the "remedies at law," such as money damages, are inadequate.[143] This means that you have to show that no other available legal remedy will address your injury. In other words, you must show that an injunction is the only way to prevent and correct the source of your injury, and that money damages will not do this.[144] Because an injunction often involves court monitoring, you should also explain why such ongoing court involvement is necessary.

When attempting to decide whether these requirements have been met, just like with a preliminary injunction, a court will have to consider who will suffer more between you and the defendant if they grant the injunction in your favor, or deny the injunction in the defendant's favor.[145] It is your responsibility to show the court that that harm you would suffer if your injunction is denied, is greater than the harm the defendant would suffer if your injunction is granted. Finally, you also need to convince the court that granting your *permanent injunction* would not hurt the public interest. As with a preliminary injunction, you can attempt to satisfy these requirements by showing that granting the injunction will not have a negative impact on public resources.[146]

(c) Declaratory Relief

Finally, the court may issue a *declaratory judgment*. A declaratory judgment is a statement about the nature and limits of your rights. An example would be a court order declaring that a particular prison procedure is unconstitutional. The court can issue a declaratory judgment in response to a pleading that appropriately states that your rights have been violated, or it can be granted as part of the final relief in the lawsuit.[147] A declaratory judgment can be useful if prison officials threaten to take some action that you believe would violate your rights. In these cases, you may use Section 1983 to ask the court for a declaratory judgment saying that it would be illegal for the prison to take that action. You may ask for a declaratory judgment even if you are not seeking any other type of relief, but a lawsuit often asks for another type of relief, like an injunction ordering a prison to change it procedures, in addition to declaratory judgment.[148] So, if you believe that the declaratory judgment is not enough to protect you, you can still ask for an injunction.

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due process violations are involved, "courts must consider the nature of the constitutional injury before making such a conclusion.").

143. *See* O'Shea v. Littleton, 414 U.S. 488, 502, 94 S. Ct. 669, 679, 38 L. Ed. 2d 674, 687 (1974) (noting that to obtain equitable relief, plaintiff must prove "likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law"); Younger v. Harris, *401 U.S. 37, 46, 91 S. Ct. 746, 751, 27 L. Ed. 2d 669, 676* (1971) (stating that proof of an irreparable injury is required for any injunction). These requirements are often referred to as the requirements for "standing" (the right to make a legal claim before the court) to seek injunctive relief.

144. *See* O'Shea v. Littleton, 414 U.S. 488, 502, 94 S. Ct. 669, 679, 38 L. Ed. 2d 674, 686–687 (1974) (holding that plaintiffs did not meet the requirements for injunctive relief because there were state and federal remedies that could provide them with adequate relief for their alleged wrongs); Pinckney v. Bd. of Educ., 920 F. Supp. 393, 400–401 (E.D.N.Y. 1996) (holding that irreparable harm was not shown by alleged procedural due process violation where plaintiff could be compensated with money damages).

145. *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391, 126 S. Ct. 1837, 1839, 164 L. Ed. 2d 641, 645 (2006); *see also* Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 546 n.12, 107 S. Ct. 1396, 1404 n.12, 94 L. Ed. 2d 542, 556 n. 12 (1987).

146. *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391, 126 S. Ct. 1837, 1839, 164 L. Ed. 2d 641, 645 (2006); *see also* Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 546 n.12, 107 S. Ct. 1396, 1404 n.12, 94 L. Ed. 2d 542, 556 n. 12 (1987).

147. Declaratory Judgment Act, 28 U.S.C. § 2201(a).

148. Declaratory Judgment Act, 28 U.S.C. § 2201(a)*; see, e.g.*, Clarkson v. Coughlin, 898 F. Supp. 1019, 1051 (S.D.N.Y. 1995) (granting plaintiffs' motion for declaratory judgment that the corrections department deprived them of equal protection of law by creating a special unit for deaf incarcerated people that was unavailable to male but not female incarcerated people).

2. Whom to Name as Defendants

Figuring out exactly whom to name as a defendant in your Section 1983 lawsuit can be confusing. As noted in Part B(1)(a) above, you can only sue a "person" who violated your rights while acting "under color" of state law. For the purposes of Section 1983, the definition of a "person" includes individual people (like prison wardens, guards, and other employees). The definition also includes *cities, counties, or municipalities* that adopt policies, rules, or regulations that violate your rights.[149] However, the definition of a "person" does not include *state* governments and their agencies (including your state's department of corrections).[150]

(a) Individual Defendants

If any of your defendants are individuals, you must decide in what "capacity" you will sue them. You can sue them in their "individual capacities," in their "official capacities," or both. When you sue someone in his individual capacity, you are suing him personally. When you sue someone in his official capacity, you are suing his office. For example, if you sue someone in his official capacity, you are suing the county jail warden's office rather than suing the individual who happens to be the county jail warden. Whether you sue a particular individual in his individual capacity, his official capacity, or both, will affect the type of damages you can receive. It will also affect the defenses that the individual can raise.[151]

In general, if you want to get an injunction (described in Part C(1)(b) of this Chapter), you should sue defendants in their official capacities. If you want to receive money damages, you should generally sue defendants in their individual capacities. For example, if one of the defendants in your case is a state official, and you sue them in their official capacity, the suit would be considered a suit against the state rather than that person.[152] So if you were to sue a state official in their official capacity, they would not be considered a "person" under the definition of Section 1983 and they would be immune from liability.[153] If you are seeking money damages against a high-ranking local official, like a sheriff or a warden, then you should probably sue him in both his official and individual capacities. If you are confused about which capacity to use for a particular defendant, you always have the option of suing that defendant in both capacities. However, you should be aware that suing defendants in both capacities might lead the defendants to file motions asking that a part of your lawsuit be dismissed. These motions can delay your lawsuit.

Sometimes you may not know the name of the person who violated your rights. In such a case, you must refer to the defendant as "John (or Jane) Doe."[154] This tells the court that you do not know the person's name. You must, however, locate and identify all John and Jane Does at some point or the claims against them will be dismissed.[155] You also have to be concerned with the statute of limitations

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149. *See* Monell v. Dept. of Soc. Servs., 436 U.S. 658, 690–691, 98 S. Ct. 2018, 2035–2036, 56 L. Ed. 2d 611, 635 (1978) (holding that municipalities and local governments are considered "persons" under Section 1983 when an official government policy or custom caused a constitutional violation).

150. *See* Will v. Mich. Dept. of State Police, 491 U.S. 58, 68–71, 109 S. Ct. 2304, 2311–2312, 105 L. Ed. 2d 45, 56–58 (1989) (holding that states and state defendants sued in their official capacities are not "persons" under Section 1983 and therefore may not be sued for money damages).

151. See Part C(3) of this Chapter for an explanation of how individual and official capacities affect potential defenses and the types of damages you can receive.

152. *See* Hafer v. Melo, 502 U.S. 21, 25, 112 S. Ct. 358, 361, 116 L. Ed. 2d 301, 309 (1991); *see also* Will v. Michigan Dept. of State Police, 491 U.S. 58, 70–71, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45, 57 (1989).

153. *See* Will v. Michigan Dept. of State Police, 491 U.S. 58, 70–71, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45, 57 (1989); *see also* Figure 2 of this Chapter.

154. *See* Roper v. Grayson, 81 F.3d 124, 126 (10th Cir. 1996) (holding that it is permissible to name John or Jane Doe as a defendant "so long as the plaintiff provides an adequate description of some kind which is sufficient to identify the person involved so process eventually can be served"); Dean v. Barber, 951 F.2d 1210, 1215–1216 (11th Cir. 1992) (finding plaintiff adequately identified unnamed defendant such that he could be added later when his identity was determined).

155. *See, e.g.*, Figueroa v. Rivera, 147 F.3d 77, 82–83 (1st Cir. 1998) (upholding dismissal without

that sets the time limit for the claim. You will need to identify the John and Jane Does and amend your complaint before the statute of limitations on the claim has expired.[156] Once the lawsuit is started, you should be able to learn the defendants' identities through discovery. For more information on discovery, see Chapter 8 of the *JLM*, "Obtaining Information to Prepare Your Case: The Process of Discovery."

(b) Supervisor Liability[157]

A supervisory official who causes or participates in a violation of your rights may be liable. "*Respondeat superior*" is the idea that supervisors are legally responsible for their subordinates' (lower-ranked staff members') actions, whether or not the supervisor knew about those actions.[158] However, the concept of "*respondeat superior*" does not apply to Section 1983 lawsuits.[159] Instead, in Section 1983 lawsuits, supervisory officials can only be charged with responsibility for lower officials' acts if they were personally involved in them.[160] A supervisor is considered to be "personally involved" in a constitutional violation if:

(1) The supervisor, "participated directly in the alleged constitutional violation"; or

(2) The supervisor, "after being informed of the violation [of your rights] . . . failed to remedy the wrong"; or

(3) The supervisor "created a policy or custom under which" your constitutional rights were violated, "or allowed such a policy or custom to continue"; or

(4) The supervisor was "grossly negligent" in that he did not adequately supervise the subordinates who violated your rights; or

(5) The supervisor, "exhibited deliberate indifference to the right by failing to act on information indicating unconstitutional acts were occurring".[161]

To win in a supervisor liability claim, you must be able to show two things: (1) that your constitutional rights were actually violated, and (2) that there was a clear connection between the violation of your rights and the supervisor's actions or failure to act.[162] If the supervisor participated

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prejudice of a claim where plaintiffs had made no attempt to identify or to serve John Doe defendants 17 months after filing the lawsuit). Note that under the Federal Rules of Civil Procedure 4(m), "a district court may dismiss a complaint without prejudice as to a particular defendant if the plaintiff fails to serve that defendant within 120 days after filing the complaint." Figueroa v. Rivera, 147 F.3d 77, 83 (1st Cir. 1998).

156. *See* Singletary v. Pa. Dept. of Corrections, 266 F.3d 186, 196–200 (3d Cir. 2001).

157. Please note that the law on Supervisory Liability changes frequently, and varies depending on the federal circuit in which your case is being heard. For example, as this edition of the *JLM* went to print, the Second Circuit released a decision that makes it harder to show personal involvement by a supervisor. *See* Tangreti v. Bachmann, No. 19-3712, 2020 U.S. App. LEXIS 40392, at *15 n.4 (2d Cir. Dec. 28, 2020). Although this chapter list five ways in which a supervisor may be considered personally involved, if your case is being heard in the Second Circuit, only factor (1) and the first half of factor (3), which states that the supervisor "created a policy or custom un which your constitutional rights were violated," may be used to show that a supervisor was personally involved in violating your constitutional rights. As the law continues to develop, please be sure to review recent cases in the federal circuit in which your case is being heard.

158. Respondeat superior is Latin for "let the superior [master] make answer." Respondeat Superior, Black's Law Dictionary (10th ed. 2014).

159. *See, e.g.,* Worrel v. Henry, 219 F.3d 1197, 1214 (10th Cir. 2000) ("Under § 1983, a defendant may not be held liable under a theory of *respondeat superior*."); Aponte Matos v. Toledo Davila, 135 F.3d 182, 192 (1st Cir. 1998) (quoting Seekamp v. Michaud, 109 F.3d 802, 808 (1st Cir.1997)) ("Supervisory liability under § 1983 'cannot be predicated on a respondeat theory, but only on the basis of the supervisor's own acts or omissions.'").

160. *See* Ashcroft v. Iqbal, 556 U.S. 662, 676–677, 129 S. Ct. 1937, 1948–1949, 173 L.Ed.2d 868, 883 (2009).

161. *See* Brandon v. Kinter, 938 F.3d 21, 36–37 (2d Cir. 2019) (discussing the ways in which supervisors may be found liable under Section 1983); Warren v. Pataki, 823 F.3d 125, 136 (2d Cir. 2016); *see also* Lilly v. Town of Lewiston, No. 1:18-CV-00002 EAW, 2020 U.S. Dist. LEXIS 53904, at *25 (W.D.N.Y. Mar. 27, 2020) (*unpublished*); Hincapie v. City of N.Y., 434 F. Supp. 3d 61, 77 (S.D.N.Y. 2020) (S.D.N.Y. Jan. 22, 2020) (*unpublished*).

162. *See* Peatross v. City of Memphis, 818 F.3d 233, 241–242 (6th Cir. 2016) (detailing the requirements for supervisory liability); *see also* Dodds v. Richardson, 614 F.3d 1185, 1197–1202 (10th Cir. 2010) (explaining

directly in the alleged violation, they clearly may be held liable as a supervisor or in their individual capacity.[163] What follows is a discussion of the four other types of situations in which you may be able to hold a supervisor liable.

(i) Failure to Act to Remedy A Wrong

Before 2009, a supervisor could be liable under Section 1983 if he became aware of a violation of your rights but did not take steps to remedy that violation.[164] However, in 2009, the Supreme Court made it harder to assert supervisor liability. Now, a supervisor will only be held liable under Section 1983 when you can show that *he actually participated* in the constitutional violation.[165] Due to this, if you are looking to bring a supervisory liability claim, do not use cases that took place before 2009.

(ii) Creating or Allowing an Unconstitutional Policy or Custom

A supervisor may be personally involved in a violation of your rights if he develops an unconstitutional policy or if he allows an unconstitutional policy to continue.[166] Supervisors can be liable for an unconstitutional policy even if that policy is not written down. Unwritten policies include informal policies or customs.[167] Supervisors generally cannot be held liable for a constitutional policy that a subordinate simply fails to follow.[168] However, the supervisor *can* be held liable if subordinates fail to follow the policy because the supervisor did not do a good enough job of hiring or training them. This exception is discussed in Part C(2)(b)(iii), below.

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how the Supreme Court's ruling in *Iqbal* effected the requirements for § 1983 supervisory liability claims).

163. *See* Ashcroft v. Iqbal, 556 U.S. 662, 676, 129 S. Ct. 1937, 1948, 173 L. Ed. 2d 868, 882 (2009); *see also* Brandon v. Kinter, 938 F.3d 21, 36 (2d Cir. 2019); Littlejohn v. City of New York, 795 F.3d 297, 314 (2d Cir. 2015).

164. *See*, *e.g.*, Vance v. Peters, 97 F.3d 987, 993 (7th Cir. 1996) (permitting supervisor liability where "[t]he plaintiff . . . [demonstrated] that the communication, in its content and manner of transmission, gave the prison official sufficient notice to alert him or her to [a constitutional violation] … .") (citation omitted); Taylor v. Mich. Dept. of Corr., 69 F.3d 76, 81–82 (6th Cir. 1995) (finding that the warden could be found to have known of the possibility that an incarcerated person would be raped because warden knew that there were problems in the classification procedures and that young incarcerated people were more vulnerable to sexual assaults); Williams v. Smith, 781 F.2d 319, 324 (2d Cir. 1986) (holding that a supervisor who affirmed an incarcerated person's disciplinary conviction when that incarcerated person had not been permitted to call witnesses may be liable for violating the incarcerated person's due process rights); Boone v. Elrod, 706 F. Supp. 636, 638 (N.D. Ill. 1989) (finding supervisors would be liable under Section 1983 where plaintiff claimed they ignored complaints of threats and attacks by other incarcerated people).

165. In 2009, the Supreme Court held that "[b]ecause vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's *own individual actions*, has violated the Constitution." Ashcroft v. Iqbal, 556 U.S. 662, 676, 129 S. Ct. 1937, 1948, 173 L. Ed. 2d 868, 882 (2009) (emphasis added). In *Iqbal*, the Supreme Court explicitly rejected the argument that a supervisor could be liable merely by knowing of a subordinate's discriminatory intent. Ashcroft v. Iqbal, 556 U.S. 662, 677, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868, 883 (2009) (finding that "a supervisor's mere knowledge of his subordinate's discriminatory purpose . . ." does not make them liable for a constitutional violation).

166. *See* Taylor v. Mich. Dept. of Corr., 69 F.3d 76, 84 (6th Cir. 1995) (finding that a warden could be liable for failure to adopt reasonable policies to ensure that transferees were not placed in grave danger of rape); Redman v. Cty. of San Diego, 942 F.2d 1435, 1446–1447 (9th Cir. 1991) (*en banc*) (noting that sheriff could be liable for incarcerated person's rape where he approved a deficient classification policy and knew of overcrowding at the facility), *abrogated on other grounds by* Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970, 128 L.E. 2d 811 (1994); Williams v. Coughlin, 875 F. Supp. 1004, 1014–1015 (W.D.N.Y. 1995) (finding that the superintendent of a prison could be liable for policy of withholding food from incarcerated people who committed disciplinary infractions if they knew such a policy was in place and failed to take actions to remedy it).

167. *See* Leach v. Shelby Cty. Sheriff, 891 F.2d 1241, 1247–1248 (6th Cir. 1989) (stating that a sheriff may be liable for an unwritten policy of deliberate indifference to incarcerated people's serious medical needs).

168. *See* Buffington v. Balt. Cty., 913 F.2d 113, 122–123 (4th Cir. 1990) (holding that the county was not liable for subordinates' violation of a suicide prevention policy); Vasquez v. Coughlin, 726 F. Supp. 466, 473–474 (S.D.N.Y. 1989) (noting that a supervisor was not liable for a subordinate's violation of incarcerated person's rights where policies existed that were designed to prevent such violations).

(iii) Deficient Management of Subordinates

A supervisor may be liable if a subordinate violates your constitutional rights because of the supervisor's mismanagement of his subordinates. A subordinate is an individual who works under the command of the supervisor. This type of liability can occur when the supervisor:

(1) Knew of a subordinate's past misconduct and failed to take action to fix it;[169] or,
(2) Failed to set up policies that help guide subordinates' conduct to prevent violations of constitutional rights;[170] or,
(3) Failed to inform and train subordinates on policies designed to avoid violations of constitutional rights;[171] or,
(4) Failed to properly supervise subordinates to make sure that they followed policies.[172]

If your complaint alleges that inadequate training caused a violation of your rights (as described in situation (3) above), then you must show that the failure to train staff was so reckless or negligent that bad behavior from the staff was almost guaranteed to happen.[173]

(iv) Deliberate Indifference

For situation (4), the definition of deliberate indifference can vary from one circuit to another. It may also depend on the type of supervisor liability you are claiming. Be sure to look at cases in your circuit to see how your circuit defines "deliberate indifference" for the purposes of supervisor liability. Most courts say that a supervisor acts with "deliberate indifference" when they know or should have known that there is a substantial risk of harms that violate your constitutional rights and they also fail to prevent or remedy those harms.[174]

(c) Municipal or Local Government Liability

A municipality or local government—such as a county, city, or town—can be held liable under Section 1983. You must show that the violation of your constitutional rights was either (1) caused by a policy or custom of the municipality *or* (2) caused by a municipal policymaker's failure to do certain things, like properly train employees. In the first situation, the municipality has "direct liability" for violating your rights. In the second situation, the municipality has "indirect liability" for violating your

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169. *See* Estate of Davis v. Delo, 115 F.3d 1388, 1396 (8th Cir. 1997) (affirming a finding that the superintendent of a prison was liable for a guard's use of excessive force where the superintendent knew of the guard's propensity for excessive force, had received written complaints about the guard, and nonetheless failed to take steps to investigate and correct the problem).

170. *See* Bryant v. McGinnis, 463 F. Supp. 373, 387–388 (W.D.N.Y. 1978) (holding that a commissioner could be liable for failing to create policies for protecting and allowing Muslim religious practices).

171. *See* Gilbert v. Selsky, 867 F. Supp. 159, 166 (S.D.N.Y. 1994) (finding that a Director of Inmate Discipline may be liable for failing to adequately train disciplinary hearing officers who violated incarcerated people' rights by refusing to allow them to call relevant witnesses at a disciplinary hearing).

172. *See* Taylor v. Mich. Dept. of Corr., 69 F.3d 76, 80–82 (6th Cir. 1995) (noting that a warden's failure to ensure that staff properly carried out a transfer policy may create supervisor liability); Allman v. Coughlin, 577 F. Supp. 1440, 1448 (S.D.N.Y. 1984) (finding that a state commissioner could be liable for failing to supervise an emergency response team).

173. McDaniels v. McKinna, No. 03-1231, 96 F. App'x 575, 579, 2004 U.S. App. LEXIS 8262, at *8 (10th Cir. Apr. 27, 2004) (quoting Meade v. Grubbs, 841 F.2d 1512, 1528 (10th Cir. 1988)) (*unpublished*); *see also* Smith v. Hill, 510 F. Supp. 767, 775 (D. Utah 1981) (requiring that the actions of the relatively remote supervisors be grossly negligent before liability attaches).

174. *See* generally Parker v. Landry, 935 F.3d 9, 15 (1st Cir. 2019) (citations omitted) (establishing that in the First Circuit "[a] showing of deliberate indifference has three components: the plaintiff must show (1) that the officials had knowledge of facts, from which (2) the official[s] can draw the inference (3) that a substantial risk of serious harm exists."); *see generally* Morgan v. Dzurenda, 956 F.3d 84, 89 (2d Cir. 2020) (noting that for an 8th Amendment deliberate indifference claim, a prison official must "know[ ] of and disregard[ ] an excessive risk to inmate health or safety … [and] be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.").

rights. The requirements for each type of liability are discussed in detail in Parts C(2)(c)(i) and (ii) of this Chapter below.

There are several benefits to naming a municipality as a defendant. First, you can sue it for both compensatory damages and injunctive relief.[175] But note that you cannot recover punitive damages from a municipality.[176] Second, municipalities, unlike individuals, cannot claim qualified immunity.[177] Third, if you win, the municipality will probably make broad changes in handling situations like yours – possibly helping others in the future.

(i) "Direct" Municipal Liability

In order to hold a municipality directly liable for violating your rights, you must meet the regular requirements for a Section 1983 claim, and you must also show that:

(1) A policy or custom of the municipality caused your rights to be violated;[178] *and*

(2) The policy was created by someone who is a final policymaker for the municipality.[179]

A policy or custom violates your rights if it is "unconstitutional on its face," meaning that the policy or custom itself directly causes your rights to be violated.[180] For example, if a jail guard refuses to get medical help for you when you are injured, the municipality will not be liable for failing to provide medical care. However, the municipality *can* be liable if the jail has a known *policy* of delaying medical help to some or all persons in jails,[181] or if it has unwritten policies (such as a custom or settled practice) that are unconstitutional.[182] A municipality may also be held liable for the actions of policymakers. For example, if a policymaker fires an employee for an unconstitutional reason, the firing may be considered a "policy."[183] A municipality can also be held responsible for a custom or settled practice of

175. *See* Monell v. Dept. of Soc. Servs., 436 U.S. 658, 690, 98 S. Ct. 2018, 2035–2036, 56 L. Ed. 2d 611, 635 (1978) (concluding that local government entities may be sued under Section 1983 for compensatory damages, as well as injunctive and declaratory relief).

176. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271, 101 S. Ct. 2748, 2762, 69 L. Ed. 2d 616, 634–635 (1981) (holding that punitive damages are not available against municipalities in Section 1983 actions for reasons of policy and history).

177. *See* Owen v. City of Independence, 445 U.S. 622, 638, 100 S. Ct. 1398, 1409, 63 L. Ed. 2d 673, 685–686 (1980) (holding that qualified immunity is not available to a municipality). "Qualified immunity" is discussed in further detail in Part C(3)(c) of this Chapter.

178. *See* Oklahoma City v. Tuttle, 471 U.S. 808, 822–823, 105 S. Ct. 2427, 2436, 85 L. Ed. 2d 791, 803–804 (1985) (requiring a showing of an actual connection between the policy or custom and the violation for a finding of municipal liability).

179. *See* Pembaur v. Cincinnati, 475 U.S. 469, 481–483, 106 S. Ct. 1292, 1299–1300, 89 L. Ed. 2d 452, 464–465 (1986) (noting that municipalities can only be held liable under *Section* 1983 for policies made by officials who had final authority to make the challenged policy).

180. *See* Monell v. Dept. of Soc. Servs., 436 U.S. 658, 694–695, 98 S. Ct. 2018, 2037–2038, 56 L. Ed. 2d 611, 638 (1978) (holding that a municipality can be held liable when an unconstitutional official policy is the "moving force" behind a violation).

181. *See* Gibson v. Cty. of Washoe, 290 F.3d 1175, 1189 (9th Cir. 2002) (finding that a municipal policy of delaying medical care to incarcerated people who are "combative, uncooperative or unable to effectively answer questions due to intoxication" may create municipal liability for deliberate indifference to serious medical needs of incarcerated people) (internal quotation marks omitted).

182. *See* Bd. of Comm'rs v. Brown, 520 U.S. 397, 404, 117 S. Ct. 1382, 1388, 137 L. Ed. 2d 626, 639 (1997) (observing that a policy or custom need not be formal or written so long as a plaintiff can demonstrate that the alleged unwritten policy or custom is "so widespread as to have the force of law"); Paige v. Coyner, 614 F.3d 273, 284 (6th Cir. 2010) ("[A] policy or custom does not have to be written law; it can be created 'by those whose edicts or acts may fairly be said to represent official policy.'" (quoting Monell v. Dept. of Social Servs., 436 U.S. 658, 694, 98 S. Ct. 2018, 2037–2038, 56 L. Ed. 2d 611, 638 (1978))).

183. *See* Hall v. Marion Sch. Dist. No. 2, 31 F.3d 183, 196 (4th Cir. 1994) (holding that a school board that had final authority to make firing decisions could be liable for the unconstitutional firing of teacher); Bowles v. City of Camden, 993 F. Supp. 255, 268–269 (D.N.J. 1998) (allowing plaintiff to go forward with his claim against city and mayor for unconstitutional firing). eHowever, the municipality must, in some way, have *deliberately* caused the injury. *See* Pembaur v. Cincinnati, 475 U.S. 469, 483, 106 S. Ct. 1292, 1300, 89 L. Ed. 2d 452, 465

the municipality that is unconstitutional.[184] In all of these situations, you must be able to show a clear link between the existence of the policy or custom and the constitutional violation.[185]

Under the second requirement for "direct" municipal liability, the person who created the policy must be someone who has final authority to make that particular policy for the municipality.[186] A court will look at the law in your state to see if your state gives that individual the authority to make policy.[187]

If you are claiming that a municipal custom (rather than an official policy) caused a violation of your rights, you generally must show that the custom was so widespread that policymakers knew about it or should have known about it.[188] In other words, you will be arguing that, because the custom was so widespread, policymakers must have approved of it.[189]

(ii) "Indirect" Municipal Liability

There are two "indirect" ways that a municipality can be held responsible when its employees violate your rights. The first involves bad training. A municipality may be liable when its failure to adequately train, supervise, or discipline its employees results in an employee violating your rights.[190] The second involves bad hiring. A municipality may be liable for failing to adequately screen (look at the background of) an employee during hiring if that employee later violates your rights. For both of these, you will need to show that an employee of the municipality violated your constitutional rights and that the municipality showed "deliberate indifference" to your constitutional rights. To prove

(1986) ("municipal liability under § 1983 attaches where – and only where – a deliberate choice to follow a course of action is made from among various alternatives").

184. *See* Monell v. Dept. of Social Servs., 436 U.S. 658, 690–691, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611, 635 (1978) (finding a municipality may be liable for a custom that causes a violation of rights where a plaintiff can demonstrate that the custom is so "'persistent and widespread'" that it constitutes a "'permanent and well settled'" city policy (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 167–168, 90 S. Ct. 1598, 1613–1614, 26 L. Ed. 2d 142, 159–160 (1970))).

185. *See* Bd. of Comm'rs v. Brown, 520 U.S. 397, 404, 117 S. Ct. 1382, 1388, 137 L. Ed. 2d 626, 639 (1997) ("[I]t is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. . .[A] plaintiff must show that the municipal action was taken with the requisite degree of culpability and. . . [is] a direct causal link between the municipal action and the deprivation of federal rights."). This is a high standard to meet, and you may have to prove that the municipality's legislative body or authorized decision maker intentionally deprived you of a federally protected right or that the action itself violated federal law. *See* Oklahoma City v. Tuttle, 471 U.S. 808, 823, 105 S. Ct. 2427, 2436, 85 L. Ed. 2d 791, 804 (1985) (finding that municipal liability requires a showing of an actual connection between the policy or custom and the constitutional violation).

186. *See* St. Louis v. Praprotnik, 485 U.S. 112, 123, 108 S. Ct. 915, 924, 99 L. Ed. 2d 107, 118 (1988) ("[O]nly those municipal officials who have 'final policymaking authority' may by their actions subject the government to § 1983 liability." (quoting Pembaur v. Cincinnati, 475 U.S. 469, 483, 106 S. Ct. 1292, 1300, 89 L. Ed. 2d 452, 465 (1986))).

187. *See* McMillian v. Monroe Cty., 520 U.S. 781, 786, 117 S. Ct. 1734, 1737, 138 L. Ed. 2d 1, 8 (1997) (finding that state law determines whether an individual is an authorized policymaker for a municipality).

188. Trevino v. Gates, 99 F.3d 911, 918 (9th Cir. 1996) ("Absent a formal governmental policy, [the plaintiff] must show a 'longstanding practice or custom which constitutes the standard operating procedure of the local government entity.'" (quoting Gillette v. Delmore, 979 F.2d 1342, 1346 (9th Cir. 1992)).

189. *See, e.g.*, Pineda v. City of Houston, 291 F.3d 325, 328 (5th Cir. 2002) (holding that in order for a municipality to be liable for a widespread custom, the municipality or a municipal policymaker must have "actual or constructive knowledge" of the custom); Sorlucco v. N.Y.C. Police Dept., 971 F.2d 864, 871 (2d Cir. 1992) (concluding a plaintiff may establish a municipality's liability by showing that the actions of subordinate officers are sufficiently widespread to amount to "constructive acquiescence," or implied approval, by senior policymakers).

190. *See* City of Canton v. Harris, 489 U.S. 378, 388, 109 S. Ct. 1197, 1204, 103 L. Ed. 2d 412, 426 (1989) (holding that a city could be liable under § 1983 for failure to train its employees, but only if that failure "amount[ed] to deliberate indifference to the rights of persons with whom the [employees] come into contact").

"deliberate indifference" here, you must show that the municipal policymakers knew that their actions were likely to cause someone's rights to be violated in a particular way.[191]

(iii) Failure to Train, Supervise, or Discipline

Some types of training are so obviously necessary that a municipality can be held liable for not providing such training. For example, failing to train armed jail guards about when they may use deadly force would likely be illegal. That training failure would create an obvious risk that an incarcerated person's rights will be violated and can amount to "deliberate indifference."[192]

In other situations, existing trainings might not be enough. For example, there may be a pattern of repeated unconstitutional behavior by municipal employees. At some point, this pattern makes it obvious that better training, supervision, or discipline is needed.[193] A municipality may be held liable for failing to adequately address these obvious needs.[194] In all cases, you must be able to show that the inadequate training polices were the direct cause of, or the "moving force" behind, your injuries.[195] Importantly, just because the training is imperfect or not done exactly how you would prefer is not enough to establish municipal liability.[196] Also, it is not enough to claim that only one officer (perhaps

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191. *See* Castro v. Cty. of L.A., 833 F.3d 1060, 1076 (9th Cir. 2016) (finding that "deliberate indifference" is an objective standard, and noting that even in cases that do not involve pre-trial detainees, this objective standard applies.); Gibson v. County of Washoe, 290 F.3d 1175, 1186 (9th Cir. 2002) ("[T]he plaintiff must show that the municipality was on actual or constructive notice that its omission would likely result in a constitutional violation."); Brown v. Muhlenberg Twp., 269 F.3d 205, 216 (3d Cir. 2001) ("To survive summary judgment on a failure to train theory, the [plaintiffs] must present evidence that the need for more or different training was so obvious and so likely to lead to the violation of constitutional rights that the policymaker's failure to respond amounts to deliberate indifference.").

192. *See* City of Canton v. Harris, 489 U.S. 378, 390, 109 S. Ct. 1197, 1205, 103 L. Ed. 2d 412, 427 (1989) ("[I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.").

193. *See* Bd. of the Cty. Comm'rs v. Brown, 520 U.S. 397, 407, 117 S. Ct. 1382, 1390, 137 L. Ed. 2d 626, 641 (1997) ("If a [training] program does not prevent constitutional violations, municipal decisionmakers may eventually be put on notice that a new program is called for. Their continued adherence to [an insufficient training program] may establish the. . .'deliberate indifference' . . . necessary to trigger municipal liability."); City of Canton v. Harris, 489 U.S. 378, 397, 109 S. Ct. 1197, 1209, 103 L. Ed. 2d 412, 432 (1989) (O'Connor, J., concurring in part and dissenting in part) ("[M]unicipal liability for failure to train may be proper where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion. In such cases, the need for training may not be obvious from the outset, but a pattern of constitutional violations could put the municipality on notice that its officers confront the particular situation on a regular basis, and that they often react in a manner contrary to constitutional requirements.").

194. *See, e.g.*, Young v. City of Providence, 404 F.3d 4, 27–28 (1st Cir. 2005) (concluding that municipal liability could be established where a city failed to train police officers to avoid misidentifications of off-duty police officers because problems with misidentifications had occurred in the past and a failure to train officers in the area posed an "obvious risk"); Olsen v. Layton Hills Mall, 312 F.3d 1304, 1320 (10th Cir. 2002) (holding that a jury must decide whether a county's failure to train its officers to recognize detainees' symptoms of Obsessive Compulsive Disorder—which the court noted is a fairly common disease—amounts to deliberate indifference); Davis v. Lynbrook Police Dept., 224 F. Supp. 2d 463, 479 (E.D.N.Y. 2002) (finding that six reports and complaints alleging potential unconstitutional conduct of a police officer could "demonstrate [to a jury] an 'obvious need for more or better supervision to protect against constitutional violations'") (quoting Vann v. City of New York, 72 F.3d 1040, 1049 (2d Cir. 1995)); Perrin v. Gentner, 177 F. Supp. 2d 1115, 1125 (D. Nev. 2001) (finding that evidence of a municipality's failure to adequately train police officers and discipline them for use of excessive force could support an inadequate training and supervision claim).

195. *See* City of Canton v. Harris, 489 U.S. 378, 389, 109 S. Ct. 1197, 1204 –1205, 103 L. Ed. 2d 412, 427 (1989) (noting that the deliberate indifference standard "is most consistent with our admonition in Monell. . .that a municipality can be liable under § 1983 only where its policies are the 'moving force [behind] the constitutional violation'") (quoting Monell v. Dept. of Soc. Servs., 436 U.S. 658, 694, 98 S. Ct. 2018, 2038, 56 L. Ed. 2d 611, 638 (1978)).

196. *See* City of Canton v. Harris, 489 U.S. 378, 391, 109 S. Ct. 1197, 1206, 103 L. Ed. 2d 412, 428 (1989) (observing that imperfect training cannot itself be the basis for § 1983 liability); Grazier *ex. rel.* White v. City of

the one who violated your rights) was inadequately trained. Rather, you must claim that the training program as a whole is inadequate.[197]

(iv) Inadequate Screening

You can also make an inadequate screening claim. Here, you are claiming that the municipality knew or should have known that it was *highly likely* that the individual it hired would violate your rights.[198] For example, imagine that a jail hired a guard who was fired from a previous job for assaulting persons confined in the jail. If that guard then assaulted you, you could claim that the municipality was responsible because it should have known that there was a high risk that this guard would assault someone.[199]

In order to win on an inadequate screening claim, you must show that the decision to hire the individual who violated your rights shows "deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the [hiring] decision."[200] It is not enough to show that the city or town hired someone who committed bad acts in the past.[201] Instead, you must show that an adequate look at the job applicant's background would cause an objectively "reasonable policymaker" to conclude that it was "plainly obvious" that hiring that person would result in a violation of someone's federal rights.[202] You must also show that it was highly likely—not simply possible or probable—that the particular harm you suffered would be the result of hiring the person.[203]

Philadelphia, 328 F.3d 120, 125 (3d Cir. 2003) (noting that the scope of failure to train liability is narrow, and it is likely not sufficient for plaintiffs to "merely allege that a different training program than the one in place would have been more effective").

197. Palmquist v. Selvik, 111 F.3d 1332, 1345 (7th Cir. 1997) (finding that where a town gave police officers some training on handling suspects exhibiting abnormal behavior, the argument that even more training should have been given was unpersuasive, given that "[i]n determining the adequacy of training, the focus must be on the program, not whether particular officers were adequately trained").

198. *See* Bd. of the Cty. Comm'rs v. Brown, 520 U.S. 397, 412, 117 S. Ct. 1382, 1392, 137 L. Ed. 2d 626, 644 (1997) ("[A] finding of culpability simply cannot depend on the mere probability that any officer inadequately screened will inflict any constitutional injury. Rather, it must depend on a finding that [the particular] officer was highly likely to inflict the *particular* injury suffered by the plaintiff.").

199. *See* Romero v. City of Clanton, 220 F. Supp. 2d 1313, 1318 (M.D. Ala. 2002) (finding plaintiff had validly alleged an inadequate screening claim against a city that hired a police officer who allegedly had a prior history of sexual misconduct and who later attempted to sodomize the plaintiff). Please note that when evaluating the plaintiff's inadequate screening claim against the city, the court let the complaint proceed because it also saw the inadequate screening as a failure to train on the part of the city.

200. Bd. of the Cty. Comm'rs v. Brown, 520 U.S. 397, 411, 117 S. Ct. 1382, 1392, 137 L. Ed. 2d 626, 644 (1997) (holding that a plaintiff must show that the decision to hire reflects deliberate indifference to the risk that the particular violation that occurred would follow the decision).

201. *See* Snyder v. Trepagnier, 142 F.3d 791, 797 (5th Cir. 1998) (holding that evidence that an officer had committed two nonviolent offenses in the past was not enough to hold the municipality liable, on an inadequate screening claim, for that officer having shot the plaintiff in the back); Waterman v. City of New York, No. 96 Civ. 1471 (AGS), 1998 U.S. Dist. LEXIS 17087, at *9–10 (S.D.N.Y Oct. 26, 1998) (*unpublished*) (concluding that a plaintiff could not prevail on an inadequate screening claim where an off-duty officer caused plaintiff to suffer cuts, bruises, and a laceration to the head because plaintiff only offered evidence that the officer had been arrested once for assault).

202. Bd. of the Cty. Comm'rs v. Brown, 520 U.S. 397, 411, 117 S. Ct. 1382, 1392, 137 L. Ed. 2d 626, 644 (1997) (finding that in order to hold a municipality liable for a hiring decision, a plaintiff must show that "adequate scrutiny of an applicant's background would lead a reasonably policymaker to conclude" that the violation is a "plainly obvious consequence" of the decision to hire); *see also* Lawson v. Dallas County, 286 F.3d 257, 264 (5th Cir. 2002) ("Unlike the deliberate indifference standard applied to individual employees, this standard [for municipal deliberate indifference] is an objective one; it considers not only what the policymaker actually knew, but what he should have known, given the facts and circumstances surrounding the official policy and its impact on the plaintiff's rights.")

203. Bd. of the Cty. Comm'rs v. Brown, 520 U.S. 397, 412, 117 S. Ct. 1382, 1392, 137 L. Ed. 2d 626, 644 (1997) ("[A] finding of culpability simply cannot depend on the mere probability that any officer inadequately screened will inflict any constitutional injury. Rather, it must depend on a finding that [the particular] officer was

In other words, the violation of your rights must have a strong link to the bad acts that the supervisor knew or should have known that the employee committed in the past, and it must have been highly likely that the employee would repeat those bad acts.[204]

Making a successful claim for inadequate screening during hiring is very difficult. A court will demand a very close connection between the information available to the person making the hiring decision and the violation that took place. These claims are not likely to succeed unless the person who violated your rights engaged in similar behavior before he was hired, and the supervisor knew or should have known about it.

3. Defenses That May Be Raised Against Your Claim

There are several ways that the people you are suing might be able to defend themselves against your Section 1983 lawsuit. For example, the defendants might claim that the facts in your complaint are false, or that your legal arguments are incorrect. You will not know how the defendants will choose to defend themselves until after you file your complaint. You do not need to respond to their defenses until after you receive either an answer or a motion to dismiss from the defendants.[205] However, your lawsuit is more likely to succeed if you can write your complaint in a way that avoids some of the defenses that you think they might use.

The rest of this Part will explain some of the defenses that are most likely to come up in a Section 1983 lawsuit. Most of the following sections focus on the different kinds of immunities that are almost always an issue in Section 1983 suits. Immunities are rules that protect certain individuals or agencies from liability for their actions even when they may have done something wrong.

(a) Eleventh Amendment Immunity

In general, the Eleventh Amendment to the U.S. Constitution protects states and their agencies from being sued in federal court.[206] This means that you cannot name the state itself as a defendant in your Section 1983 suit.[207] You also cannot name the Department of Corrections or any other state government agency as a defendant.[208] Eleventh Amendment immunity is also known as "sovereign immunity."

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highly likely to inflict the *particular* injury suffered by the plaintiff.").

204. *See* Bd. of the Cty. Comm'rs v. Brown, 520 U.S. 397, 412, 117 S. Ct. 1382, 1392, 137 L. Ed. 2d 626, 644 (1997) (holding that municipal liability for inadequate screening requires a strong connection between the job applicant's background and the specific harm he inflicted).

205. *See* Part C(9) of this Chapter, "What to Expect After Your Legal Papers Have Been Filed in Court," for an explanation of an "answer" and a "motion to dismiss."

206. Note, however, that these rules do not apply to claims brought under the Rehabilitation Act of 1973, 29 U.S.C. § 794, or some claims brought under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101–12213. *See* United States v. Georgia, 546 U.S. 151, 154, 159, 126 S. Ct. 877, 879, 882, 163 L. Ed. 2d 650, 656, 659 (2006) (holding that individuals may sue states under the ADA, which incorporates by reference the Rehabilitation Act of 1973, where the conduct alleged to violate the ADA also violates the Constitution). For more information on the rights of prisoners with disabilities, see Chapter 28 of the *JLM*, "Rights of Prisoners with Disabilities." In addition, some states may allow you to sue the state or its agencies under certain state laws.

207. Alabama v. Pugh, 438 U.S. 781, 782, 98 S. Ct. 3057, 3057, 57 L. Ed. 2d 1114, 1116 (1978) ("[S]uit [alleging 8th Amendment violations in state prisons] against the State. . . is barred by the [11th] Amendment, unless [the State] has consented to the filing of such a suit."); Will v. Mich. Dept. of State Police, 491 U.S. 58, 65–66, 109 S. Ct. 2304, 2310, 105 L. Ed. 2d 45, 55 (1989) (holding that a State is not liable to § 1983 suits that result in damages and noting that Congress did not intend for § 1983 to create an exception to the 11th Amendment). But you should note that a state does not automatically receive this immunity. The state still must affirmatively raise an 11th Amendment immunity defense; if they do not, they may waive the ability to raise the defense. Wis. Dept. of Corr. v. Schacht, 524 U.S. 381, 389, 118 S. Ct. 2047, 2052–2053, 141 L. Ed. 2d 364, 372 (1998) ("The [11th] Amendment, however, does not automatically destroy original jurisdiction. Rather, the [11th] Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it.") (internal citations omitted).

208. Alabama v. Pugh, 438 U.S. 781, 782, 98 S. Ct. 3057, 3057, 57 L. Ed. 2d 1114, 1116 (1978) ("[S]uit

This same Eleventh Amendment immunity rule prevents you from suing a state official in his "official capacity" in federal court *for money damages*.[209] This is considered the same thing as suing the state.[210] However, this immunity does not apply to suits for *injunctive* or *declaratory*[211] relief against state officials sued in their official capacity. In other words, although you cannot sue the state itself for an injunction, you can sue a state official in his official capacity for an injunction.[212] Fortunately for you, suing a state official in his official capacity for an injunction has the same effect as suing the state or a state agency for an injunction. When you sue state officials for injunctive relief, remember to sue them in their official capacity.[213]

Eleventh Amendment immunity does not apply to suits for money damages against state officials sued in their *individual* capacities.[214] If you are seeking money damages and are suing state officials, you must sue them as an individual, and not in their official job capacity.

Eleventh Amendment immunity does not apply to any suits against county and city officials.[215] It should be noted, however, that state and county officials may claim one of the personal immunities discussed below. You should read the following Parts carefully so that you will be able to argue why the defendants in your suit are not immune from being sued.

(b) Absolute Immunity of Individuals

Certain types of individuals are absolutely (completely) immune from suit for all actions taken within the scope of their official duties. If an official is absolutely immune it means that he cannot be

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against the State and its Board of Corrections is barred by the [11th] Amendment. . . ."); *see also* Hale v. Arizona, 993 F.2d 1387, 1399 (9th Cir. 1993) (finding that a governmental agency in charge of the prison industry is "an arm of the state" and therefore protected by 11th Amendment immunity); Alden v. Maine, 527 U.S. 706, 747, 119 S. Ct. 2240, 2265, 44 L. Ed. 2d 636, 677 (1999) (asserting that private suits against states who do not waive their sovereign immunity must be rejected given that states' sovereign immunity derives from the history of the Constitution and not just the Eleventh Amendment therefore such immunity cannot be revoked by Congress).

209. Arizonans for Official English v. Arizona, 520 U.S. 43, 69 n.24, 117 S. Ct. 1055, 1070 n.24, 137 L. Ed. 2d 170, 194 n.24 (1997) ("State officers in their ***official capacities,*** like States themselves, are not amenable to suit for ***damages*** under § 1983.") (emphasis added).

210. Kentucky v. Graham, 473 U.S. 159, 169, 105 S. Ct. 3099, 3107, 87 L. Ed. 2d 114, 123–124 (1985) (noting that official capacity suits for money damages have the same effect as suing the state for money damages, and therefore both types of suits are barred).

211. Injunctive relief is an order by a court that the defendant must stop or correct the practices the plaintiff is challenging. *Injunction,* BLACK'S LAW DICTIONARY (11th ed. 2019). Declaratory relief is a decision by a court that settles the rights or legal relations of the parties for the issue raised by the plaintiff. *Declaratory Judgment,* BLACK'S LAW DICTIONARY (11th ed. 2019).

212. Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 645, 122 S. Ct. 1753, 1760, 152 L. Ed. 2d 871, 882 (2002) (allowing a plaintiff to seek injunctive relief against state commissioners sued in their official capacities); Kentucky v. Graham, 473 U.S. 159, 167 n.14, 105 S. Ct. 3099, 3106 n.14, 87 L. Ed. 2d 114, 122 n.14 (1985) ("[O]fficial-capacity actions for prospective [injunctive] relief are not treated as actions against the State.").

213. Suits for injunctive relief against state officials in their official capacities are said to fall within the "*Ex parte Young* doctrine." In *Ex parte Young*, the Supreme Court said that state officials can be sued in their official capacities for an injunction in federal court, even though the state itself cannot be sued. *Ex parte Young*, 209 U.S. 123, 155–156, 28 S. Ct. 441, 452, 52 L. Ed. 714 (1908).

214. *See* Hafer v. Melo, 502 U.S. 21, 30–31, 112 S. Ct. 358, 364–365, 116 L. Ed. 2d 301, 313 (1991) (holding that state officials, when sued in their individual capacities, are "persons" within the meaning of § 1983 and therefore are not immune under the 11th Amendment). Some states will actually pay any damages awarded against state officials sued in their individual capacities because of state "indemnification" laws. Even though the state will be paying damages, an indemnification law does not turn your lawsuit into a suit against the state that would be barred by the 11th Amendment. Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 317 n.10, 110 S. Ct. 1868, 1879 n.10, 109 L. Ed. 2d 264, 279 n.10 (1990) ("Lower courts have uniformly held that States may not cloak their officers with a personal [11th] Amendment defense by promising, by statute, to indemnify them for damage awards imposed on them for actions taken in the course of their employment.").

215. Monell v. Dept. of Soc. Servs., 436 U.S. 658, 690 n.54, 98 S. Ct. 2018, 2035 n.54, 56 L. Ed. 2d 611, 635 n.54 (1978) (noting that the 11th Amendment does not prevent suits against local governments).

sued for money damages and sometimes cannot be sued for injunctive relief either. Legislators,[216] prosecutors,[217] witnesses,[218] and judges (including certain administrative judges)[219] are usually completely immune from liability for money damages under Section 1983 as long as they were acting within the scope of their official duties. You should be aware of these immunities when deciding whom to name as defendants in your lawsuit.

You usually will not be able to sue any of these individuals for violating your constitutional rights if their actions were within the scope of their official responsibilities. To figure out whether an action falls within the scope of an official's duties, courts look at the nature of the individual's responsibilities and not just the individual's title. For example, many officials with state or federal legislative responsibilities will be completely immune from suit even if they are not named legislators.[220]

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216. *See* Bogan v. Scott-Harris, 523 U.S. 44, 49, 118 S. Ct. 966, 970, 140 L. Ed. 2d 79, 85 (1998) ("[S]tate and regional legislators are entitled to absolute immunity from liability under § 1983 for their legislative activities . . . Congress did not intend the general language of § 1983 to 'impinge on [this immunity].'" (citations omitted) (quoting Tenney v. Brandhove, 341 U.S. 367, 376, 71 S. Ct. 783, 788, 95 L. Ed. 1019, 1027 (1951))); Tenney v. Brandhove, 341 U.S. 367, 372, 71 S. Ct. 783, 786, 95 L. Ed. 1019, 1024–1025 (1951) (extending absolute legislative immunity to protect state legislators); Kilbourn v. Thompson, 103 U.S. 168, 202–204, 26 L. Ed. 377, 391–392 (1880) (interpreting the Speech and Debate Clause, U.S. Const. art. I, § 6, to provide absolute immunity to federal legislators when they perform activities typical of legislative sessions or activities related to House business).

217. *See* Burns v. Reed, 500 U.S. 478, 492, 111 S. Ct. 1934, 1942, 114 L. Ed. 2d 547, 562 (1991) (holding that a prosecutor's appearance in court in order to support an application for a search warrant and present evidence were protected by absolute immunity in a civil rights action brought by arrestee); Imbler v. Pachtman, 424 U.S. 409, 430–431, 96 S. Ct. 984, 995, 47 L. Ed. 2d 128, 143–144 (1976) (holding that a prosecutor was absolutely immune from suit even though he knowingly used perjured testimony, deliberately withheld exculpatory information, and failed to make full disclosure of all facts casting doubt upon the state's testimony). However, you should note that prosecutors may not have immunity for their conduct when they act as "administrator[s] or investigative officer[s]." Imbler v. Pachtman, 424 U.S. 409, 430–431, 96 S. Ct. 984, 995, 47 L. Ed. 2d 128, 143–144 (1976). The key factor is whether the prosecutor's actions were "closely associated with the judicial process." Burns v. Reed, 500 U.S. 478, 495–496, 111 S. Ct. 1934, 1944–1945, 114 L. Ed. 2d 547, 564–565 (1991) (denying absolute immunity to a prosecutor for giving legal advice to police). Prosecutorial immunity is also limited to immunity from being sued for money damages. Prosecutors do not have immunity from being sued for injunctive relief. If a prosecutor violates your rights while acting within the scope of his official duties, you can sue him for injunctive relief. *See* Supreme Court of Va. v. Consumers Union of the U.S., Inc., 446 U.S. 719, 736, 100 S. Ct. 1967, 1977, 64 L. Ed. 2d 641, 656 (1980) (noting that prosecutors, though shielded by absolute immunity for damages liability, may be subject to § 1983 suits for injunctive relief).

218. *See* Briscoe v. LaHue, 460 U.S. 325, 345–346, 103 S. Ct. 1108, 1121, 75 L. Ed. 2d 96, 114 (1983) (holding that a police officer, when testifying in court, is acting as a witness and is therefore entitled to absolute immunity).

219. Before 1996, the Supreme Court had held that judicial immunity did not prohibit declaratory and injunctive relief against a judicial officer acting in his judicial capacity. *See* Pulliam v. Allen, 466 U.S. 522, 541–542, 104 S. Ct. 1970, 1981, 80 L. Ed. 2d 565, 579 (1984) (allowing an injunction against a state judge's practice of incarcerating persons awaiting trial for non-incarcerable offenses and stating that "judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity"). However, in 1996, Congress amended Section 1983 by enacting Section 309(c) of the Federal Courts Improvement Act of 1996, which provided that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." Pub. L. No. 104-317, § 309(c), 110 Stat. 3847, 3853 (1996) (codified at 42 U.S.C. § 1983 (2018)). The Senate report indicates that the amendment "restores the doctrine of judicial immunity to the status it occupied prior to [*Pulliam*]" because *Pulliam* had departed from "400 years of common law tradition and weakened judicial immunity protections." S. Rep. No. 104-366, at 36 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4202, 4216. Currently, therefore, judicial immunity prohibits injunctive relief from being granted against a judge acting in his official capacity, unless that judge violated a declaratory decree or declaratory relief is unavailable. While this amendment does not grant judges absolute immunity, it makes securing injunctive relief against a judicial officer extremely difficult.

220. *See* Supreme Court of Va. v. Consumers Union of the U.S., Inc., 446 U.S. 719, 734, 100 S. Ct. 1967, 1976, 64 L. Ed. 2d 641, 655 (1980) (holding that defendant judges were absolutely immune from suit challenging the state bar disciplinary rules at issue because they acted in a legislative capacity when they created those rules); *see also* Bogan v. Scott-Harris, 523 U.S. 44, 55, 118 S. Ct. 966, 973, 140 L. Ed. 2d 79, 89 (1998) (explaining that "[w]e have recognized that officials outside the legislative branch are entitled to legislative immunity when they

Similarly, officials who perform judicial functions within administrative agencies may be completely immune even though they are not technically judges.[221] According to the Supreme Court, prison officials on a prison disciplinary committee are not performing judicial functions.[222] This means that they are not completely immune from liability for violating your rights.

Keep in mind that no official is absolutely immune from being sued for money damages for actions *outside* the scope of his official duties. As described above, you must look at the nature of the official's actions, not just his title, to determine whether his actions are covered by absolute immunity. For example, a prosecutor is absolutely immune from suit only for actions taken within "the scope of his prosecutorial duties."[223] Therefore, he has absolute immunity for actions related to starting and presenting the government's case against you. He does not, however, have absolute immunity for investigative or other actions that did not relate to his role as prosecutor.[224] In *Buckley v. Fitzsimmons*, the Supreme Court held that a prosecutor did not have absolute immunity for making allegedly false statements to the media about the defendant because giving statements to the press was outside his role as a prosecutor.[225] Absolute immunity also does not cover a prosecutor's investigative actions to establish probable cause to arrest a defendant because this work could be done by police officers or detectives, so it does not relate to his role of preparing for trial.[226] On the other hand, interviewing witnesses and evaluating evidence to prepare for trial are within the prosecutor's role, so they are always covered by absolute immunity.[227]

Judges (including certain administrative judges)[228] do not have absolute immunity from damages when they take actions that are not judicial in nature.[229] They also do not have absolute immunity

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perform legislative functions"); Lake Country Estates v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 405, 99 S. Ct. 1171, 1179, 59 L. Ed. 2d 401, 412–413 (1979) (holding that regional officials are entitled to absolute immunity where they were officially acting in a capacity comparable to that of state legislators); Baraka v. McGreevey, 481 F.3d 187, 195–197 (3d Cir. 2007) (finding a governor and committee chair protected by legislative immunity for advocating and signing a law abolishing position of state poet laureate).

221. *See* Butz v. Economou, 438 U.S. 478, 512–513, 98 S. Ct. 2894, 2914, 57 L. Ed. 2d 895, 920 (1978) (granting administrative judges of the Department of Agriculture absolute individual immunity for damages from wrongful initiation of administrative proceedings).

222. *See* Cleavinger v. Saxner, 474 U.S. 193, 206, 106 S. Ct. 496, 503, 88 L. Ed. 2d 507, 517–518 (1985) (declaring that prison officials on prison disciplinary committees have qualified immunity instead of absolute immunity).

223. Imbler v. Pachtman, 424 U.S. 409, 420–424, 96 S. Ct. 984, 990–992, 47 L. Ed. 2d 128, 137–140 (1976) ("[A] prosecutor enjoys absolute immunity from § 1983 suits for damages when he acts within the scope of his prosecutorial duties.").

224. *See* Zahrey v. Coffey, 221 F.3d 342, 346 (2d Cir. 2000) ("The nature of a prosecutor's immunity depends on the capacity in which the prosecutor acts at the time of the alleged misconduct. Actions taken as an advocate enjoy absolute immunity, while actions taken as an investigator enjoy only qualified immunity. This immunity law applies to *Bivens* actions as well as actions under section 1983.") (citations omitted).

225. Buckley v. Fitzsimmons, 509 U.S. 259, 277–278, 113 S. Ct. 2606, 2617–2618, 125 L. Ed. 2d 209, 228–229 (1993) (holding prosecutor's prejudicial out-of-court statements to the press were not within the scope of his duties and therefore not entitled to absolute immunity); *see also* Burns v. Reed, 500 U.S. 478, 496, 111 S. Ct. 1934, 1944–1945, 114 L. Ed. 2d 547, 565 (1991) (denying absolute immunity to a prosecutor for giving legal advice to police).

226. *See* Buckley v. Fitzsimmons, 509 U.S. 259, 273–274, 113 S. Ct. 2606, 2616, 125 L. Ed. 2d 209, 226 (1993) (holding that "[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer," he is not entitled to absolute immunity); Zahrey v. Coffey, 221 F.3d 342, 346–347 (2d Cir. 2000) (noting that a prosecutor accused of fabricating false evidence was entitled at most to a qualified immunity defense because the alleged misconduct occurred while he was acting in an investigative capacity).

227. *See* Imbler v. Pachtman, 424 U.S. 409, 430–431, 96 S. Ct. 984, 995, 47 L. Ed. 2d 128, 144 (1976) (holding a prosecutor absolutely immune for all actions performed "in initiating a prosecution and in presenting the State's case").

228. Butz v. Economou, 438 U.S. 478, 514, 98 S. Ct. 2894, 2915, 57 L. Ed. 2d 895, 920–921 (1978) ("We therefore hold that persons subject to these [administrative law] restraints and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts").

229. *See* Forrester v. White, 484 U.S. 219, 228–229, 108 S. Ct. 538, 545, 98 L. Ed. 2d 555, 566 (1988)

when they act with a "complete absence of all jurisdiction."[230] Judges act with the complete absence of jurisdiction when they make a ruling in cases that they have no authority to hear in the first place. For example, family court judges do not have authority to try felony cases. If they did hear such cases, they would be acting without jurisdiction and would not have immunity.[231] In contrast, if you think that a judge had the power to hear your case, but made a mistake that harmed you, you cannot sue the judge for money damages. Instead, you should try to appeal the judge's ruling.

(c) Qualified Immunity of Individuals

Officials who are sued in their individual capacity and who are not completely immune from suit may still have a limited form of immunity, known as "qualified immunity." State, city, and county officials at all levels may claim some type of qualified immunity.[232] However, private parties (people who are not government officials) who rely on state law or who act under color of state law usually cannot claim qualified immunity.[233]

Officials with "qualified immunity" will only have to pay money damages if "their conduct . . . violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known."[234] To claim qualified immunity, the official has to show either that it was objectively

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(holding that because "it [is] the nature of function performed, not the identity of the actor who performed it, that inform[s] our immunity analysis," a judge who fired an employee because of her sex was not absolutely immune from suit); *see also* Leclerc v. Webb, 270 F. Supp. 2d 779, 793 (E.D. La. 2003) ("The Court is persuaded that the [Federal Courts Improvement Act of 1996] does not bar injunctive relief where a judicial officer acts in other capacities such as the enforcement capacity.").

230. *See* Mireles v. Waco, 502 U.S. 9, 11–12, 112 S. Ct. 286, 287–288, 116 L. Ed. 2d 9, 14 (1991) (*per curiam*) ("[Judicial] immunity is overcome in only two sets of circumstances. First, a judge is not immune from liability for nonjudicial actions, *i.e.*, actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." (citations omitted)); Bradley v. Fisher, 80 U.S. 335, 351–352, 20 L. Ed. 646, 651 (1872) (noting that a judge does not have complete immunity when he acts in a situation where he knows that he has absolutely no jurisdiction over the subject matter of the lawsuit).

231. Stump v. Sparkman, 435 U.S. 349, 357 n.7, 98 S. Ct. 1099, 1105 n.7, 55 L. Ed. 2d 331, 339 n.7 (1978) (noting the difference between an act in excess of jurisdiction and one in the absence of jurisdiction: "[I]f a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune.").

232. *See* Procunier v. Navarette, 434 U.S. 555, 561–562, 98 S. Ct. 855, 859–860, 55 L. Ed. 2d 24, 30–31 (1978) (noting that the scope of qualified immunity varies depending on the "scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the [official's] action"), *overruled in part on other grounds by* Harlow v. Fitzgerald, 457 U.S. 800, 817, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982).

233. *See* Wyatt v. Cole, 504 U.S. 158, 168–169, 112 S. Ct. 1827, 1833–1834, 118 L. Ed. 2d 504, 515 (1992) (concluding that the rationales mandating qualified immunity for public officials are not applicable to private parties); Richardson v. McKnight, 521 U.S. 399, 412, 117 S. Ct. 2100, 2107, 138 L. Ed. 2d 540, 552 (1997) (holding that prison guards at a privatized prison, unlike prison guards who are employed by the government, were not entitled to qualified immunity where state law "reserves certain important discretionary tasks—those related to prison discipline, to parole, and to good time—for state officials"). *But see* Eagon *ex rel.* Eagon v. City of Elk City, 72 F.3d 1480, 1489–1490 (10th Cir. 1996) (holding that defendant, a private individual acting under the authority of the city but not a city official, was entitled to qualified immunity because she "was not 'invoking state law in pursuit of private ends'" but was "performing a government function pursuant to a government request"; "'a private individual who performs a government function pursuant to a state order or request is entitled to qualified immunity if a state official would have been entitled to such immunity had he performed the function himself'" (quoting Warner v. Grand County, 57 F.3d 962, 966–967 (10th Cir. 1995))).

234. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982). For examples of cases dealing with the issue of qualified immunity, see Anderson v. Creighton, 483 U.S. 635, 641, 107 S. Ct. 3034, 3040, 97 L. Ed. 2d 523, 531–532 (1987) (holding that since defendant could reasonably have believed that the search at issue was lawful, he should have been allowed to claim a defense of qualified immunity) and Oliveira v. Mayer, 23 F.3d 642, 648–649 (2d Cir. 1994) (holding that defendants should have been given the

reasonable for the official to believe that the actions did not violate the law, or that the law was not clearly established at the time of the violation.[235] In other words, prison officials sued in their individual capacity can have qualified immunity even if their conduct is found to be illegal. But this will only happen if the court finds that it was *objectively reasonable* for the official to believe the conduct was legal[236] or that the *law was unclear* when the violation occurred.[237]

You do not have to allege in your complaint that the law that was violated was clearly established.[238] The defendant is responsible for raising the qualified immunity defense.[239] If the defendant fails to claim qualified immunity at the trial court level, the defendant may lose the right to raise that defense in later proceedings, such as appeals.[240]

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opportunity to prove that it was reasonable for them to believe that they were not violating settled law and were therefore entitled to a qualified immunity defense).

235. *See, e.g.,* Oliveira v. Mayer, 23 F.3d 642, 648 (2d Cir. 1994) (remanding, based on factual dispute related to whether a reasonable officer could believe that his conduct was lawful); Powell v. Ward, 643 F.2d 924, 934 n.13 (2d Cir. 1981) (stating that a defendant who "knew or should have known that her conduct violated a constitutional norm" was not entitled to immunity); Fiscus v. City of Roswell, 832 F. Supp. 1558, 1564 (N.D. Ga. 1993) (holding that a Supreme Court decision issued the same month as the alleged violation did not constitute clearly established law); Kaminsky v. Rosenblum, 737 F. Supp. 1309, 1319 (S.D.N.Y. 1990) (holding that qualified immunity did not apply because the law was objectively clear to prison doctors that their alleged conduct implicated the prisoner's rights, where prison doctors were also actually aware of such law).

236. "Objectively reasonable" means that it does not matter whether the officer himself believed that the conduct was legal. Instead, the officer has to prove that a reasonable officer could have believed that the conduct was legal.

237. Whether the law is clear depends on the context of the facts of your case. For example, simply showing that the right to bodily privacy is clearly established is not enough to defeat an officer's qualified immunity to your claim that by strip-searching you, he violated your substantive due process right to privacy. Instead, you would also have to show that at the time you were strip-searched, clearly established law (from the Supreme Court or a court in your circuit or district) stated that strip-searching in a context similar to what you experienced violated your right to bodily privacy. *See* Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272, 281 (2001) (stating that the question of whether a law is clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition"), *overruled on other grounds by* Pearson v. Callahan, 555 U.S. 223, 236, 129 S. Ct. 808, 818, 172 L. Ed. 2d 565, 576 (2009) (holding that the two-step process mandated in *Saucier* for evaluating qualified immunity claims is not mandatory).

238. Thomas v. Independence Twp., 463 F.3d 285, 293 (3d Cir. 2006) ("[A] plaintiff has no obligation to plead a violation of clearly established law in order to avoid dismissal on qualified immunity grounds."). However, if the defendant does raise a qualified immunity defense, the court may require you to allege additional facts so that it is able to decide the issue of qualified immunity. *See* Thomas v. Independence Twp., 463 F.3d 285, 302 (3d Cir. 2006) (directing the district court to order the plaintiff to provide a more definite statement and, based on the facts they allege, reconsider the qualified immunity issue).

239. *See* Gomez v. Toledo, 446 U.S. 635, 640, 100 S. Ct. 1920, 1924, 64 L. Ed. 2d 572, 577–578 (1980) (stating that the Supreme Court "has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action; instead [the Supreme Court] ha[s] described it as a defense available to the official in question"). Note that Mitchell v. Forsyth, 472 U.S. 511, 530, 105 S. Ct. 2806, 2817, 86 L. Ed. 2d 411, 427 (1985), allows defendants to immediately appeal a court's decision to deny them qualified immunity, provided that the denial turns on an issue of law. These immediate appeals are called "interlocutory appeals." If a defendant brings an immediate appeal of a denial of qualified immunity, you may attempt to oppose him by arguing to the appellate court that the issue turns on "disputed questions of fact" rather than questions of pure law. *See* Tierney v. Davidson, 133 F.3d 189, 194 (2d Cir. 1998) ("[A] district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment.") (citation omitted); Kulwicki v. Dawson, 969 F.2d 1454, 1461 (3d Cir. 1992) (holding that an order denying qualified immunity is subject to interlocutory appeal). *See also* Feagley v. Waddill, 868 F.2d 1437, 1439–1442 (5th Cir. 1989) (holding that "if disputed factual issues material to immunity are present, the district court's denial of summary judgment sought on the basis of immunity is not appealable").

240. *See* Walsh v. Mellas, 837 F.2d 789, 799 n.5 (7th Cir. 1988) (holding that the qualified immunity defense was waived because it was not raised prior to the district court's final decision).

Keep in mind that qualified immunity is not a defense to a claim for injunctive relief.[241] Even if an individual has qualified immunity, the court can order that individual to stop doing something that violates your rights. Qualified immunity is also not available as a defense for municipalities[242] or privately employed prison guards.[243] Qualified immunity is usually (but not always) decided by the judge during summary judgment proceedings.[244] Summary judgment is described in Part C(8) of this Chapter.

Figure 2 below should help you understand which defendants are completely or partially immune from suit in federal court, and what kind of relief you can request. You should note that state courts have different immunity rules. If you want to bring your lawsuit in state court (discussed below in Part D(2)), you should research your state's immunity rules.

Type of Defendant	Type of Immunity	Relief You Can Obtain
State or state agency	Eleventh Amendment (sovereign) immunity	None, unless state law authorizes such lawsuits
Any officials sued in their *individual* capacities	Qualified immunity	Declaratory judgment; Injunctive relief; or Money damages. Money damages are only available if a) the official does not raise the qualified immunity defense or b) he does raise the defense, but you can demonstrate that a reasonable person would have known his actions violated a clearly established right
State officials in their official capacities	Eleventh Amendment (sovereign) immunity from suit for money damages only	Declaratory judgment; Injunctive relief

241. *See* Davidson v. Scully, 148 F. Supp. 2d 249, 254 (S.D.N.Y. 2001); Project Release v. Prevost, 463 F. Supp. 1033, 1037 (E.D.N.Y. 1978) (finding that the Court could issue a declaratory judgment against officials despite their qualified immunity).

242. *See* Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 166, 113 S. Ct. 1160, 1162, 122 L. Ed. 2d 517, 523 (1993) ("[U]nlike various government officials, municipalities do not enjoy immunity from suit—either absolute or qualified—under § 1983. In short, a municipality can be sued under § 1983, but it cannot be held liable unless a municipal policy or custom caused the constitutional injury [because there is no *respondeat superior* municipal liability under § 1983]."); Owen v. City of Independence, 445 U.S. 622, 638, 100 S. Ct. 1398, 1409, 63 L. Ed. 2d 673, 685–686 (1980) (holding that a municipality cannot use the defense of qualified immunity in a Section 1983 action by asserting that its employees acted in good faith); Cote v. Town of Millinocket, 901 F. Supp. 2d 200, 227 n.39 (D. Me. 2012) (conceding that "qualified immunity is not a concept applicable to a municipality"). *But see* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271, 101 S. Ct. 2748, 2762, 69 L. Ed. 2d 616, 634–635 (1981) (deeming it "unwise" for punitive damages to be available against a municipality in a Section 1983 suit unless there is a compelling reason for them to be).

243. *See* Richardson v. McKnight, 521 U.S. 399, 412–413, 117 S. Ct. 2100, 2107–2108, 138 L. Ed. 2d 540, 552–553 (1997) (holding that private prison guards cannot use the defense of qualified immunity but acknowledging that the decision is narrow and not necessarily applicable to other contexts, such as cases that may involve a private individual "acting under close official supervision"); Holly v. Scott, 434 F.3d 287, 294 (4th Cir. 2006) (noting that the "distinction between public and private correctional facilities is critical").

244. *See* Snyder v. Trepagnier, 142 F.3d 791, 799–800 (5th Cir. 1998) (noting that qualified immunity is ordinarily determined by the judge, but finding that there was no error in allowing the jury to decide the issue when there were facts in dispute relating to qualified immunity); Warren v. Dwyer, 906 F.2d 70, 76 (2d Cir. 1990) ("The better rule, we believe, is for the court to decide the issue of qualified immunity as a matter of law, preferably on a pretrial motion for summary judgment when possible. . . ."); Halcomb v. Wash. Metro. Area Transit Auth., 526 F. Supp. 2d 20, 22–23 (D.D.C. 2007) (noting that pretrial resolution of the qualified immunity defense may not always be practical due to factual disputes); *see also* Hunter v. Bryant, 502 U.S. 224, 227, 112 S. Ct. 534, 536, 116 L. Ed. 2d 589, 595 (1991) ("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.").

Type of Defendant	Type of Immunity	Relief You Can Obtain
Non-state (local or municipal) officials in their official capacities	None	Declaratory judgment; Injunctive relief; Money damages
Witnesses	Absolute immunity	None, unless you are alleging that the individual violated your rights at a time when he was not acting as a witness
Legislators and individuals authorized to perform legislative functions	Absolute immunity from any suit for actions performed within the scope of official legislative duties	None, unless you are alleging that the individual violated your rights while acting outside the scope of his official legislative duties
Prosecutors	Absolute immunity from suit for money damages only, for actions performed within the scope of official prosecutorial duties	Declaratory judgment; Injunctive relief
Judges (including certain administrative judges)	Absolute immunity from suit for money damages only, for actions performed within the scope of official judicial duties, unless acting without any jurisdiction over the case	Declaratory judgment; Injunctive relief, but only if a declaratory judgment has been violated or is not available
Municipalities	Immunity from punitive damages	Declaratory judgment; Injunctive relief; Money damages
Private parties acting under color of state law (such as prison guards at a privately-run prison)	Qualified immunity in some circumstances	Declaratory judgment; Injunctive relief; Money damages

Figure 2: Types of Immunity Available to and Types of Damages Available from Different Defendants

(d) Defenses Based on Required Procedure

The defendants could claim several defenses based on your alleged failure to follow certain procedural rules. First, the defendants may try to convince the court to dismiss your lawsuit by arguing that you have not met important procedural requirements. For example, the court can dismiss your case if you do not meet the filing deadline established by your state's "statute of limitations". See Part C(5) of this Chapter for an explanation of statutes of limitations. Be sure to look up your state's statute of limitations so you can easily avoid this defense by filing your lawsuit before the deadline. As you will see in Part C(5), there is no federal statute of limitation for Section 1983 claims. For this reason, it is very important that you look at the state statute of limitations for the injury that is most similar to your Section 1983 claim.

The defendants may also argue that your claim has already been resolved by an earlier court case or a prior administrative proceeding. If this argument applies to you, the court may refuse to hear your current lawsuit due to one or more of the legal doctrines of "*res judicata*," "collateral estoppel," and "preclusion."[245] These doctrines forbid the re-litigation of specific claims or issues that have already

245. Allen v. McCurry, 449 U.S. 90, 101–104, 101 S. Ct. 411, 418–420, 66 L. Ed. 2d 308, 317–319 (1980) (holding that collateral estoppel applied to Section 1983 actions and included both civil and criminal state-court decisions); *see* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5, 99 S. Ct. 645, 649 n.5, 58 L. Ed. 2d 552, 559 n.5 (1979) ("Under the doctrine of *res judicata*, a judgment on the merits in a prior suit bars a second suit involving

been litigated in previous cases between the same parties. "Non-mutual" collateral estoppel can also be used in some cases where only one of the parties was involved in the prior lawsuit, if that party had a full and fair opportunity to litigate the issue.[246] In general, an issue will be barred by *collateral estoppel* if:

(1) The issue has been actually litigated;
(2) The issue was subject of a final judgment; and
(3) The issue was essential to that judgment.[247]

To avoid these defenses, you should carefully review any claims you have previously filed, and anything a court may have said about those claims, to ensure you are not making claims that have previously been raised in your current case. In general, a claim will be considered to have been "previously raised"—and therefore barred by *res judicata* —if:

(1) There was a final judgment *on the merits* of the claim in the previous case,[248]
(2) The ruling court in the previous case was a court of competent jurisdiction,[249]
(3) The prior action involved the same parties as the present case, and
(4) The prior case involved the same type of claim (cause of action).[250]

Finally, the defendants may argue that your complaint should be dismissed if you did not exhaust (use up) all administrative procedures available to you before filing. This is because under the Prison Litigation Reform Act, you *must* exhaust all administrative remedies (such as incarcerated person grievance procedures) that are available to you before bringing a suit. See Chapter 14 of the *JLM* for more information on the exhaustion requirement and Chapter 15 of the *JLM* for information on incarcerated person grievances. Remember to keep copies of everything that you or prison officials write in this process, so that if a defendant claims that you did not use all required administrative procedures, you will be able to prove that you did.[251] Note, however, that neither Section 1983 nor the

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the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.").

246. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326, 99 S. Ct. 645, 649, 58 L. Ed. 2d 552, 559 (1979) (explaining that collateral estoppel and *res judicata* have the "dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation").

247. *See* Bravo-Fernandez v. United States, 137 S. Ct. 352, 359, 196 L. Ed. 2d 242, 242 (2016); Ashe v. Swenson, 397 U.S. 436, 443, 90 S. Ct. 1189, 1194, 25 L. Ed. 2d 469, 475 (1970) ("'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."); Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc., No. 18-1086, 2020 WL 2477020, at *4 (U.S. May 14, 2020); *see generally* Jarosz v. Palmer, 436 Mass. 526, 530–531, 766 N.E.2d 482, 487–488 (2002) (detailing elements of collateral estoppel).

248. "On the merits" generally means that the previous lawsuit was decided on a motion for summary judgment or after a trial, or was dismissed with prejudice.

249. "Jurisdiction" is a word for a court's power to hear and decide a case. If the court that heard your original case was not a court with power to hear that case, you can file the same case in another court.

250. *See In re* Teltronics Servs., Inc., 762 F.2d 185, 190–191 (2d Cir. 1985) (holding that the doctrine of *res judicata* "applies to preclude later litigation if the earlier decision was (1) a final judgment on the merits, (2) by a court of competent jurisdiction, (3) in a case involving the same parties or their privies, and (4) involving the same cause of action"); Comm'r of Internal Revenue v. Sunnen, 333 U.S. 591, 597, 68 S. Ct. 715, 719, 92 L. Ed. 898, 905 (1948) (holding that "when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action," res judicata bars future litigation between the parties or their privies as to any matter which was raised or might have been raised).

251. It is also a good idea to save all documents related to these procedures because if your complaints are ignored, the writings may be evidence of the prison officials' indifference that can be used in your Section 1983 suit. Their responses might also admit things, like explanations for their behavior, which you can use later at trial.

PLRA requires you to exhaust all possible state court remedies before suing in federal court.[252] This means that you do not have to file a lawsuit in state court before filing one in federal court. Instead, you can go directly to federal court. You must only show that you went through the *administrative* procedural process.

4. Where to File

Once you have decided to bring your Section 1983 action in federal district court, you have to figure out *which* federal district court is the correct court.[253] For example, New York is divided into four federal judicial districts; Northern, Eastern, Western, and Southern. Your Section 1983 suit must be filed in the same district where the harm occurred *or* in the district where any defendant lives, but only if all the defendants live in the same *state*.[254] If the defendants do not all live in the same state, and there is a reason that you cannot file in the district where the harm occurred, then you can file in a judicial district where any defendant can be found.[255] In most cases, this will mean that you have to file in the district where your prison is located. If you have been moved to another prison or have been released since the time you suffered the wrong, you must still file in the district where the harm occurred. Appendix I of the *JLM* contains the addresses of all federal district courts. Appendix I also outlines each New York state prison and the federal district they belong to.

Part of the decision process when figuring out where to file your complaint also involves making sure that the court has the power to hear your case. When filing in a court, you must make sure that the court has "personal jurisdiction" over these defendants (which means that the court you are suing in has power over these defendants).[256] For federal courts, personal jurisdiction is governed by the Federal Rules of Civil Procedures that incorporate local state long-arm statutes.[257] Long-Arm statutes are state laws that allow people in that state to sue people who live out-of-state in that state's court, if certain requirements are met.[258]

If you are filing in the state where the defendants live or work, personal jurisdiction will be satisfied easily. In general, for personal jurisdiction to exist for an out-of-state defendant, the defendant must have made minimum contacts with the state and/or they purposefully availed themselves to that state (meaning they interacted with the state by choice to receive some benefit by being in that state).[259] Along with proving minimum contacts and/or purposeful availment, you must

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252. *See* Jenkins v. Morton, 148 F.3d 257, 259–260 (3d Cir. 1998) (holding that Congress, with the PLRA, "did not mandate that the prisoner must exhaust his administrative remedies and exhaust his right to judicial appellate review before bringing an action" and noting that the same is true of Section 1983 claims); *see also* Powe v. Ennis, 177 F.3d 393, 394 (5th Cir. 1999) (*per curiam*) ("A prisoner's administrative remedies are deemed exhausted [under the PLRA] when a valid grievance has been filed and the state's time for responding thereto has expired.").

253. Visit http://www.uscourts.gov/court-locator (last visited June 10, 2020) for help in locating your local federal district court.

254. 28 U.S.C. § 1391(b) (describing requirements for where a plaintiff may bring a civil action in terms of appropriate "venue").

255. 28 U.S.C. § 1391(b)(3) (stating that "if there is no district in which an action may otherwise be brought as provided in this section," a civil action may be brought in "any judicial district in which any defendant is subject to the court's personal jurisdiction").

256. *See* Walden v. Fiore, 571 U.S. 277, 283–284, 134 S. Ct. 1115, 1121, 188 L. Ed. 2d 12, 19 (2014).

257. *See* FED. R. CIV. P. 4(k)(1)(A); FED. R. CIV. P. 4(k)(2); *see also* Walden v. Fiore, 571 U.S. 277, 283, 134 S. Ct. 1115, 1121, 188 L. Ed. 2d 12, 19 (2014).

258. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473–474, 105 S. Ct. 2174, 2182–2183, 85 L. Ed. 2d 528, 541 (1985) (discussing constitutionality of long-arm statutes).

259. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 880–884, 131 S. Ct. 2780, 2787–2789, 180 L. Ed. 2d 765, 774–776 (2011). Note that there are different ways to prove that a defendant has made the necessary minimum contacts with a state but unless an accident occurred in that state, simply being in the state once or conducting business in the state once is generally not enough. *See e.g.* Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 1239–1240, 2 L. Ed. 2d 1283, 1297–1298 (1958) (describing what counts a purposeful availment); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S. Ct. 559, 567, 62 L. Ed. 2d 490, 501 (1980) (noting that when deciding personal jurisdiction, courts consider whether a defendant's own conduct and

show that it would be fair to allow that state court to have personal jurisdiction over the out-of-state defendant.[260] When deciding if personal jurisdiction is fair, the judge will balance the burden the defendant will face versus the benefit you will receive by having to have the case in that court—while also considering if the jurisdiction you are seeking has a compelling reason to hear this case.[261] Ultimately, if you are not able to convince a Judge that their court has personal jurisdiction over your case, the case will be dismissed. This means you will need to refile in a more appropriate jurisdiction.

5. When to File

If you have been harmed, you do not have an unlimited amount of time to bring your lawsuit. There are strict deadlines for filing, and so you need to pay attention to the applicable statute of limitations. The statute of limitations is the amount of time you have after the harm occurs until your right to file a lawsuit expires forever. Because there is no federal statute of limitations for Section 1983 claims, this time period is governed by the *state* statute of limitations for the analogous personal injury suits in the state where the court is located.[262] This rule applies because the Supreme Court has found that the harms addressed by Section 1983 claims are similar to the harms addressed by tort claims for personal injuries.[263]

The statute of limitations for personal injury suits is the amount of time you will have to bring your Section 1983 suit. Even if your Section 1983 claim is based on *intentional* actions, the Supreme Court has explicitly said that the statute of limitations for your Section 1983 suit is not based off of the statute of limitations for the similar intentional tort that state, but instead the statute of limitations for personal injury suits within that state.[264] For example, New York law says that personal injury suits have to be brought within three years from the date you suffered the wrong, while intentional torts suits for assault must be brought within one year from the date you suffered the

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connection with a state are enough that the defendant would anticipate being sued in that jurisdiction).

260. *See* Walden v. Fiore, 571 U.S. 277, 283, 134 S. Ct. 1115, 1121, 188 L. Ed. 2d 12, 19 (2014).

261. *See* Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement, 326 U.S. 310, 316–320, 66 S. Ct. 154, 158–160, 90 L. Ed. 95, 101–104 (1945).

262. *See* Wallace v. Kato, 549 U.S. 384, 387, 127 S. Ct. 1091, 1094, 166 L. Ed. 2d 973, 980 (2007) (holding that the statute of limitations for Section 1983 is determined by "the law of the State in which the cause of action arose " and that the statute of limitations "is that which the State provides for personal-injury torts"); Wilson v. Garcia, 471 U.S. 261, 280, 105 S. Ct. 1938, 1949, 85 L. Ed. 2d 254, 266 (1985) (holding that the statute of limitations for a Section 1983 claim is the same as for state tort actions for personal injuries), *superseded by statute on other grounds*, Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 313(a), 104 Stat. 5089, 5114–5115 (codified as amended at 28 U.S.C. § 1658(a)). If your state has different statutes of limitations for different types of personal injury actions, courts will apply the state's general or residual personal injury statute of limitations to your Section 1983 case. *See* Owens v. Okure, 488 U.S. 235, 249–250, 109 S. Ct. 573, 582, 102 L. Ed. 2d 594, 606 (1989) ("[W]here state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions."). "General" statutes of limitations apply to all personal injury claims, but have some exceptions. "Residual" personal injury statutes of limitation are those that apply to types of personal injuries not specified elsewhere. Note that Congress has created a four-year "catch-all" statute of limitations applicable to "civil action[s] arising under an Act of Congress enacted after" December 1, 1990. 28 U.S.C. § 1658(a). This four-year statute of limitations applies to all claims "made possible by a post-1990 [congressional] enactment" that do not themselves contain a statute of limitations provision. Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 382, 124 S. Ct. 1836, 1845, 158 L. Ed. 2d 645, 656 (2004). *Do not be confused* by this new four-year catch-all provision: Section 1983 was enacted *before* 1990 and has not been amended to make any claims possible after December 1, 1990, so courts still apply the statute of limitations established by state law.

263. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 709, 119 S. Ct. 1624, 1638, 143 L. Ed. 2d 882, 904–905 (1999) (finding that "there can be no doubt that claims brought pursuant to [Section] 1983 sound in tort").

264. *See* Owens v. Okure, 488 U.S. 235, 250–251, 109 S. Ct. 573, 582, 102 L. Ed. 2d 594, 606 (1989).

wrong.[265] This means that in New York, you have three years to file a suit under Section 1983.[266] You should look up the statute of limitations for personal injury suits in the state where you are filing your claim (you can usually find this information in the state code of statutes).

The statute of limitations period begins to run when the alleged harm occurred. The statute of limitations can sometimes be expanded if you could not reasonably have learned about the harm when it first occurred.[267] For example, if the statute of limitations is three years, you have three years to file your case from the date that the injury occurred. However, if you were not reasonably able to discover the harm when it first occurred—e.g. because a surgical instrument was mistakenly left in your body and you learned about it only after it caused an infection much later—or if the injury that violated your rights continues over a period of time—for example, failure to treat a medical condition despite repeated requests for medical care—the statute of limitations may not start to run until the injury period ends. You should not assume, however, that the court will expand the statute of limitations and agree that you could not reasonably have discovered the injury at an earlier time or that your injury is continuing. Therefore, you should bring your lawsuit early enough so that all of the actions in your complaint occurred during the limitations period.

6. What to File

(a) Your Complaint

Your lawsuit begins when you file your "complaint." Many districts provide model (template) complaint forms for Section 1983 actions. After you figure out in which district you have to file, write to the clerk of that district and ask for the model forms (in New York, you should write to the *pro se* clerk). If you cannot get the forms, make your own using the examples provided in Appendix A of this Chapter. You should also read the local rules of practice for the federal district court where you decide to file. You can get the local rules for a small fee from the court clerk and possibly through your prison law library.

There are several very important things that you must include in your complaint. If you miss some of these things your complaint may be dismissed (rejected), so you should make sure not to leave any of them out.

First, you must identify yourself as the "plaintiff" (the party who is bringing the suit). You also have to identify the "defendant(s)" (the party or parties you are suing).[268] In addition, you need to

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265. N.Y. C.P.L.R. 214(5) (McKinney 2019) ("The following actions must be commenced within three years: . . . an action to recover damages for a personal injury. . . ."); *see* Eagleston v. Guido, 41 F.3d 865, 871 (2d Cir. 1994) (finding that "[f]or [Section] 1983 actions arising in New York, the statute of limitations is three years"); Lawson v. Rochester City School Dist., 446 Fed. App'x 327, 328 (2d Cir. 2011) (noting that the statute of limitations for a §1983 claim arising in New York was still three years); *see also* Laboy v. Ontario Cty., 318 F. Supp. 3d 582, 587 (W.D.N.Y. 2018) (citing *Lawson* in regards to the statute of limitations being three years).

266. *See* Owens v. Okure, 488 U.S. 235, 235, 109 S. Ct. 573, 574, 102 L. Ed. 2d 594, 606 (1989) (holding that New York's three-year statute of limitations for general personal injury suits is the statute of limitations that is applied to [Section] 1983 claims, because "where state law provides multiple statutes of limitations for personal injury actions, courts considering [Section] 1983 claims should borrow the State's general or residual personal injury statute of limitation").

267. Wallace v. Kato, 549 U.S. 384, 388, 127 S. Ct. 1091, 1095, 166 L. Ed. 2d 973, 980 (2007) ("[T]he accrual date of a [Section] 1983 cause of action is a question of federal law . . . governed by federal rules conforming in general to common-law tort principles. . . . [A]ccrual occurs when the plaintiff has 'a complete and present cause of action, that is, when 'the plaintiff can file suit and obtain relief.'" (citation omitted)); Hunt v. Bennett, 17 F.3d 1263, 1266 (10th Cir. 1994) ("Section 1983 claims accrue, for the purpose of the statute of limitations, when the plaintiff knows or has reason to know of the injury which is the basis of his action." (quoting Johnson v. Johnson Cty. Comm'n Bd., 925 F.2d 1299, 1301 (10th Cir. 1991))); Singleton v. City of New York, 632 F.2d 185, 191 (2d Cir.1980) (holding the same); Bireline v. Seagondollar, 567 F.2d 260, 263 (4th Cir.1977) (holding the same).

268. You should name the defendants using their full, proper names. If you do not know a defendant's full name, write down whatever identifying information you do know, such as his nickname, badge number, official position or duties, etc. Only defendants who have been adequately identified can be served with the summons and complaint. For more information on what you should do if you do not know a defendant's name, see Part C(2)(a)

"state the grounds" for your complaint, which means you must specify the actions by the defendant(s) that violated your constitutional or other rights. When doing this, you must specifically state *which* of your constitutional or federal statutory rights were violated. You also must tell the court what laws give the court "subject matter jurisdiction" (the power to hear your suit). This means that if you are suing in federal court, you must state in your complaint that 28 U.S.C. § 1331[269] and § 1343(a)(3)[270] give the federal district courts jurisdiction over cases under 42 U.S.C. § 1983. You also have to tell the court the type of relief you are seeking—damages, injunctive relief, declaratory relief, or any combination of these. See Part C(1) of this Chapter for information on the types of relief and remedies that are available. As mentioned in Part C(5), you also have to explain why the court has personal jurisdiction over these defendants.

The Federal Rules of Civil Procedure require you to make a "short and plain statement" of your claim in the complaint.[271] In your complaint, you should include a reasonably specific description of the incident or practice that is the basis for your claim. Give the court specific details such as names, dates, locations, and injuries suffered. Details help convince the court that you "state a claim for relief" and that your claim should not be dismissed. In particular, your complaint should explain how each person you name as a defendant was involved in the violation about which you are complaining. Being clear about the facts will allow the court to apply the law more accurately to your claim.

The Supreme Court has held that complaints must be "plausible" to avoid dismissal.[272] This means that you must include enough facts to describe what happened or is happening to you to allow a court to decide that the defendants you have named violated your rights. It is not enough just to state that the defendant(s) broke the law: you must give facts to support that conclusion. Thus, you can't just say that "X violated my rights." You must explain, with specifics details, *how* your rights were violated and how you know that it was the defendant who committed the violation. Even though courts generally look at pro se complaints (complaints by those who represent themselves without an attorney) somewhat less strict than complaints they receive from parties who have an attorney,[273] your

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of this Chapter.

269. 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). This means that they have original jurisdiction over Section 1983 actions, which are civil actions arising from a federal law.

270. 28 U.S.C. § 1343(a)(3) ("The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . .To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. . . .").

271. FED. R. CIV. P. 8(a) ("A pleading that states a claim for relief must contain (1) a short and plain statement of the grounds for the court's jurisdiction. . .; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.").

272. *See* Ashcroft v. Iqbal, 556 U.S. 662, 677–680, 129 S. Ct. 1937, 1949–1950, 173 L. Ed. 2d 868, 883–885 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d. 929, 949 (2007). The Supreme Court laid out a two-step approach to determining whether a complaint should be dismissed for failure to state a claim. First, the factual and legal elements of a claim should be separated. The court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. Second, the court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief." In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to "show" such an entitlement by providing sufficient facts to make its legal claims plausible.

273. *See, e.g.*, Cohen v. Valentin, Civil No. 11-1942 (PGS), 2011 U.S. Dist. LEXIS 130300, at *8 (D.N.J. Nov. 9, 2011) (*unpublished*) (explaining that "the sufficiency of this pro se pleading must be construed liberally in favor of Plaintiff, even after *Iqbal*") (be careful citing to unpublished cases as many jurisdictions do not allow you to cite to unpublished cases); *see also* Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081, 1086 (2007) (*per curiam*) (reviewing a prisoner's pro se civil rights complaint shortly after *Twombly* and holding that "[a] document filed *pro se* is 'to be liberally construed'" (quoting Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251, 261 (1976))).

complaint still must be plausible to survive dismissal.[274] Therefore, a detailed account of the facts is important to make sure that your complaint is considered by the court.

(b) Including Supplemental State Claims in Your Complaint

You may want to add some supplemental state law claims to your federal claim. A state law claim is "supplemental" to a federal constitutional or statutory violation if it arises from the same core set of facts.[275] A federal court will consider a supplemental state law claim if it is included in a complaint with a non-frivolous federal claim.[276] For example, you could file a single complaint claiming that (1) prison officials violated your Eighth Amendment rights by failing to prevent another incarcerated person from assaulting you *and* (2) the officials were negligent under state tort law.[277] For more information on state tort claims, see Chapter 17 of the *JLM*.

7. How to File Your Complaint

Each court has its own detailed procedures for filing a complaint. You should try to obtain a copy of the local Rules of the Court for the district where you are filing your lawsuit. You can get a copy of these rules in your prison's law library or by writing to the clerk of the court and (sometimes) paying a small fee.

You can also ask the clerk of the district court for model Section 1983 forms and *in forma pauperis* papers (described below). Be sure to ask the clerk how many copies of each document you need to file. You may also need to submit a summons to the court clerk that will be issued to each defendant you are naming in the complaint. A summons is the document that orders the defendant to respond to or "answer" your complaint with their own legal papers. Appendix A-1 of this Chapter has a sample summons form.

You should file your complaint by mailing the complaint, your *in forma pauperis* papers, the summonses, and as many copies of those documents as the court requires all together in a sealed envelope to the clerk of the court for the federal district in which the wrongful act took place. The clerk will call for a United States Marshal to deliver a copy of the complaint and a summons to each defendant. The court clerk will return one copy of each paper to you marked "received by the clerk," so that you will have a record of all papers that you have officially filed with the court. Although the amount of time it will take for you to receive this copy varies among courts, it should range from one to two weeks. Make sure to keep all of the documents that you receive from the court.[278]

An *in forma pauperis* declaration is a sworn statement in which you tell the court that you cannot afford the filing fee and other legal expenses. If the court approves your *in forma pauperis* declaration, you do not have to pay certain court expenses, including a fee and travel expenses (a mileage charge) for each summons delivered by the U.S. Marshal.[279]

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274. *See, e.g.*, Atherton v. D.C. Office of the Mayor, 567 F.3d 672, 681–682 (D.C. Cir. 2009) (noting liberal construction of pro se complaints but explaining that "even a pro se complainant must plead 'factual matter' that permits the court to infer 'more than the mere possibility of misconduct'" (quoting Ashcroft v. Iqbal, 556 U.S. 662,679, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868, 884 (2009))); *see also* Starr v. Baca, 652 F.3d 1202, 1215–1216 (9th Cir. 2011) (examining *Twombly*, *Erickson*, and *Iqbal* and finding two common principles: "[f]irst, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action" and, "[s]econd, the factual allegations that are taken as true must plausibly suggest an entitlement to relief").

275. 28 U.S.C. § 1367 (describing the requirements for a federal court to exercise supplemental jurisdiction over a state law claim).

276. 28 U.S.C. § 1367(a) ("[T]he district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.").

277. For more information on state tort claims, see Chapter 17 of the *JLM*.

278. *See* John W. Witt et al., Section 1983 Litigation: Forms § 1 (2d ed. 2016 & Supp. 2020).

279. *See*, *e.g.*, U.S. Dist. Ct., EDNY, In Forma Pauperis—Prisoner, *available for download at* https://www.nyed.uscourts.gov/forms/forma-pauperis (last visited June 11, 2020);); *see also* JOHN W. WITT ET AL., SECTION 1983 LITIGATION: FORMS § 7.02 (2d ed. 2016 & Supp. 2020) (providing sample Form 7-1 for "Application

In forma pauperis status does not relieve you from having to pay the filing fees associated with filing a complaint. These fees are no longer waived in the same manner that they were in the past.[280] See Chapter 14 of the *JLM* to determine how you are required to pay the filing fees. If you cannot obtain a form for an *in forma pauperis* declaration from the clerk of the district court, use the form in Appendix A-5 of this Chapter as a model (fill in your answers to the questions) and file it with an *in forma pauperis* motion, an example of which is also contained in Appendix A-5.

If you wish the court to appoint an attorney for you, you should also make this request when filing to proceed *in forma pauperis*. See Appendix A-6 of this Chapter for a sample form to request an attorney. However, because you do not have a right to assigned counsel in Section 1983 proceedings, it will be entirely up to the court whether to grant this request.

To summarize, the following are the general steps required to file a complaint:

(1) Determine the federal district court in which you must file. This is usually the court in the district where the harm took place. (See Appendix I of the *JLM* if you are in New York.)

(2) Write to the clerk of that district court (the *pro se* clerk if there is one), and ask:
   (a) For a model Section 1983 complaint form,
   (b) For *in forma pauperis* papers,
   (c) For the local rules of practice for that district,
   (d) Whether you need a summons for each named defendant, and
   (e) How many copies of each document (complaint, *in forma pauperis* declaration, and summons) you must file, then

(3) Complete and mail to the clerk of the court:
   (a) Your complaint and copies of the complaint, including any affidavits (use the sample complaints in Appendix A of this Chapter as a guide for drafting your complaint if the clerk does not send you model forms);
   (b) *In forma pauperis* papers and copies (use the forms for an *in forma pauperis* motion and an *in forma pauperis* declaration found in Appendix A-5 of this Chapter if you cannot obtain model forms from the clerk of the district court); and
   (c) Summonses (if necessary) and copies (see Appendix A-1 of this Chapter for a sample summons).

By mailing these documents to the clerk, you have filed your Section 1983 lawsuit. However, you must also follow-up to make sure that the papers have been properly served upon the defendants. Filing alone is not sufficient; your lawsuit will be dismissed if it is not served properly and on time.

8. What to Expect After Your Legal Papers Have Been Filed in Court

Once you file your complaint, your lawsuit has officially begun. It is your responsibility to make sure that your lawsuit continues to move forward. It is not enough to simply file your complaint and then wait for something to happen. Nothing will happen unless you stay involved.

After you file your complaint and serve the defendant(s), the defendant(s) must respond by filing an "answer."[281] Defendants are supposed to file answers within twenty-one days of receiving the complaint,[282] but some defendants ask for extra time. The defendant's answer usually denies that your allegations (claims) or statements of the facts are true.

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to Proceed *In Forma Pauperis*").

280. 28 U.S.C. § 1915(b) (outlining procedures for prisoner payment of filing fees).

281. For more information, see Chapter 6 of the *JLM.*

282. FED. R. CIV. P. 12(a)(1)(A)(i) ("A defendant must serve an answer: (i) within 21 days after being served with the summons and complaint. . .").

Rather than filing an answer, the defendant may first file a motion to dismiss your complaint under Federal Rule of Civil Procedure 12(b).[283] In the motion to dismiss, a defendant may argue that even if your allegations are true, they do not make out a legal claim that can be granted relief. Basically, the defendant may argue that your complaints are not violations of statutory or constitutional rights covered by Section 1983. The defendant may also argue that the court lacks subject matter over one or more of the claims in your complaint, that the venue (the place where you filed the lawsuit) is incorrect, or that the court lacks personal jurisdiction over one or more of the defendants. The court should give you the opportunity to amend (make changes to) your complaint if you left something important out of your original complaint. If the district court dismisses your complaint without letting you amend it first, you may have grounds for an appeal.[284]

If the defendant does not respond to your complaint at all, you can move (apply) for a "default judgment." If the court grants you a default judgment, you win your case because the defendants did not answer. Although the court probably will not grant your motion for a default judgment, it may force the defendant to respond.

Another way a defendant might try to end your lawsuit is by filing for summary judgment under Federal Rule of Civil Procedure 56.[285] In a summary judgment motion, the defendants argue that there is no real dispute over the facts, and they should win on the undisputed facts. For example, the defendants may claim that they are immune from suit for your claim.[286] If the defendants make a summary judgment motion, you must show that there is a "genuine dispute as to material fact"[287] that requires a trial in your lawsuit. To raise a genuine dispute as to material fact, you must provide factual support that would be admissible in evidence for each element of your claim against each defendant. For example, if you are suing supervisory officials, you must provide some evidence that the particular officials are responsible for what happened. Factual support can be your own affidavit or declaration, the affidavit or declaration of other people who witnessed the event, or relevant documents like letters from the defendant(s).[288] If you need discovery (the opportunity to obtain more information) in order to defend against a summary judgment motion, you can ask to delay the motion, but you will have to explain to the court what discovery you want and why you think it would help. Since statements in response to a summary judgment motion must be sworn to, you cannot just rely on your complaint unless the complaint is verified. If a verified complaint does not address all the relevant issues, you will still need to support it with a declaration.[289]

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283. FED. R. CIV. P. 12(b)(6) ("Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: . . . (6) failure to state a claim upon which relief can be granted. . .").

284. *See* Platsky v. CIA, 953 F.2d 26, 29 (2d Cir. 1991) (holding that the *pro se* plaintiff whose claim was dismissed should be given an opportunity to amend his pleadings and refile his complaint). *But see* Woodard v. Hardenfelder, 845 F. Supp. 960, 969 (E.D.N.Y. 1994) (holding that "leave to file an amended complaint is only appropriate when, based on the plaintiff's first complaint, it is conceivable that an amended complaint could state a cause of action for a violation of the plaintiff's civil rights"). Taken together, these cases mean that you should be given a chance to amend your original complaint with additional facts that support your legal claim, unless the court determines that based upon what you wrote in your original complaint, there is no possible way that you can prove additional facts to strengthen your legal claim.

285. FED. R. CIV. P. 56(a) ("A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought.").

286. For more information on other possible defenses, see Part C(3) of this Chapter.

287. FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

288. If you give the court documents, you must provide a proper "foundation" (explanation) for the documents so the court knows what the document is, when you received it, who gave it to you, etc. You must explain in an affidavit or declaration what the documents are (for example, that the document is the notice the lieutenant gave you that you were found guilty of a particular disciplinary offense, or that it is the grievance you filed and the decision you received, etc.).

289. See Chapter 6 of the *JLM* for explanations of documents such as affidavits and declarations.

The defendants in your lawsuit may try to stop your case by making it "moot." A lawsuit is moot when it includes claims that no longer exist. Courts will not hear lawsuits that become moot. For example, if you ask for an injunction against certain bad prison conditions and the prison then improves the conditions, your lawsuit would be moot. Mootness is usually decided when the defendant files a summary judgment motion. To avoid having your claim dismissed because of mootness, you can request money damages for injuries you have already incurred—a damages claim is never moot.[290] You can also ask the court to decide if the changes made by prison officials really solve the problem and are not just temporary.[291]

If your suit is not dismissed, the next stage of the proceedings may be the "discovery" or investigation stage. Discovery is the process where each party requests information from the other party about the case. See Chapter 8 of the *JLM* for more information on discovery in a federal civil case. It is your responsibility, not the court's, to keep your case moving. Once you have filed your complaint, you should begin discovery. This means sending discovery request to the defendants. Defendants often ignore discovery requests from *pro se* plaintiffs such as incarcerated people. If the defendants in your case do this, you should write a letter to the defendants, requesting a response "in a timely manner," and stating that if you do not hear from them you will write to the judge. Most courts now have what are called "meet and confer" requirements. Under these requirements, you must try to settle any discovery disputes with the defendant before you ask the court for help. If you do not hear from the defendants after you write to them, or if you are unable to resolve a discovery dispute with them, you should write to the judge after a week or two.[292] Judges want cases to move quickly. If your discovery demands are proper, the judge should order the defendants to fulfill these demands or help you narrow the request so they may be met. See Appendix A of Chapter 8 of the *JLM* for examples of letters that you may send to defendants and judges.

If you receive discovery requests from the defendants, you should make sure to respond quickly and honestly. This is because you are required to follow the rules of the court when you file a lawsuit. In addition, if you ignore discovery requests or delay your response to them, you might hurt your case and make the judge less likely to believe you in the future.

If you are threatened or punished by prison officials for bringing your suit, you should tell the court or your attorney (if you have been assigned one) as soon as possible. You should also tell the court if your appointed attorney has not communicated with you.

If the court dismisses your suit, make sure that you understand the reasons for the dismissal. A lawsuit can be dismissed with or without prejudice. If the court dismissed your suit "without prejudice," you can file your suit again.[293] If your suit is dismissed "with prejudice," you cannot re-file your complaint. Instead, you must appeal the court's decision to dismiss your complaint *before the deadline to appeal*.

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290. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 478 n.1, 109 S. Ct. 706, 713 n.1, 102 L. Ed. 2d 854, 872 n.1 (1989) (stating that the end of an affirmative action program did not make a challenge to the program moot because the plaintiff had asserted a claim for monetary damages).

291. *See* Weinstein v. Bradford, 423 U.S. 147, 148–149, 96 S. Ct. 347, 348–349, 46 L. Ed. 2d 350, 352–353 (1975) (holding that the release of the plaintiff prisoner on parole mooted his challenge to earlier parole board proceedings, but also noting that where an issue is so short-lived that it will not continue throughout the time it takes to litigate ("capable of repetition, yet evading review"), the issue will not be declared moot if there is a "reasonable expectation that the same complaining party would be subjected to the same action again"); *see also* Davis v. FEC, 554 U.S. 724, 735, 128 S. Ct. 2759, 2769, 171 L. Ed. 2d 737, 749 (2008) (noting that "'the established exception to mootness for disputes capable of repetition, yet evading review . . . applies where "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again."'") (quoting FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449, 462, 127 S. Ct. 2652, 2662, 168 L. Ed. 2d 329, 342 (2007)).

292. *See* Chapter 8 of the *JLM*, "Obtaining Information to Prepare Your Case: The Process of Discovery."

293. For example, if you filed in the wrong district court, you may be allowed to re-file in the right court. Your suit could also be dismissed without prejudice because of a technical problem in your pleadings. If the statute of limitations has not ended, you may have the chance to fix your pleadings and re-file your complaint.

D. Alternate Ways to Bring Lawsuits

1. Filing Your Lawsuit as a Class Action

Section 1983 claims can also be brought as "class action" suits. A class action is a lawsuit brought on behalf of a group of people who experience the same harm or have the same complaint—in other words, all people in the group are "similarly situated."[294]

Class actions are very complicated and can take years. It is also very difficult to bring a class action without an attorney. Losing a class action affects the rights of all class members, so having a good lawyer is very important. Courts will probably not "certify" (recognize) a case as a class action if you do not have a lawyer. If you believe that other incarcerated people like you are experiencing similar mistreatment, you should talk with a lawyer about whether bringing a class action would be appropriate.

A class action will only be recognized by the court if it meets *all* of the following conditions:

(1) The "class" (group) of persons in a similar position must be too large for each person to bring his own lawsuit or even join individual lawsuits;

(2) The prison officials must have acted or refused to act on grounds that apply to the entire class;

(3) The personal claims of the main plaintiff(s) (the "class representative(s)") must be typical of the other plaintiffs; and

(4) The class representative(s) must fairly and adequately protect the rights of the other members of the class.[295]

Class actions are appropriate only if the wrong you suffered was also suffered by the other plaintiffs in the suit. All of you together will be considered a "class." The class members do not need to know each other, but you must have a way to reasonably identify most of them, so they can be made aware of the suit (notice) and given an opportunity to decide whether to participate.[296] Again, in order to have your class "certified", you will probably need to get a lawyer or ask the court to appoint one, because class actions are very complicated.

If you decide to proceed on your own and feel that the case fits the requirements of a class action suit, you should name yourself and "all others similarly situated" as the plaintiffs (for example, "John Smith individually and on behalf of all others similarly situated"). In the complaint, you should include all the facts related to the wrongs done to you and also provide whatever information you have about similar treatment of other incarcerated people. The court will then decide, on the basis of the facts you provide, whether or not a class action would be proper. If the court allows the class action, it may

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294. There are two main advantages offered by a class action. First, the suit will not become "moot" if one plaintiff is transferred or released (a suit is "moot" when the suit no longer applies to the person or persons who brought the suit). *See* U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 404, 100 S. Ct. 1202, 1212–1213, 63 L. Ed. 2d 479, 495 (1980) (holding that the resolution of the named plaintiff's substantive claim does not necessarily moot all other issues in the case, even if class certification has been denied so far); Sosna v. Iowa, 419 U.S. 393, 401, 95 S. Ct. 553, 558, 42 L. Ed. 2d 532, 541 (1975) (holding that when a claim is no longer relevant for a named plaintiff in a class action suit, the claim may still be alive and not moot for the class of persons the named plaintiff has been certified to represent). *But see* Sze v. INS, 153 F.3d 1005, 1010 (9th Cir. 1998) (noting two exceptions to *Sosna's* mootness doctrine: where, in a proposed class action, plaintiffs' claims are "inherently transitory" and "there is a constantly changing putative class," leaving the court no time to certify the class; and where "but for the 'relation back' of a later class certification, putative class members' claims would be barred by the statute of limitations." (quoting Wade v. Kirkland, 118 F.3d 667, 670 (9th Cir. 1997)), *overruled in part on other grounds en banc by* United States v. Hovsepian, 359 F.3d 1144, 1161 (9th Cir. 2004). The second advantage of bringing a class action is that, if you win, each member of the class can enforce the judgment or injunction on behalf of the other class members, which avoids separate enforcement actions. *See, e.g.*, Daniels v. City of New York, 198 F.R.D. 409, 422 (S.D.N.Y. 2001) (noting that a judgment in favor of class-action plaintiffs challenging New York's stop and frisk policy would avoid the need to bring separate enforcement actions).

295. FED. R. CIV. P. 23(a).

296. FED. R. CIV. P. 23(c)(2).

appoint an attorney to represent the class. If the court does not recognize the class action, you will be allowed to amend your complaint and sue by yourself.

2. Using State Law and/or State Courts

There are certain advantages to suing in federal court, such as easier and more generous discovery rules and potentially higher damage awards. But you may want to file in state court if you have only state law claims or if there are other advantages to bringing your Section 1983 claim in a particular state court.

(a) Bringing Your Section 1983 Action in State Court

Even if you have a federal law claim, you may want to consider bringing your Section 1983 action in state court. The advantages and disadvantages of federal court compared with state court are different depending on the state. Some state courts might have more sympathetic judges, more favorable procedural rules, or fewer cases to hear than federal courts. State courts may, however, place restrictions on damages or the amount you can recover for attorney fees. State courts also have different immunity rules (restricting who you can and cannot sue) than federal courts, which might be helpful or harmful to your lawsuit depending on which state you are in and whom you want to sue. You should research the law and practices of your state to see if it has any of these advantages or disadvantages.

Bringing your Section 1983 action in state court will also avoid some, but not all of the restrictions of the PLRA. For example, the barriers in the PLRA for incarcerated people filing *in forma pauperis* (filing as a poor person in order to avoid paying many of the normal fees and costs) do not apply in state court (although, as mentioned above, many states have their own PLRA-like laws that may restrict *in forma pauperis* filing). Another advantage is that the requirement that you exhaust all of your administrative remedies before bringing your Section 1983 claim does apply in state court.

(b) Turning Your Federal Civil Rights Claim into a State Law Claim

By bringing a state claim (instead of a federal civil rights claim) in state court, you can avoid the Prison Litigation Reform Act ("PLRA"), since the PLRA only applies to claims under federal law.[297] You can do this by converting your federal civil rights claim into a state tort claim or other state law claim.[298] For example, a claim in federal court for "deliberate indifference to serious medical needs" in violation of the Eighth Amendment could instead be brought in state court as a tort action for medical malpractice. Or, if a disciplinary hearing denied you due process, you could file in state court for violation of the state regulations governing prison disciplinary proceedings.

In addition to avoiding the PLRA, you may have a better chance of winning if you file in state court because of the lower standard that you, as the plaintiff, will have to meet to prove your case. For example, a state court may find that you have a valid state medical malpractice tort claim even if you cannot show the prison officials were "deliberately indifferent" as required in a Section 1983 claim.[299]

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297. *See* Kozlowski v. Coughlin, 2001 U.S. Dist. LEXIS 19294, at *10–14 (S.D.N.Y. Nov. 19, 2001) (*unpublished*) (explaining that Congress intended the PLRA to limit federal control in operation of the prison system, and that federal rights are limited to those created by federal law). You may want to avoid the PLRA because it is designed to make it harder for prisoners to take their claim to federal court. For example, the PLRA makes prisoners who file *in forma pauperis* (as a poor person) pay the full $350 filling fee (as well as an additional $450 if you wish to appeal the court's decision). It will also give you a "strike" if you have a case dismissed as frivolous, malicious, or failing to state a valid legal claim. If you get three strikes, you will no longer be able to file claims *in forma pauperis* and will have to pay the full amount of court costs and fees. For more information on the PLRA, see Chapter 14 of the *JLM*, "The Prison Litigation Reform Act."

298. For more information on state tort claims, see Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions."

299. *See* Estelle v. Gamble, 429 U.S. 97, 104–106, 97 S. Ct. 285, 291–292, 50 L. Ed. 2d 251, 260–261 (1976) (concluding that the "deliberate indifference" standard that must be met to prove a Section 1983 claim against a prison official for denial of medical care consists of "unnecessary and wanton infliction of pain" or conduct that is

However, many state statutes contain PLRA-like restrictions as well.[300] You need to research the law in your own state before deciding to file a claim in state court.

Another possible advantage of bringing your claim in state court is that you may be able to enforce rights that are not granted under federal law. State constitutions may protect rights that are not recognized by the U.S. Constitution. This is because the U.S. Constitution protects a minimum level of individual rights and allows the states to provide greater rights for state citizens through their own constitutions, statutes, and rule-making authority.[301] Again, you will need to research your own state's constitution and statutes to find out whether you can sue for violations of any of those provisions. Please note that if you turn your claim into a state law claim, there may be statutes in the state (such as immunity statutes or statutes about jurisdiction) that can impact money damages. For more information on state tort claims, be sure to see Chapter 17 of the *JLM*.

E. Special Concerns for People Incarcerated in Federal Prisons

1. *Bivens* Actions

There is no statute similar to Section 1983 that clearly allows individuals to sue *federal* officials, rather than state officials, who violate federal rights while acting under color of federal law (acting in their official role as federal officials). However, the Supreme Court has held that, even without a specific statute, federal officials may be sued for damages and "injunctive relief" for violations of your constitutional rights.[302] These lawsuits are usually referred to as *Bivens* actions, named after the case

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"repugnant to the conscience of mankind," and not merely the "inadvertent failure to provide adequate medical care" (quoting Gregg v. Georgia, 428 U.S. 153, 173, 96 S. Ct. 2909, 2925, 49 L. Ed. 2d 859, 874 (1976) and Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 472, 67 S. Ct. 374, 380, 91 L. Ed. 422, 430 (1947))).

300. *See, e.g.*, CAL. CIV. PROC. CODE §§ 391–391.7 (West 2004) (governing vexatious (troublesome) litigants in general, and preventing those litigants that a court has found to be troublesome from filing future lawsuits without the permission of a judge); FLA. STAT. ANN. § 57.085(6)–(7) (West 2004) (allowing a court to dismiss a prisoner's claim if it is frivolous, malicious, or harassing, and requiring that a prisoner who has litigated as an indigent [a person who has demonstrated that he is unable to pay court costs and fees] twice within the previous three years receive permission from a judge before going ahead with another suit), *invalidated in part by* Mitchell v. Moore, 786 So. 2d 521, 528 (Fla. 2001); GA. CODE ANN. §§ 42-12-1–42-12-9 (West 1996) (governing payment of certain court fees and costs by a prisoner, and requiring that any prisoner who has filed three or more actions that were later dismissed as frivolous or malicious be barred from filing any future actions unless the prisoner is under imminent danger of serious physical injury); TEX. CIV. PRAC. & REM. CODE ANN. §§ 14.001–14.014 (West 1995) (requiring that prisoners exhaust their administrative remedies before filing a claim in state court and that the state court claim be filed within 31 days of when the prisoner receives a written decision from the administrative grievance system, allowing courts to dismiss claims that are frivolous or malicious, and governing costs and fees that the court may require a prisoner to pay).

301. *See* People v. Pavone, 26 N.Y.3d 629, 639, 47 N.E.3d 56, 64, 26 N.Y.S.3d 728, 736 (2015) ("This Court has previously, and repeatedly, applied the State Constitution . . . to define a broader scope of protection than that accorded by the Federal Constitution in cases concerning individual rights and liberties . . . Thus, our analysis of defendant's claim is grounded in our recognition of the greater expanse of our State Constitution.") (internal quotations and citations omitted); State v. LaValle, 3 N.Y.3d 88, 129, 817 N.E.2d 341, 366, 783 N.Y.S.2d 485, 510 (2004) ("It bears reiterating here that on innumerable occasions this Court has given the State Constitution an independent construction, affording the rights and liberties of the citizens of this State even more protection than may be secured under the United States Constitution.") (internal quotations omitted); Cooper v. Morin, 49 N.Y.2d 69, 79, 399 N.E.2d 1188, 1193, 424 N.Y.S.2d 168, 174 (1979) ("We have not hesitated when we concluded that the Federal Constitution as interpreted by the Supreme Court fell short of adequate protection for our citizens to rely upon the principle that that document defines the minimum level of individual rights and leaves the States free to provide greater rights for its citizens through its Constitution, statutes or rule-making authority.") (internal citations omitted).

302. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 394, 91 S. Ct. 1999, 2003, 29 L. Ed. 2d 619, 625–626 (1971) (holding that plaintiff could sue federal agents directly through the 4th Amendment for violating their rights); *see also* Carlson v. Green, 446 U.S. 14, 18–20, 100 S. Ct. 1468, 1471–1472, 64 L. Ed. 2d 15, 23–24 (1980) (finding that the widow of deceased federal prisoner had a *Bivens* remedy directly under the 8th Amendment). *But see* FDIC v. Meyer, 510 U.S. 471, 486, 114 S. Ct. 996, 1006, 127 L. Ed. 2d 308, 323–324 (1994) (refusing to extend *Bivens* doctrine to suits against federal agencies).

where the Supreme Court ruled that the Fourth Amendment guarantees freedom from unreasonable "search and seizures" and creates a cause of action when this freedom is violated by a federal agent.

A *Bivens* action is the federal equivalent of a Section 1983 action. Therefore, most of the discussion of Section 1983 in Part B also applies to a federal *Bivens* action. Before continuing, you should review all of Part B. Appendix A of this Chapter provides sample Section 1983 complaints, which can also be used for *Bivens* actions. This Part explains the differences between Section 1983 suits and *Bivens* actions.

2. Exhaustion of Remedies

Before filing a *Bivens* suit against federal officials, you must exhaust (use up) any and all available administrative remedies, such as internal grievance procedures, regardless of whether you are suing for injunctive relief, declaratory relief, or money damages.[303] See Chapter 14 of the *JLM* for more information.

3. History of Bivens Actions in the Supreme Court

Since the original case in 1971, the Supreme Court has only ever approved a *Bivens* action in two other cases.[304] The first case, *Davis v. Passman,* was a Fifth Amendment gender-discrimination case, where a Congressman fired his administrative assistant because she was a woman.[305] In that case, the Supreme Court held that she could sue for damages under a *Bivens* action because her right to Due Process under the Fifth Amendment was violated.[306] The second case, *Carlson v. Green*, was an Eighth Amendment Cruel and Unusual Punishment case were a mother sued federal prison officials after her son died because the prison failed to properly treat his asthma.[307] In *Carlson*, the Court held that the family was allowed to bring a *Bivens* actions to get damages for the prison's violation of the son's Eight Amendment rights.[308]

Besides these three cases, the Supreme Court has never approved of any awards of damages based on *Bivens* Actions. Recently, the Supreme Court has limited *Bivens* Actions to cases that are similar to one of these three cases.[309] Due to this, who you can sue, and what you can write in your complaint, has been severely limited.

4. Whom You Can Sue

In bringing a *Bivens* action, you are generally limited to suing the federal official who violated your federal constitutional rights. When you sue for money damages (as opposed to a different type of remedy like declaratory relief), you can sue the federal official only in his *individual* capacity,[310] not in

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303. See Booth v. Churner, 532 U.S. 731, 741, 121 S. Ct. 1819, 1825, 149 L. Ed. 2d 958, 966–967 (2001) (holding that the PLRA requires that all administrative remedies be exhausted before filing suit, regardless of the form of relief sought).

304. See Ziglar v. Abbasi, 137 S. Ct. 1843, 1854–1857, 198 L. Ed. 2d 290, 305–309 (2017) (explaining that the Supreme Court has only allowed plaintiffs to bring a Bivens remedy in two cases other than United States v. Bivens and listing cases where the Court refused to extend Bivens to other contexts).

305. Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979).

306. Davis v. Passman, 442 U.S. 228, 248–249, 99 S. Ct. 2264, 2279, 60 L. Ed. 2d 846, 865 (1979).

307. Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980).

308. Carlson v. Green, 446 U.S. 14, 18, 100 S. Ct. 1468, 1471, 64 L. Ed. 2d 15, 23 (1980).

309. See Hernandez v. Mesa, 140 S. Ct. 735, 742–734, 206 L. Ed. 2d 29, 40–42 (2020) (explaining that Bivens remedies are in tension with "the Constitution's separation of legislative and judicial power"); Ziglar v. Abbasi, 137 S. Ct. 1843, 1855–1857, 198 L. Ed. 2d 290, 307–309 (2017) (describing Bivens, Davis, and Carlson as in tension with more recent case law and noting that it is a "disfavored judicial activity" to expand Bivens remedies to new contexts) (internal citation and quotation marks omitted).

310. To show that a federal official has acted in his individual capacity, it is generally necessary to show personal involvement. See, e.g., Volpe v. Nassau County, 915 F. Supp. 2d 284, 299 (E.D.N.Y. 2013) (noting that "the complaint [was] devoid of any reference to actions taken by [the defendant] in violation of the plaintiffs' constitutional rights. . ."); Caidor v. Tryon, 11-CV-6379L, 2011 U.S. Dist. LEXIS 119539, at *6 (W.D.N.Y. Oct. 5, 2011) (*unpublished*) (noting that "to establish a *Bivens* claim, a plaintiff must allege facts showing that the individual defendants participated in the alleged constitutional violation."); Goldberg v. Rocky Hill, 973 F.2d 70,

his *official* capacity.[311] This is because "official capacity" suits are considered to be the same as suits against the government, and the federal government has "sovereign immunity," meaning that they cannot be sued.[312] You also cannot bring a *Bivens* action against a federal agency[313] or a private corporation that contracts with the federal government to operate prison facilities.[314] In *Corrections Services Corporation v. Malesko*, the Supreme Court held that it would be unfair to allow *Bivens* suits against private corporations and not federal agencies. Violations by these private corporations, the Court said, are best handled through tort remedies available to incarcerated people.[315] It is not yet clear whether *employees* of private corporations contracting with the federal prisons may be sued under *Bivens*. While some courts have found that *Malesko* excluded only private entities and not private individuals from *Bivens* actions,[316] others have found that neither private entities nor their employees can be sued.[317]

5. What You Can Complain About: Will a Court Hear your *Bivens* Action?

Since the Supreme Court's decision in *Ziglar*, federal courts will only be allowed to hear your *Bivens* action if it is the same context as one of the three cases mentioned in part E(3). The Supreme Court has said that if your case is different in a meaningful way from the previous *Bivens* cases they decided, then the context is new and you cannot bring a *Bivens* action. For example, if your case is based on a violation of your First Amendment rights, that would be considered a new context and you could not bring a *Bivens* action. However, even if your case also involves a Fourth, Fifth, or Eighth

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73 (2d Cir. 1992) (noting that "to establish *personal* liability in a [Section] 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right.").

311. *See* Tapia-Tapia v. Potter, 322 F.3d 742, 746 (1st Cir. 2003) (holding that the Postmaster General cannot be sued in his official capacity under *Bivens*); Affiliated Prof'l Home Health Care Agency v. Shalala, 164 F.3d 282, 286 (5th Cir. 1999) (noting that *Bivens* "provides a cause of action only against government officers in their individual capacities."); Buford v. Runyon, 160 F.3d 1199, 1203 (8th Cir. 1998) (holding that a *Bivens* claim cannot be brought against a federal official in his official capacity); Randall v. United States, 95 F.3d 339, 345 (4th Cir. 1996) (noting that *Bivens* actions must be brought against federal officials individually); Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 510 (2d Cir. 1994) (stating that a *Bivens* action "must be brought against the federal officers involved in their individual capacities.").

312. *See* Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 510 (2d Cir. 1994) ("Under the doctrine of sovereign immunity, an action for damages will not lie against the United States absent consent. Because an action against . . . federal officers in their official capacities is essentially a suit against the United States, such suits are also barred under the doctrine of sovereign immunity, unless such immunity is waived."). See the discussion of state sovereign immunity under the 11th Amendment in Part C(3)(a) of this Chapter. The discussion generally applies to the federal government as well.

313. *See* FDIC v. Meyer, 510 U.S. 471, 486, 114 S. Ct. 996, 1006, 127 L. Ed. 2d 308, 323 (1994) (finding a damages remedy against federal agencies inappropriate and inconsistent with *Bivens* because of the "potentially enormous financial burden for the Federal Government").

314. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 63, 122 S. Ct. 515, 517, 151 L. Ed. 2d 456, 461 (2001) (refusing to extend *Bivens* to allow recovery against a private company operating a halfway house under contract with the Federal Bureau of Prisons).

315. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 72–73, 122 S. Ct. 515, 522, 151 L. Ed. 2d 456, 466–467 (2001) ("Nor are we confronted with a situation in which claimants . . . lack effective remedies. . . .For example, federal prisoners in private facilities enjoy a parallel tort remedy that is unavailable to prisoners housed in government facilities.").

316. *See* Sarro v. Cornell Corr., Inc., 248 F. Supp. 2d 52, 58–61 (D.R.I. 2003) (finding private prison guards to be federal actors under *Bivens* because they are considered state actors within the meaning of § 1983 and act under the color of federal law). *But see* LaCedra v. Donald W. Wyatt Det. Facility, 334 F. Supp. 2d 114, 141 (D.R.I. 2004) (holding that no *Bivens* action can be brought against employees of a public corporation because they are not federal agents and expressly disagreeing with the district court ruling in *Sarro*).

317. *See* Holly v. Scott, 434 F.3d 287, 296 (4th Cir. 2006) (dismissing *Bivens* lawsuit brought by prisoner in a privately run federal prison against prison officials because he could seek relief under state law); Peoples v. CCA Det. Ctrs., 422 F.3d 1090, 1104–1105 (10th Cir. 2005) (finding *Bivens* actions are not available against private prison employees because other remedies, such as negligence actions, are available), *vacated in part by an equally divided court en banc*, 449 F.3d 1097 (10th Cir. 2006).

Amendment issue, it still might be considered a different context. For instance, if the rank of the officers you are suing is different from the officers in one the previous *Bivens* cases, that could be considered a meaningful difference.[318] Figure 3 below provides examples of *Bivens* actions that were denied because the context of each case was considered meaningfully different.

Case	Type of Law Suit
Bush v. Lucas, 462 U.S. 367, 390, 103 S. Ct. 2404, 2417, 76 L. Ed. 2d 648, 665 (1983)	First Amendment lawsuit against a federal employer
Chappell v. Wallace, 462 U.S. 296, 297, 305, 103 S. Ct. 2362, 2364, 2368, 76 L. Ed. 2d 586, 589, 594 (1983)	Race-discrimination lawsuit against military officers
United States v. Stanley, 483 U.S. 669, 684, 107 S. Ct. 3054, 3064, 97 L. Ed. 2d 550, 567 (1987)	Substantive due process lawsuit against military officers
Schweiker v. Chilicky, 487 U.S. 412, 414, 108 S. Ct. 2460, 2463, 101 L. Ed. 2d 370, 375 (1988)	Procedural due process lawsuit against Social Security officials
FDIC v. Meyer, 510 U.S. 471, 473–474, 114 S. Ct. 996, 999, 127 L. Ed .2d 308, 315–316 (1994)	Wrongful Termination Suit against a Federal Agency
Minneci v. Pollard, 565 U.S. 118, 120, 132 S. Ct. 617, 620, 181 L. Ed. 2d 606, 610 (2012)	Eighth Amendment Suit Against prison guards at a private prison.

Figure 3: Examples of *Bivens* actions that were denied.[319]

Additionally, federal courts may refuse to hear *Bivens* complaints based on violations of the Fifth Amendment's Due Process Clause[320] that fall within the category of less serious harms (like removal of personal items).[321] For harms that are simple tort violations, you should sue using the Federal Tort Claims Act ("FTCA"),[322] rather than *Bivens* action. The FTCA is a statute that authorizes damages suits against the federal government for actions by federal employees who, within the scope of their employment, negligently or wrongfully inflict harm on people or their property.[323] You begin a FTCA claim by submitting Form 95, "Claim for Damage, Injury, or Death," and requesting money damages from the federal agency whose employee allegedly committed the harmful action.[324] Many FTCA cases are resolved at the agency level through negotiation and eventual settlements. However, if your state FTCA claim is denied, you may file suit in federal court. But remember, the judge will dismiss your case if you go to federal court without exhausting the administrative remedy.[325]

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318. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1860, 198 L. Ed. 2d 290, 311–312 (2017).

319. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1857, 198 L. Ed. 2d 290, 308–309 (2017).

320. The 5th and 14th Amendments to the Constitution each contain a Due Process Clause. The 5th Amendment's clause applies to the federal government; the 14th Amendment's applies to states.

321. *See, e.g.*, Hudson v. Palmer, 468 U.S. 517, 525–526, 533, 104 S. Ct. 3194, 3200, 3204, 82 L. Ed. 2d 393, 402–403, 407 (1984) (holding that the 4th Amendment's prohibition on unreasonable searches and seizures did not apply to searches of prison cells or seizures of prisoner property, and that such seizures did not violate the 14th Amendment's Due Process Clause if a remedy was available after the seizure); Daniels v. Williams, 474 U.S. 327, 328, 106 S. Ct. 662, 663, 88 L. Ed. 2d 662, 666 (1986) (holding that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property.").

322. Federal Tort Claims Act, 28 U.S.C. § 1346(b).

323. A person acts negligently when he fails to use the care that a reasonably prudent person would use in the same circumstance. *Negligent*, BLACK'S LAW DICTIONARY (11th ed. 2019). A person acts wrongfully when he commits an act that will damage another person's rights—even if that action is not a crime. *Wrongful Conduct*, BLACK'S LAW DICTIONARY (11th ed. 2019).

324. You may obtain this form by writing to the clerk of the federal district court in which you plan to file your action. Form 95 is also available at http://www.justice.gov/civil/docs_forms/SF-95.pdf (last visited Aug. 22, 2020).

325. *See* Deutsch v. Fed. Bureau of Prisons, 737 F. Supp. 261, 266 (S.D.N.Y. 1990) (holding that failure to file an administrative claim will bar a plaintiff from suing under the Federal Tort Claims Act).

6. What You Should File

If you are suing for injunctive relief and money damages in a *Bivens* action, you must serve (provide) a copy of the summons and complaint to: (1) the named defendants, (2) the U.S. Attorney for the district in which you bring your suit, and (3) the Attorney General of the United States in Washington, D.C.[326] If you are suing in a *Bivens* action for only money damages, you need to serve the summons and complaint to: (1) the U.S. Attorney for the district in which you bring your suit, (2) the Attorney General of the United States in Washington D.C., and (3) the officer or employee being sued.[327] You must serve these papers using either registered or certified mail.[328]

7. Where to File

If you are seeking injunctive (an order from the court to the person you sued to do something or to stop doing something) or declaratory (a court statement of your rights) relief, you may file your lawsuit in the federal district where *any* defendant lives, where the events complained of occurred or are occurring, or where you currently live.[329] If, however, you are suing for money damages only, you must file suit in the federal district where *all* the defendants live or the district where your claim arose (where the events you are complaining about occurred).[330] As mentioned in Part C(5), you will also need to show that the court you are filing your case in has personal jurisdiction (power to make a valid judgement) over these defendants. Always make sure that you show that the court has personal jurisdiction over your case, because your case will be dismissed if a Judge does not believe their court has personal jurisdiction over your case.

F. Conclusion

If your constitutional rights have been violated you may be able to obtain relief by suing state and local officials under 42 U.S.C. Section 1983 or suing federal officials through a *Bivens* action. Through these suits, you may receive monetary relief, injunctive relief, and/or declaratory judgment. In a Section 1983 claim against state and local officials you can sue officials in their official capacities as representatives of the state. However, when suing federal officials based on a *Bivens* action you may only sue the federal officials in their individual capacity. (Refer to Part E of this chapter to review the special requirements for filing *Bivens* actions.) Appendix A of this chapter provides helpful examples of forms for making your claim, such as a summons form, a sample temporary restraining order, and a sample full complaint. Remember to read Chapter 14 of the *JLM* on the Prison Litigation Reform Act before starting your Section 1983 claim.

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326. FED. R. CIV. P. 4(i)(1).

327. FED. R. CIV. P. 4(i)(3).

328. FED. R. CIV. P. 4(i)(1). (3). You can send certified mail by bringing the correspondence to the mail room staff fully prepared for mailing with the appropriate stamps. You must pay for the cost of postage. To determine the price, you can review the postal chart(s). You may follow similar procedures for sending registered mail. There are many ways to try to find the addresses for those being served. One way is to send a letter to the last known address with "Return Service Requested. Do Not Forward." written on the envelope. The letter will be returned to you with the new address if there is a new address on file. Another way is to ask the post office if there is a forwarding address available for the individual you wish to serve. If you are able to use the internet, you may conduct a basic internet search to find the phone number or address of the individual, or call information for this data. Or, you may use social media to find this information.

329. 28 U.S.C. § 1391(e)(1) ("A civil action in which a defendant is an officer or employee of the United States . . . may, except as otherwise provided by law, be brought in any judicial district in which (A) a defendant resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (C) the plaintiff resides if no real property is involved in the action.").

330. *See* Stafford v. Briggs, 444 U.S. 527, 544, 100 S. Ct. 774, 785, 63 L. Ed. 2d 1, 15 (1980) (finding that under 28 U.S.C. § 1391(b), "suits against private persons for money damages must be brought 'in the judicial district where all defendants reside, or in which the claim arose'").

APPENDIX A

Forms and Samples

This Appendix contains the following materials:

A-1. Sample Summons Form
A-2. Sample Section 1983 Complaint Form
A-3. Form for an Affidavit
A-4. Order to Show Cause and Temporary Restraining Order ("TRO")
A-5. *In Forma Pauperis* ("IFP") Papers
  a. Notice of Sample Motion to Proceed *In Forma Pauperis*
  b. Declaration in Support of Request to Proceed *In Forma Pauperis*
A-6. Application for Appointment of Counsel
A-7. "Prisoner Authorization"
A-8. Sample Language for Statement of Facts
A-9. Sample Full Complaint

Remember, people incarcerated in federal prisons can also use the "Sample Section 1983 Complaint Form" for a *Bivens* action. Just cross out the reference to "42 U.S.C. § 1983" and replace it with "28 U.S.C. § 1331 (*Bivens* action)."

Parts B and C of this Chapter contain instructions on when and how to use each of the following forms. **DO NOT USE THESE FORMS UNTIL YOU HAVE READ PARTS B AND C OF THIS CHAPTER.**

You may obtain free model forms for Section 1983 complaints and supporting papers by writing to the clerk of the district court in which you plan to file your action. These model forms are designed to make your work less confusing, and will help the district court process your case. If for some reason you cannot obtain model forms, draft your own papers based on the samples in this section. The footnotes included with each sample form tell you how to fill in the necessary information. **DO NOT TEAR ANY OF THESE FORMS OUT OF THE *JLM*.**

If you are in New York and need to know the name or address of the court to which you should send these papers, consult Appendix I at the end of the *JLM* for the federal courts in New York and Appendix II for the state courts in New York.

For sample forms for *state* court *In Forma Pauperis* Motions and Declarations in Support of Request to Proceed *In Forma Pauperis*, see Appendix A of Chapter 9 of the *JLM*.

A-1. SAMPLE SUMMONS FORM[331]

[This is based on the official form. You can get as many free copies as you need from the clerk of the U.S. district court for your district.]

United States District Court
for the
_____[332]

[*Name(s) of the Incarcerated Person(s) Who Are Bringing the Suit*], Plaintiffs,	
v.	
[*Names and Titles of All the People and Governments Whom You Are Suing*], individually and in their official capacities,[334] Defendants.	Civil Action No.____[333]

SUMMONS IN A CIVIL ACTION

To: *[Defendant's name and address]*

_____

_____

_____

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the

331. *See* Admin. Office of the U.S. Courts, *Form No. AO 440, Summons in a Civil Action*, *available at* http://www.uscourts.gov/forms/notice-lawsuit-summons-subpoena/summons-civil-action (last visited Aug. 22, 2020) (providing official form); *see also Self Representation*, *Resource Guide*, NAT'L CTR. FOR STATE CTS., *available at* https://www.ncsc.org/topics/access-and-fairness/self-representation/resource-guide (last visited Aug. 22, 2020) (listing helpful resources and state court websites with some state court forms); *Legal Forms*, WASHLAW, *available at* http://www.washlaw.edu/legalforms/#fedcts (last visited Aug. 22, 2020) (providing links to federal court forms, state court forms, and form databases).

332. Name of the federal district where the prison in which the alleged offense occurred is located, for example, "Southern District of New York" or "District of Colorado."

333. Leave this blank. This entry will be filled in by the clerk of the court where you file the form.

334. See Part C(2) of this Chapter for information on whom to name as proper defendants.

plaintiff or plaintiff's attorney, whose name and address are:

_____[335]

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF THE COURT

Date:_____ _____

Signature of Clerk or Deputy Clerk

335. Your complete prison address.

A-2. SAMPLE SECTION 1983 COMPLAINT FORM[336]

In the United States District Court
for the_____[337]

[*Name(s) of the Incarcerated Person(s)*]	:	
	:	
Plaintiffs,	:	
	:	Complaint
v.	:	
	:	
[*Names and Titles of All the People and Governments Whom You Are Suing*], individually and in their official capacities[339],	:	Civil Action No.____ [338]
	:	Jury Trial Demanded
Defendants.	:	

I. Complaint

Plaintiff(s), [*your name and the name of any other plaintiffs*], pro se, for their complaint state as follows:

II. Parties, Jurisdiction and Venue

1. Plaintiff [*your name*] was confined[340] in the [*type of facility*: municipal (city) jail, federal penitentiary, state correctional institution], located at [*address of the facility*] in the city of ____ in the state of _____ from [*dates of confinement at that facility*] to _____ of 20___. Plaintiff is currently confined at [*your current address*].
2. Plaintiff [*your name*] is, and was at all times mentioned herein, an adult citizen of the United States and a resident of the state of _____.
3. [*If other incarcerated people are complaining, you should repeat paragraphs 1, 2, and 3 with their names and addresses*].
4. Defendant [*name of first defendant*][341] was at all relevant times herein mayor of the City of ____.[342]

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336. John W. Witt et al., Section 1983 Litigation: Forms § 1.03 (2d ed. 2016 & Supp. 2020) (using sample complaint Forms 1-5 to 1-8 as a guide and source of sample language). See also U.S. Dist. Ct., EDNY, Civil Rights Complaint—Prisoner, *available at* https://img.nyed.uscourts.gov/files/forms/PRO%20SE%20CivilRightsCmpPrisoner120115.pdf (last visited Jan. 28, 2019).

337. Name of the federal district where the prison in which the alleged offense occurred is located. For example, "Southern District of New York" or "District of Colorado."

338. Leave this blank. This will be filled in by the clerk of the court where you file the form.

339. See Part C(2) of this Chapter for information on whom to name as proper defendants.

340. Add "as a pretrial detainee" if you had not yet gone to trial at the time of the incident about which you are complaining.

341. If you do not know the names of the defendants, you should refer to them as either John or Jane Doe. See Part C(2) of this Chapter for more information.

342. From paragraph 4 onward, use the descriptions and titles of defendants that are correct for your case.

5. Defendant [*name of second defendant*] was at all relevant times herein the commissioner of adult services for the City of ___, with responsibility for operating and maintaining detention, penal, and corrective institutions within the City of _____, including the city jail.[343]
6. Defendant [*name of third defendant*] is and was at all relevant times herein the warden or "superintendent" of the municipal prison for the City of _____. As Superintendent of the prison, Defendant manages its day-to-day operations and executes its policies.
7. Defendant [*name of fourth defendant*] is and was at all relevant times herein an employee of the prison.
8. Defendant _____ is employed as [*job of defendant, such as prison guard, mayor, warden or doctor*] at [*name of prison or other place that this defendant works*]. Defendant _____is employed as [*job of defendant, such as prison guard, mayor, warden or doctor*] at [*name of prison or other place that this defendant works*].
9. Defendant City of ___ is and was at all relevant times herein a municipal corporation of the State of ___.
10. This action arises under and is brought pursuant to 42 U.S.C. Section 1983 to remedy the deprivation, under color of state law, of rights guaranteed by the Eighth and Fourteenth Amendments[344] to the United States Constitution. This Court has jurisdiction over this action pursuant to 28 U.S.C. Sections 1331 and 1343.
11. Plaintiff's claims for injunctive relief are authorized by Rule 65 of the Federal Rules of Civil Procedure.
12. This cause of action arose in the _____ District of _____.[345] Therefore, venue is proper under 28 U.S.C. Section 1391(b).

III. Previous Lawsuits by Plaintiff

Use this paragraph if you have not filed any lawsuits relating to these facts before:

13. Plaintiff has filed no other lawsuits dealing with the same facts involved in this action or otherwise relating to his/her imprisonment.

Use these paragraphs if you have filed a lawsuit relating to these facts before:

14. Plaintiff has filed other lawsuits dealing with the same facts involved in this action or otherwise relating to his/her imprisonment.
15. [*Describe the lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)*] The parties to the previous lawsuit were Plaintiffs [*names of all of the plaintiffs in that lawsuit*] and Defendants [*names of all of the defendants in that lawsuit*] in the [*if federal court, name the district; if state court, name the*

343. Include the type of prison about which you are complaining, such as "federal penitentiary" or "state correctional institute."

344. Use the name of the part of the Constitution or federal statute that protects your rights.

345. Fill in the name of the district and state where you are filing, for example, "Southern District of New York" or "District of Colorado."

county] Court, Docket Number __, under [*name of judge to whom case was assigned*]. The case was [*disposition (outcome) of the cases: dismissed? appealed? still pending?*]. The lawsuit was filed on _____, 20 __ and I learned of the outcome on _____, 20___.

IV. Exhaustion of Administrative Remedies[346]

16. [*Read Chapter 14 of the* JLM*, "The Prison Litigation Reform Act," to determine whether you need to include any description here of how you exhausted your administrative remedies and in what detail. It may depend on your jurisdiction.*]

V. Statement of Claim

17. At all relevant times herein, defendants were "persons" for purposes of 42 U.S.C. Section 1983 and acted under color of law to deprive plaintiffs of their constitutional rights, as set forth more fully below.

VI. Statement of Facts

18. [*State here fully but as briefly as possible the facts of your case. Describe how each defendant is involved. The facts should be in clear, chronological order, like you are telling a story. Try to start out each paragraph with the date of the events you are describing. Include also the names of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or statutes.*[347] *If you intend to allege a number of related claims, number and give each claim a separate paragraph. Use as much space as you need. Attach extra sheet(s) if necessary. See the examples of language given for each kind of violation in Appendix A-8. You should also look at the full sample complaint in Appendix A-9.*]

VII. Prayer for Relief

[*State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes. Examples of relief you might want to include are*:

19. Plaintiffs request an order declaring that the defendants have acted in violation of the United States Constitution.
20. Plaintiffs request an injunction[348] compelling defendants to provide or stop _____.

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346. Whether you will need to include this section and what you will need to include in it varies greatly depending on where you are filing your lawsuit. For an explanation of how to indicate to the court that you exhausted your administrative remedies, see Chapter 14 of the JLM, "The Prison Litigation Reform Act." Pay particular attention to whether the courts in your jurisdiction require you to plead and prove in your complaint that you exhausted the administrative grievance procedures available to you. Depending on where you are, you may be able to omit this section entirely. However, in some circuits, such as the 6th Circuit, you will need to include quite a bit of information in this section.

347. You should try to write the facts in such a way that they satisfy the appropriate legal standard. See Appendix A-9 of this Chapter for a full sample complaint.

348. An order from the court forcing the defendants to do or stop doing something.

21. Plaintiffs request $ ___ as compensatory damages.]

Signed this __day of _____, 20__.

_____
[*Name of Plaintiff*]

I declare under penalty of perjury that the foregoing is true and correct.

_____
PLAINTIFF'S NAME

_____
DATE

A-3. FORM FOR AN AFFIDAVIT[349]

[This form is for plaintiffs, other incarcerated people, or anyone else who wants to make a sworn statement on behalf of plaintiffs.]

In the United States District Court
for the_____[350]

[*Name of First Incarcerated Person in Complaint*[351]], et al., Plaintiffs,	
v.	Affidavit
[*Name of First Defendant in Complaint*[353]], et al. Defendants.	Civil Action No.____[352]

AFFIDAVIT OF [*NAME OF PERSON MAKING STATEMENT*]

I, [*full name of incarcerated person or other person making the statement*], being duly sworn according to the law depose and say [*that I am the Plaintiff in the above entitled proceeding, if you or another plaintiff are making the statement*].

[*Write statement here. Use numbered paragraphs.*]

All of the information I have submitted [*in support of my request, Plaintiff's case, etc.*] is true and correct.

_____
Sign Here Before Notary Public

_____
[Print your name]

_____
_____
Sworn to before me this
____ day of ____ , 20__ .

_____[354]
NOTARY PUBLIC

349. A sample affidavit can be found at https://www.nycourts.gov/courts/nyc/smallclaims/forms/affidavitinsupport.pdf (last visited Jan. 28, 2019).

350. Name of the federal district where the prison in which the alleged offense occurred is located, for example, "Southern District of New York" or "District of Colorado."

351. Your name.

352. Leave this blank.

353. The name of the first defendant against whom you are bringing suit.

354. Leave blank. You should have this affidavit notarized. The notary public will fill in the date here.

A-4. Order to Show Cause and Temporary Restraining Order ("TRO")[355]

[Be sure to submit, along with this paper, an affidavit (Form A-3) stating how you will be hurt if you do not get temporary relief and how you tried to notify the defendants of your request for temporary relief.]

In the United States District Court
for the_____[356]

[*Name of First Incarcerated Person in Complaint*], et al., Plaintiffs, v. [*Name of First Defendant in Complaint*], et al., Defendants.	Order to Show Cause for Preliminary Injunction and Temporary Restraining Order Civil Action No. ____

Upon the complaint, supporting affidavits of plaintiffs sworn to the ____ day of _____, 20___, and the memorandum of law submitted herewith, it is:

ORDERED that the defendants [*names of defendants against whom you need immediate court action*] show cause in room ____ of the United States Courthouse, [*address*] on the __day of ____ , 20__ , at __ o'clock,[357] or as soon thereafter as counsel may be heard, why preliminary injunction should not issue pursuant to Rule 65(a) of the Federal Rules of Civil Procedure enjoining the defendants, their successors in office, agents and employees and all other persons acting in concert and participation with them, from [*a precise statement of the actions you want the preliminary injunction to cover*].

IT IS FURTHER ORDERED that effective immediately, and pending the hearing and determination of this order to show cause, the defendants [*names of defendants against whom you want temporary relief*] and each of their officers, agents, employees, and all persons acting in concert or participation with them, are restrained from [*statement of actions you want the preliminary injunction to cover*].

IT IS FURTHER ORDERED that personal service of a copy of this order and annexed affidavit upon the defendants or their counsel on or before [*date*], shall be deemed good and sufficient service thereof.

---

355. *See, e.g.*, JOHN W. WITT ET AL., SECTION 1983 LITIGATION: FORMS § 4.02 (2d ed. 2016 & Supp. 2020) (using sample Form 4-2, "Temporary Relief Proceedings" as a guide and source of sample language); U.S. Dist. Ct., SDNY, *Order to Show Cause for Preliminary Injunction and T.R.O.*, *available at* http://www.nysd.uscourts.gov/file/forms/order-to-show-cause-for-preliminary-injunction-and-tro (last visited Jan. 28, 2019).

356. Name of the federal district where the prison in which the alleged offense occurred is located, for example, "Southern District of New York" or "District of Colorado."

357. Leave these blank. The court clerk will fill these in.

[*leave this space blank for judge's signature*]

_____

Dated: [*leave blank*]
United States District Judge

A-5. *IN FORMA PAUPERIS* ("IFP") PAPERS[358]

[You should ask for this form from the district court clerk where you will be filing your complaint. They will also send you the paperwork that is required by the Prison Litigation Reform Act (Form A-7, "Prisoner Authorization," below) for you to fill out regarding your prison account. *Each* incarcerated plaintiff must fill out IFP *and* Prisoner Authorization forms.]

In the United States District Court
for the_____[359]

[*Name(s) of the Incarcerated Person(s) Who Are Bringing the Suit*], Plaintiffs,	
v.	Notice of Motion to Proceed *In Forma Pauperis*
[*Names and Titles of All the People and Other Entities Whom You Are Suing*], Defendant.	Civil Action No. ____[360]

APPLICATION TO PROCEED IN DISTRICT COURT WITHOUT PREPAYING FEES OR COSTS

I am a plaintiff or petitioner in this case and declare that I am unable to pay the costs of these proceedings and that I am entitled to the relief requested.

In support of this application, I answer the following questions under penalty of perjury.

1. *If incarcerated.* I am being held at: _____ _____. [*If you are employed there, or you have an account in the institution, write:*] I have attached to this document a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months for any institutional

358. *See, e.g.*, U.S. Dist. Ct., EDNY, In Forma Pauperis—Prisoner, *available for download at* https://www.nyed.uscourts.gov/forms/forma-pauperis (last visited Jan. 28, 2019); *see also* JOHN W. WITT ET AL., SECTION 1983 LITIGATION: FORMS § 7.02 (2d ed. 2016 & Supp. 2020) (using sample Form 7-1, "Application to Proceed *In Forma Pauperis*," as a guide and source of sample language).

359. Name of the federal district where the prison in which the alleged offense occurred is located, for example, "Southern District of New York" or "District of Colorado."

360. Leave this blank. This entry will be filled in by the clerk of the court where you file the form.

account in my name. I am also submitting a similar statement from any other institution where I was incarcerated during the last six months.[361]

2. *If not incarcerated.* If I am employed, my employer's name and address are: _____. My gross pay or wages are: $_____, and my take-home pay or wages are $_____ per [*specify pay period*] _____.

3. *Other Income.* In the past 12 months, I have received income from the following sources [*check all that apply*]:

(a) Business, profession, or form of self-employment	**YES**	**NO**
(b) Rent payments, interest, or dividends	**YES**	**NO**
(c) Pensions, annuities, or life insurance payments	**YES**	**NO**
(d) Disability or worker's compensation payments	**YES**	**NO**
(e) Gifts or inheritances	**YES**	**NO**
(f) Any other sources	**YES**	**NO**

If you answered "Yes" to any questions above, describe below or on separate pages each source of money and state the amount that you received and what you expect to receive in the future.

4. Amount of money that I have in cash or in a checking or savings account: $ _____

5. Any automobile, real estate, stock, bond, security, trust, jewelry, art work, or other financial instrument or thing of value that I own, including any item of value held in someone else's name [*describe the property and its approximate value*]:

6. Any housing, transportation, utilities, or loan payments, or other regular monthly expenses [*describe and provide the amount of the monthly expense*]:

7. Names (or, if under 18, initials only) of all persons who are dependent on me for support, my relationship with each person, and how much I contribute to their support:

8. Any debts or financial obligations [*describe the amounts owed and to whom they are payable*]:

Declaration: I declare under penalty of perjury that the above information is true and understand that a false statement may result in a dismissal of my claims.

Date: _____

_____

Applicant's signature

_____

_____

Printed Name

361. The Prison Litigation Reform Act ("PLRA") requires you to submit a certified copy of your prison account statement showing your balance for the last six months along with this declaration. For more information on complying with the PLRA, see Chapter 14 of the JLM, "The Prison Litigation Reform Act."

A-6. APPLICATION FOR APPOINTMENT OF COUNSEL[362]

In the United States District Court
for the_____[363]

[*Name(s) of the Incarcerated Person(s) Who Are Bringing the Suit*], Plaintiffs,	:	
v.	:	Application for the Court to Request Counsel
[*Names and Titles of All the People and Other Entities Whom You Are Suing*], Defendant.	:	Civil Action No.____[364]

(g) Name of applicant _____[365]

(h) [*Explain why you feel you need a lawyer in this case.*[366]]

(i) [*Explain what steps you have taken to find an attorney and with what results. Use additional paper if necessary.*]

(j) [*If you need a lawyer who speaks in a language other than English, state what language you speak.*]

(k) I understand that if a lawyer volunteers to represent me, and my lawyer learns that I can afford to pay for a lawyer, the lawyer may give this information to the Court.

(l) I understand that if my answers on my Application for the Court to Request Counsel are false, my case may be dismissed.

(m) I declare under penalty of perjury that the foregoing is true and correct.

Dated: _____

_____
[*Your Signature*]

362. *See, e.g.*, U.S. Dist. Ct., EDNY, *Application for Appointment of Counsel*, *available at* https://www.nyed.uscourts.gov/sites/default/files/forms/PRO SE Application for counsel.pdf (last visited Jan. 28, 2019); JOHN W. WITT ET AL., SECTION 1983 LITIGATION: FORMS § 7.04 (2d ed. 2016 & Supp. 2020) (using sample Form 7-3, "Motion for Appointment of Counsel," as a guide and source of sample language).

363. Name of the federal district where the prison in which the alleged offense occurred is located, for example, "Southern District of New York" or "District of Colorado."

364. Leave this blank. This entry will be filled in by the clerk of the court where you file the form.

365. Your name.

366. For example, you do not know the law well, you do not have access to the law library, you have a disability, your case is very complicated, etc. Use additional paper or include an affidavit supporting your application if necessary. The most common reason incarcerated people need legal representation is that Section 1983 claims involve complex legal issues that are difficult for non-lawyers to understand and litigate effectively.

A-7. PRISONER AUTHORIZATION[367]

[This is the form that should be sent to you after you submit your complaint to the district court. If you do not receive it within two weeks of submitting your complaint, you should copy the information found here and send it to the court so that your complaint is not dismissed because you did not comply with the Prison Litigation Reform Act.]

****

Mailed to the Plaintiff by the Court on this date:

Case Name: _____ v. _____

Docket No: No. Civ. ( )

NOTICE IS HEREBY GIVEN THAT THIS ACTION WILL BE DISMISSED UNLESS PLAINTIFF COMPLETES AND RETURNS THIS AUTHORIZATION FORM TO THIS COURT WITHIN FORTY-FIVE DAYS FROM THE DATE OF THIS NOTICE.

The Prison Litigation Reform Act ("PLRA" or "Act") amended the *in forma pauperis* statute (28 U.S.C. § 1915) and applies to your case. Under the PLRA, you are required to pay the full filing fee when bringing a civil action if you are currently incarcerated or detained in any facility. If you do not have sufficient funds in your prison account at the time your action is filed, the Court must assess and collect payments until the entire filing fee of $ _____[368] has been paid, no matter what the outcome of the action.

SIGN AND DATE A COPY OF THE FOLLOWING AUTHORIZATION:

I, _____, request and authorize the agency holding me in custody to send to the Clerk of the United States District Court for the _____[369] a certified copy of my prison account statement for the past six months. I further request and authorize the agency holding me in custody to calculate the amounts specified by 28 U.S.C. § 1915(b), to deduct those amounts from my prison trust fund account (or institutional equivalent), and to disburse those amounts to the United States District Court for the _____.[370] This authorization shall apply to any agency into whose custody I may be transferred, and to any other district court to which my case may be transferred and by which my poor person application may be decided.

I UNDERSTAND THAT BY SIGNING AND RETURNING THIS NOTICE TO THE COURT, THE ENTIRE COURT FILING FEE OF $ _____[371] WILL BE PAID IN INSTALLMENTS BY AUTOMATIC DEDUCTIONS FROM MY PRISON TRUST FUND ACCOUNT **EVEN IF MY CASE IS DISMISSED OR EVEN IF I VOLUNTARILY WITHDRAW THE CASE.**

_____
Signature of Plaintiff

_____

367. *See, e.g.*, U.S. Dist. Ct., SDNY, *Prisoner Authorization*, *available at* http://www.nysd.uscourts.gov/file/forms/prisoner-authorization (last visited Jan. 28, 2019).

368. Filing fees may differ depending upon the federal district court in which you file your claim.

369. Fill in the district in which the court is located, such as "Southern District of New York" or "District of Colorado."

370. Once again, fill in the federal district in which the court is located.

371. Fill in the fee charged by the district court in which your case is filed.

Date Signed

Prisoner I.D. Number:_____
Name of current facility: _____

A-8. SAMPLE LANGUAGE FOR STATEMENT OF FACTS

[The following paragraphs are examples of how to explain different types of complaints that you may want to bring.[372] **DO NOT COPY ANY OF THESE because your facts will be different than the examples.]**

INADEQUATE AND UNSANITARY HOUSING[373]

1. Numerous insects, rats, mice, and other vermin were in the prison throughout the period of plaintiffs' confinement from November 2002 until the time of this complaint.
2. An exterminator did visit the prison in March of 2005, but only the common areas and guard areas were sprayed. Individual cells were never sprayed. When the common areas were sprayed, roaches and other vermin simply moved into the individual cells. Once the fumes disappeared, the vermin returned unharmed to again infest the entire prison.
3. The exterminator wore a mask and gloves, but incarcerated people remained in their cells and were not given masks or protective clothing.
4. There was no ventilation to prevent incarcerated people from inhaling the dangerous fumes. Plaintiff and fellow incarcerated person [*Plaintiff #2*], as well as several others, suffered severe headaches and nausea after the extermination.
5. Inadequate lighting in the cells made reading for more than a few minutes at a time extremely difficult and nearly impossible. Requests for lamps or stronger light bulbs were denied on [*insert date] by [name of person who denied the light bulb*].

INADEQUATE VISITATION AND TELEPHONE ACCESS[374]

6. Plaintiff attempted to telephone his attorney beginning in March 2005 because he wished to tell him about new evidence in his case. On or about March 3, 2005, plaintiff asked [*Defendant #1*] to allow plaintiff to make a telephone call to his attorney. Defendant refused.
7. Plaintiff continued to request telephone access throughout the month of March. On April 1, 2005, he was given access to the telephone, but only after 7:30 p.m. Because his attorney works only during business hours, plaintiff was unable to contact him that day.
8. The refusal of the prison staff to allow plaintiff access to telephone contradicted stated prison policy regarding telephone use for incarcerated people in the general population posted in the cafeteria. Plaintiff was a part of the general population for the entire time that he could not access a telephone.
9. The official prison policy regarding telephone use is also insufficient for purposes of contact with incarcerated people's attorneys. While confined in the prison, each incarcerated person was allowed to make only one five-minute call during the week and one ten-minute call on the weekend. The weekday phone calls were restricted to the daytime one week and the evening the next. Each incarcerated person was allowed only one long-distance telephone call per month, even if that was the only way to contact that incarcerated person's attorney.
10. On January 17, 2006, plaintiff [*Plaintiff #2*] met with his attorney in the common area. Despite numerous requests by plaintiff [*Plaintiff #2*] and plaintiff's attorney for privacy, defendants [*Defendants #2 and #4*] refused to keep other incarcerated people away from plaintiff and his attorney. In addition, defendants [*Defendants #2 and #4*] were also observed listening to plaintiff and attorney's private conversation.

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372. These fact patterns are based in large part upon examples taken from the sample complaints in JOHN W. WITT ET AL., SECTION 1983 LITIGATION: FORMS (2d ed. 2016 & Supp. 2020).

373. *See* JOHN W. WITT ET AL., SECTION 1983 LITIGATION: FORMS § 1.03 (2d ed. 2016 & Supp. 2020) (using language from sample Form 1-5, "Pretrial Detainee Complaint–Totality of Conditions," as an example).

374. *See* JOHN W. WITT ET AL., SECTION 1983 LITIGATION: FORMS § 1.03 (2d ed. 2016 & Supp. 2020) (using language from sample Form 1-5, "Pretrial Detainee Complaint–Totality of Conditions," as an example).

11. The short amount of time allotted for the calls and the complete lack of privacy markedly decreased the quality of discussions between incarcerated people and their attorneys. The only phone was located in the common area. It was not only difficult to have a conversation over the noise of the guards and other prisoners, but also nearly impossible to have a private conversation. On numerous occasions incarcerated people complained that the guards were listening to their phone conversations.
12. The prison's attorney visitation policy was overly restrictive during the period of plaintiffs' confinement. Incarcerated people were forced to talk with their lawyer either in the common area, where other incarcerated people and guards could overhear conversations, or in a meeting room observed by guards through two-way mirrors. Since attorneys often felt uncomfortable conversing openly in the common area, surrounded by other incarcerated people, meetings frequently occurred under the watchful eye of the prison guards.

INADEQUATE MEDICAL CARE[375]

SPECIFIC INSTANCE

13. On August 23, 2004, plaintiff injured his ankle and foot while playing basketball with other incarcerated people. At approximately 2:00 p.m., he asked [*Defendant #1*] to be allowed to attend sick call at the infirmary. [*Defendant #1*] denied plaintiff's request, stating that sick call was at 8:30 a.m. and that plaintiff would have to wait until the following morning. Plaintiff then returned to his cell, his injury untreated.
14. In the early afternoon of August 23, 2004, plaintiff, still in his cell, saw [*Defendant #2*] making his rounds on plaintiff's floor. Plaintiff told [*Defendant #2*] about his foot injury and asked to see the prison nurse. [*Defendant #2*] replied that in order to see the nurse, his pain would have to be an emergency. Otherwise, plaintiff would have to wait until the next day for sick call. Plaintiff immediately told him it was an emergency. However, [*Defendant #2*] said that he did not think it was an emergency because plaintiff was not bleeding and told plaintiff to wait for sick call. [*Defendant #2*] then left to continue his rounds.
15. Later in the afternoon of August 23, 2004, plaintiff was in severe pain from his foot and noticed that it had swelled and become discolored. He called [*Defendant #4*], the shift supervisor at the time. He responded to plaintiff's call and asked him what was wrong. Plaintiff told him about his symptoms and asked to see the prison nurse. Instead, [*Defendant #4*] went to get some Advil for plaintiff.
16. On the evening of August 23, 2004, [*Defendant #3*] gave two Advil pills to plaintiff. Plaintiff took the Advil and told [*Defendant #3*] that his pain was so bad that he could not stand or walk. [*Defendant #3*] responded that he could only follow [*Defendant #4*]'s orders, and told plaintiff that sick call was at 8:30 a.m.
17. On the morning of August 24, 2004, prison staff members found plaintiff in his bed. He was unable to move his foot. Plaintiff was finally seen for the first time by the prison's staff nurse, at which time plaintiff was moved to _____County Hospital. At _____County Hospital, plaintiff's foot was examined and operated on. Plaintiff remained hospitalized for the next five days as a result of the prison's unprofessional and inappropriate neglect of his injury.
18. Plaintiff [*Plaintiff #2*] experienced earaches in both ears for the entire month of November 2002, and was unable to obtain medical attention.
19. Plaintiff [*Plaintiff #2*] also suffered severe migraines from approximately December 2, 2005, through February 14, 2005, that were completely draining. He was denied timely medical care by the prison. When [*Plaintiff #2*] was finally taken to the hospital on February 14, 2005, he was

375. *See* JOHN W. WITT ET AL., SECTION 1983 LITIGATION: FORMS §§ 1.03 (2d ed. 2016 & Supp. 2020) (using language from sample Form 1-5, "Pretrial Detainee Complaint–Totality of Conditions," and sample Form 1-8, "Prisoner Complaint–Inadequate Medical Treatment," as an example); *see also* Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care."

diagnosed as suffering from cluster migraine headaches resulting from physical problems, namely, his ear infections.

20. Plaintiff [*Plaintiff #3*] suffered from severe neck pain as a result of a factory work accident prior to plaintiff's prison confinement. [*Plaintiff #3*] has been unable to get any medical attention for this physical ailment to date.
21. Plaintiff [*Plaintiff #4*] had pieces of a broken knife lodged in his shoulder. While in the prison, the shards began causing him immense pain. Despite numerous complaints, [Plaintiff #4] has not received any medical attention to date.
22. Plaintiff [*Plaintiff #5*] suffered from an open, infected sore four inches in diameter on his leg. Plaintiff [*Plaintiff #5*] showed this sore to defendants [*Defendants #1 and #2*] on January 12, 2005. Prison authorities did not provide him with treatment or medication until February 1, 2005.
23. Plaintiff [*Plaintiff #6*] suffered severe migraine headaches resulting from stress and spiritual problems. He also had several stomach ulcers. He was unable to obtain adequate or timely medical care. Plaintiff reported these problems to defendant [*Defendant #3*] on December 1, December 15, and December 30, 2004. Defendant has not received any medical attention until the present time.
24. Plaintiff [*Plaintiff #5*] suffered a head wound in a shootout a few years prior to his sentence in prison. When the wound became painful during [*Plaintiff #5*]'s stay at the prison, he asked defendants [*Defendants #2 and #5*] on January 25, 2005 for a medical exam. He did not receive any medical care until two months after his first request. As a consequence of the delay in treatment, [*Plaintiff #5*] underwent a complicated surgical procedure on April 15, 2005, and was hospitalized for two weeks.

IN GENERAL

25. In general, defendants showed deliberate indifference to the medical needs of incarcerated people, and particularly neglected those of the plaintiffs.
26. Medical care at the prison was inadequate and unprofessional. Medical records, vital in assessing a patient's potential for future sickness, were not used to assist diagnoses. Deficiencies were the norm, and plaintiffs were unable to obtain examinations or care upon request. Incarcerated people often had to submit grievances to receive medical care from a physician or hospital.
27. Sick call occurred only once each week, the screening process for determining whether a patient needed attention was inadequate, and in the meantime, plaintiffs would have to beg guards or other staff for basic medical attention.

INADEQUATE LAW LIBRARY AND FACILITIES[376]

28. Plaintiff [*Plaintiff #1*] filed a case in the district court on May 15, 2003, regarding injuries he received from a prison guard during a prison riot. Plaintiff's case was dismissed because he failed to use the Inmate Grievance Program prior to filing his case, as required by the Prison Litigation Reform Act ("PLRA").
29. Plaintiff was unable to file his lawsuit again because the statute of limitations in New York had passed by the time he received notice that his case had been dismissed.
30. Plaintiff did not know about the PLRA because the legal materials available to him in prison contained no cases or information regarding the state of the law after 1995.
31. The prison library was shockingly inadequate. The most recent case reporters in the library dated from 1994 and several volumes were missing, specifically all of the United States reporters from 1990 and 1992.

376. *See* JOHN W. WITT ET AL., SECTION 1983 LITIGATION: FORMS § 1.03 (2d ed. 2016 & Supp. 2020) (using language from Form 1-5, "Pretrial Detainee Complaint–Totality of Conditions," as an example).

32. Plaintiffs, relying on these reporters, suffered actual injury because they could have succeeded under a different claim if they had access to current statutory and case law.
33. The incarcerated people on each block were supposed to have access to the law library at least three times a week. However, they were regularly called only once a week or less. Five incarcerated people at a time were sent to the library for a period of ninety minutes, not enough time to adequately conduct research and prepare legal documents. No books were allowed to be checked out of the library. As a result, it was extremely difficult for incarcerated people to get more than a small amount of work done each time they went to the library.

INADEQUATE MAIL FACILITIES (CORRESPONDENCE)[377]

34. The mail processing system at the prison was extremely inadequate. Mail was frequently lost or misplaced.
35. Plaintiff [*Plaintiff #2*] prepared a petition for a writ of habeas corpus. Three weeks after giving it to prison authorities to be mailed, plaintiff discovered it at the bottom of a three-foot stack of undelivered mail. In addition, the envelope was battered and dirty.
36. Plaintiff [*Plaintiff #3*] notified the mail clerk that he was expecting a letter and photographs from his wife and children. Three months later Plaintiff [*Plaintiff #3*] received a torn envelope with no photographs. The envelope was marked "Received" with the date of two months before stamped on it. Plaintiff [*Plaintiff #3*] suffered extreme emotional harm and depression due to this lack of expected correspondence with his family.
37. In addition, the prison did not have any secure place for incoming or outgoing mail to protect against the mail being stolen or lost.

INADEQUATE OPPORTUNITY TO PRACTICE RELIGION[378]

38. Plaintiffs were not permitted to meet or practice their religion. Even though numerous grievances were filed and the majority of the prisoners were Muslim, the prison did not allow any Muslim services.
39. Despite the fact that plaintiffs' religion forbids eating pork and foods cooked with pork fat, the prison offered no halal, vegetarian or alternative diet plan.

UNSAFE ENVIRONMENT[379]

40. From approximately April 2005 through December 2005 plaintiff was mercilessly beaten and savagely raped by defendant [*Defendant #1*] and other fellow incarcerated people whose names are unknown to plaintiffs.
41. As a result of these assaults, plaintiff [*name*] suffered [*describe injuries such as: broken jaw, severe facial lacerations requiring stitches, anal bleeding, and severe anxiety*]. Defendant [*Defendant #2*] knew about the injuries; despite plaintiff's request for hospitalization, defendant [*Defendant #2*] denied plaintiff access to medical care.
42. [*Specify other acts or omissions that defendants knowingly and negligently committed, which tended to cause the injuries received by plaintiff, such as:* A number of prison guards knowingly and negligently opened the cell doors of _____ and allowed the intermingling of incarcerated people, and allowed different groups with known hostilities toward each other to intermingle in

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377. *See* JOHN W. WITT ET AL., SECTION 1983 LITIGATION: FORMS § 1.03 (2d ed. 2016 & Supp. 2020) (using language from Form 1-5, "Pretrial Detainee Complaint–Totality of Conditions," as an example).

378. See John W. Witt et al., Section 1983 Litigation: Forms § 1.03 (2d ed. 2016 & Supp. 2020) (using language from Form 1-5, "Pretrial Detainee Complaint–Totality of Conditions," as an example).

379. *See* JOHN W. WITT ET AL., SECTION 1983 LITIGATION: FORMS § 1.03 (2d ed. 2016 & Supp. 2020) (using language from Form 1-7.1, "Complaint Against Prison Officials, Employees, and Fellow Prisoners for Beating and Rape of Prisoners" as an example).

order to instigate violence. These guards were well aware of the severe danger to plaintiff. The prison guards failed to properly supervise the prison and provide for plaintiff's safety. They also purposely and recklessly failed to provide plaintiff with medical assistance, thereby depriving plaintiff of his civil rights, guaranteed by the Constitution and Laws of the United States and of the State of _____.].

43. Defendants [*Defendants #2, #3, and #4*]'s recklessness, failure to properly train and manage [*prison guards or medical doctor*] of the County of _____, State of _____, and failure to adequately supervise and protect plaintiffs from the acts complained of caused the deprivation of plaintiffs' rights.

A-9. SAMPLE FULL COMPLAINT

[The following is a sample full complaint. **DO NOT COPY THIS as your facts will be different than this example.** NOTE, you will want to DOUBLE SPACE the body of your complaint. This complaint is single-spaced to save space.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF STATE

Scott Martin, Plaintiff, v. Captain Jack Williams, Sergeant John Doe, Acting Sergeant Joseph Franks, Correctional Officer Steve Doe, Dr. Stanley Thomas, Correctional Officer Ronald C. Smith, and Warden Justin A. Kent, individually and in their official capacities. Defendants.	COMPLAINT Jury Trial Demanded No. 12345

PLAINTIFF'S SECOND AMENDED COMPLAINT

Plaintiff Scott Martin for his second amended complaint against defendants Captain Jack Williams, Sergeant John Doe, Acting Sergeant Joseph Franks, Correctional Officer Steve Doe, Dr. Stanley Thomas, Correctional Officer Ronald C. Smith, and Warden Justin A. Kent, alleges as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action under 28 U.S.C. Sections 1331 and 1343(3) and (4). The matters in controversy arise under 42 U.S.C. Section 1983.

2. Venue properly lies in this District pursuant to 28 U.S.C. Section 1391(b)(2), because the events giving rise to this cause of action occurred at Plaineville Correctional Center ("Plaineville") in City, State, which is located within the Northern District of State.

PARTIES

3. Plaintiff Scott Martin is and was, at all times relevant hereto, an incarcerated person in the custody of the State Department of Corrections ("SDOC"). At the time of the events relevant hereto, Martin was incarcerated at Plaineville. Martin is currently incarcerated at the Smithville Correctional Center ("Smithville").

4. Defendant Jack Williams is an SDOC officer with the rank of Captain, who at all times relevant hereto was assigned to Plaineville.

5. Defendant Dr. Stanley Thomas was, at all times relevant hereto, a physician employed or retained by SDOC to provide medical services at Plaineville.

6. Defendant Sergeant John Doe is an SDOC officer with the rank of Sergeant, who at all times relevant hereto was assigned to Plaineville.

7. Defendant Acting Sergeant Joseph Franks was, at all times relevant hereto, a correctional officer at Plaineville, who at the time of the events described below was serving as an Acting Sergeant.

8. Defendant Officer Steve Doe was, at all times relevant hereto, a correctional officer at Plaineville.

9. Defendant Ronald C. Smith was, at all times relevant hereto, a correctional officer at Plaineville.

10. Defendant Justin A. Kent was, at all times relevant hereto, Warden of Plaineville. As Warden of the prison, Defendant manages its day-to-day operations and executes its policies.

PREVIOUS LAWSUITS BY PLAINTIFF

11. Plaintiff has filed no other lawsuits dealing with the same facts involved in this action or otherwise relating to his/her imprisonment.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

[Read Chapter 14 of the JLM*, "The Prison Litigation Reform Act."]*

FACTS

12. On or about January 1, 2003, plaintiff was assigned to and resided in cell 1, Unit 1, at Plaineville with his cellmate, Mr. Joshua Nixon ("Nixon").

12. On several occasions prior to January 1, 2003, plaintiff informed defendant Williams that he feared for his personal health and safety due to serious conflicts he was having with Nixon, and plaintiff requested that one of them be transferred as soon as possible.

13. Prior to January 1, 2003, plaintiff wrote a letter to defendant Williams that again informed Williams of his fear for his personal health and safety due to the situation between plaintiff and Nixon and asked that plaintiff be transferred from the cell.

14. On January 1, 2003, Nixon also made a request to defendant Williams for a cell transfer due to conflicts between himself and plaintiff. Defendant Williams denied the request.

15. On January 1, 2003, plaintiff personally asked defendant Williams if he could be transferred from his cell because he feared for his personal health and safety due to conflicts between himself and Nixon. Defendant Williams refused plaintiff's request.

16. On January 1, 2003, Nixon asked Correctional Officer Washington whether he could be transferred from his cell to an adjoining cell occupied only by Charles Jones, because he and plaintiff were having serious problems living together. Officer Washington agreed to make such a transfer. However, without explanation, defendant Sergeant John Doe refused to permit Officer Washington to supervise the move.

17. Charles Jones also discussed with both Officer Washington and defendant Williams Nixon's request for a move into Jones's cell, and he notified Washington and Williams that he was not opposed to Nixon moving into his cell.

18. On January 1, 2003, the same day that plaintiff and Nixon repeatedly asked various correctional officers at Plaineville for a cell transfer, the two engaged in a verbal argument about the volume level of Nixon's radio. A few hours later, plaintiff was sleeping when he heard his cellmate making noise. Plaintiff awoke to see Nixon putting on his boots. After Nixon had put on his boots, he attacked plaintiff without provocation. Nixon struck plaintiff numerous times, causing injuries to his eyes, nose, mouth, and chest. Nixon also used various objects to strike plaintiff, including the radio and a property box. During the attack, Nixon stomped on plaintiff's bare feet with his heavy boots, causing injury to plaintiff's feet.

19. As Nixon beat him, plaintiff yelled for a "med tech" and summoned prison officials for assistance via a buzzer in his cell. When Acting Sergeant Franks and Correctional Officer Steve Doe arrived, they refused to open the cell door while plaintiff was being attacked. The two officers acknowledged to plaintiff that they saw that he was being attacked but failed to intervene until later.

20. Immediately following this assault, plaintiff was taken to the emergency room at Plaineville Hospital. Plaintiff suffered from cuts and lacerations on his body and his face, as well as multiple bruises and swelling on his face and body. Plaintiff was informed by medical personnel that a deep, 1.25 inch cut in his mouth required stitches. In addition, plaintiff was given an X-ray to determine whether or not his nose was broken, but the amount of blood in plaintiff's nose rendered the X-ray inconclusive.

21. Despite the severity of his injuries and the excruciating pain plaintiff suffered as a result of these injuries, only two Tylenol were administered to plaintiff after the attack. Plaintiff endured severe pain throughout the night from his extensive injuries. The next day, despite the serious pain, Dr. Thomas prescribed only Motrin for pain relief. Although plaintiff's pain was not alleviated, no stronger pain killer was administered.

22. Notwithstanding the opinion of other medical personnel that plaintiff required stitches, defendant Dr. Thomas refused to administer any stitches for the deep cut in plaintiff's mouth. He instead told a colleague that plaintiff was "a crybaby" and discharged him from any further care. Despite plaintiff's repeated requests, defendant Dr. Thomas refused to arrange for any follow-up care for his injuries.

23. At plaintiff's request, he was given a pass permitting him to return to the Hospital the following day for follow-up medical care, but he was never called to return to the Hospital. Plaintiff wrote to defendants Warden Kent and Dr. Thomas to tell them that he had not been taken back to the Hospital for follow-up treatment for his injuries and to request such treatment, but he never was sent back to the Hospital for follow-up care. The only further action any member of the prison staff took with respect to plaintiff's injuries was to advise plaintiff in the future to avoid going to sleep before resolving disagreements with a cellmate.

24. Following his visit to the emergency room, plaintiff continued to suffer from migraine headaches, dizziness, and general physical pain as a result of his injuries. He continued to bleed from the unstitched cut in his mouth for days afterwards, making it difficult or impossible to eat.

25. Soon after, plaintiff filed a grievance and a civil suit against the above-named defendants for their deliberate indifference to harm caused to him throughout the above-mentioned period.

26. After filing the civil suit, plaintiff was the target of harassment and retaliation from both defendant Williams and defendant Smith.

27. On January 14, 2004, plaintiff exited his cell and approached defendant Smith to ask him when lunch was being served. Defendant Smith stuck out his arm and threw plaintiff backwards, nearly causing him to fall. Plaintiff then approached defendant Williams, who witnessed the event, to ask him if he would let this act go without reprimand. Defendant Smith then threatened plaintiff by telling him that "next time, I will bust your head." To this, defendant Williams responded to plaintiff, "you know what you've got to do, take care of your business." On subsequent occasions, defendant Smith verbally harassed plaintiff for filing grievances and lawsuits.

28. Defendant Williams also harassed plaintiff in retaliation for grievances plaintiff had filed against Williams. For example, on February 1, 2004, during an alcohol "shake down," plaintiff and only two other prisoners were forced to submit to a strip search, even though plaintiff had never had an alcohol violation, nor had he ever failed any drug test administered by the prison.

29. Similarly, on March 12, 2004, defendant Williams loudly berated plaintiff from the gallery for accusing him of being a racist in one of the grievances plaintiff had filed against him. Defendant Williams then approached plaintiff's cell, opened the cell door, and told plaintiff that he does not harass prisoners and only tries to help and protect them. In doing so, Williams used the precise language that plaintiff had used in his grievance against Williams, thus emphasizing that he was acting in retaliation for the grievance.

COUNT ONE: BREACH OF DUTY TO PROTECT

31. Defendant Williams exercised deliberate indifference to plaintiff's health and safety by failing to protect him from a prison attack even though he had been informed of a threat to plaintiff's health and safety. Defendant Williams received repeated requests, oral and in writing, from both plaintiff and his cellmate, Nixon, for a cell transfer due to conflict between the two and refused to act upon them. Defendant Williams' deliberate indifference to plaintiff's health and safety was further demonstrated when he spoke to plaintiff the day after plaintiff had been attacked and laughed at plaintiff's injuries.

32. Defendant Acting Sergeant John Doe exercised deliberate indifference to plaintiff's health and safety by refusing, for no reason, to authorize a cell transfer of either plaintiff or Nixon to an available cell, when he knew that there were serious conflicts between plaintiff and Nixon and that plaintiff's health and safety were at risk.

33. Defendants Sergeant Franks and Correctional Officer Steve Doe exercised deliberate indifference to plaintiff's health and safety by failing immediately to protect plaintiff from an attack by his cellmate as soon as they knew it was occurring. Instead, these defendants merely acknowledged to plaintiff that they saw the attack and, despite seeing that plaintiff had suffered and was suffering serious injuries, the defendants failed to stop the attack immediately.

34. As a result of the deliberate indifference exercised by the aforementioned defendants, plaintiff suffered serious harm at the hands of his cellmate. Plaintiff sustained multiple physical injuries, including deep cuts in his mouth and upon his face, bruises upon his face and body, as well as migraine headaches and dizziness. Plaintiff also suffered extreme emotional distress from the incident.

COUNT TWO: FAILURE TO ADMINISTER ADEQUATE MEDICAL REMEDY

36. Defendant Dr. Thomas exercised deliberate indifference to plaintiff's health by failing to provide adequate medical care to him following the attack by Nixon. Defendant Dr. Thomas intentionally did not administer stitches to a deep cut in plaintiff's mouth and refused to fulfill any of plaintiff's requests for follow-up care. Instead, defendant Dr. Thomas mocked plaintiff in front of other medical personnel.

37. As a result of Dr. Thomas's deliberate indifference to plaintiff's condition, plaintiff suffered further pain and mental anguish. He continued to suffer from migraine headaches and general pain throughout his body, and Dr. Thomas refused to provide adequate pain medication for plaintiff. In addition, plaintiff was unable to eat properly for days after receiving care from defendant Dr. Thomas, because the unstitched cut in his mouth did not properly heal.

COUNT THREE: RETALIATORY TREATMENT FOR FILING SECTION 1983 CLAIM AND FOR FILING GRIEVANCES

39. Almost immediately after plaintiff filed grievances against him, defendant Williams repeatedly harassed and caused harm to plaintiff in retaliation for the grievances. Defendant Williams forced plaintiff to submit to a strip search, even though he had no reason to do so. Defendant Williams came on the gallery and loudly berated plaintiff for allegations he made in one of the grievances filed against Williams.

40. After plaintiff filed a civil rights action against defendant Williams, plaintiff suffered retaliation by defendants Williams and Smith. When plaintiff approached defendant Smith to speak with him, defendant Smith stuck his arm out straight and struck plaintiff, throwing him backward and nearly knocking him down. Defendant Williams looked on and failed to correct or chastise defendant Smith as a result of this battery, merely warning plaintiff that "you know what you've got to do, take care of your business."

41. A few months later, after plaintiff had filed a grievance against defendants Smith and Williams for the above incident, Officer Smith verbally harassed plaintiff in retaliation for plaintiff's filing of the grievance. Defendant Smith told plaintiff that he "was the type who liked to file grievances and that it didn't matter if [Plaintiff] filed a [lawsuit] because [Plaintiff] wasn't going to be getting any money and that nothing [was] going to be done."

42. These acts represent a pattern of events demonstrating intentional retaliation against plaintiff by defendants Williams and Smith for filing grievances and a civil rights action and have caused plaintiff further mental anguish as a result.

WHEREFORE, Plaintiff prays for judgment in his favor and damages in his favor against all defendants in an amount sufficient to compensate him for the pain and mental anguish suffered by him due to the deliberate indifference and intentional misconduct of defendants, but in no event less than $300,000, together with his attorneys' fees and costs, and such additional relief as the Court may deem just and proper.

Respectfully submitted,

_____

Plaintiff Name, Plaintiff[380]

380. You must sign your name in ink on the line here.