CHAPTER 24

YOUR RIGHT TO BE FREE FROM ASSAULT BY PRISON GUARDS AND OTHER INCARCERATED PEOPLE*

A. Introduction

The United States Constitution and state laws protect incarcerated people from certain acts of violence and harassment. This includes attacks, rapes, and other forms of assault. If you believe that a guard or another incarcerated person has assaulted you, this Chapter can help explain your legal options. Part B of this Chapter describes your legal right not to be assaulted. It also explains what you need to prove in order to sue under the Eighth Amendment. Part C discusses legal protections against sexual assault and rape. Part D outlines special issues for LGBTQ incarcerated people. Part E explains how to protect your right to be free from physical and sexual assaults.

Before starting your research, keep in mind that there are two types of laws that protect your rights in prison: (1) federal constitutional law and (2) state law. Federal constitutional law comes from the United States Constitution, which protects incarcerated people from certain assaults. The most important constitutional protections against assault are in the Fifth, Eighth, and Fourteenth Amendments. This Chapter will explain these Amendments in more detail. For example, this Chapter will help you figure out if prison officials have violated your Eighth Amendment right to be free from cruel and unusual punishment in prison.[1] For a full list of the Constitution's Amendments, see Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 to Obtain Relief From Violations of Federal Law."

To help explain your constitutional rights, this Chapter will describe federal constitutional law cases decided by the U.S. Supreme Court. These cases apply to you no matter where you are imprisoned. This Chapter will also describe cases decided by "Circuit Courts of Appeals." These are the federal appeals courts below the U.S. Supreme Court. Unlike Supreme Court cases, these cases do not set the law for the entire country. Instead, they only apply in the particular group of states that make up the circuit. Therefore, before reading further, you may want to first look up which circuit your state is in. For instance, if you are in New York State, you are in the Second Circuit. Once you know what circuit you are in, you can use the cases from that circuit to understand and make an argument based on federal constitutional law. You can also use cases from other circuits to help support your argument. But, a court in your circuit does not have to follow these cases. If you are confused, you should read Chapter 2 of the *JLM*, "Introduction to Legal Research," for more information on how the judicial system is organized.

This Chapter also describes New York State law. This means if you are in a prison outside of New York, you will need to research the specific laws of your state. You can still use this Chapter to understand federal constitutional law and how state laws work in general. But, don't forget that the laws in your state might be different. For diagrams of the state and federal court systems, see the inside front and back covers of the *JLM*.

To summarize: if a guard or another incarcerated person has assaulted you in prison, you may be able to make a (1) federal constitutional law claim (that is, a claim that your constitutional rights were violated) and/or (2) a state law claim (that is, a claim that a state law was violated). The specific state law claim that you bring will depend on the state where you are imprisoned.

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* This Chapter was written by Anya Emerson based on previous versions by Sara Manaugh, Jennifer Parkinson, Hannah Breshin Otero, Aric Wu, Sara Pikofsky, and Tami Parker. Special thanks to John Boston of The Legal Aid Society, Prisoners' Rights Project for his valuable comments.

1. The 8th Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

Regardless of where you are imprisoned, you can bring a *civil* law claim. You cannot bring *criminal* law charges against your attacker. Only the government can bring charges under criminal law.[2] However, you do not have to wait for the government to bring a criminal charge against your attacker. If you have been assaulted and you want to sue your attacker in court, you can bring a civil suit even before the government charges your attacker with a crime. You can also bring a civil suit even if the government never charges your attacker at all.

State civil law includes many different areas of law. The area of state civil law you would use to file a claim after a prison assault is called "tort law."[3] Specifically, an assault is a type of tort. A tort is a wrongful act one person does to another. Tort law has developed in each state as a part of the "common law" (laws made by judges when they decide cases) rather than as "statutory law" (laws passed by the state legislature). This means that if you want to sue your attacker based on state law, you will need to read the cases decided in state courts to understand the laws that will apply to your case. In some states, the common law of torts has been "codified." Codified means that the state legislature has organized the judicial case law on torts into "statutes" (written laws passed by the legislature).[4] You should check to see whether your state legislature has codified tort law. If it has, you can find the definition of assault in the state statute. Tort law has ***not*** been codified in New York State. This means that it only exists as judge-made common law. If you are confused about tort law, you should read Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions."

If you determine your rights have been violated under federal constitutional or state law, you will first need to follow the administrative grievance procedures your prison has set up before you can go to court. Filing a grievance is explained in Chapter 15 of the *JLM*, "Inmate Grievance Procedures." If the grievance system does not help you, or if it does not help you enough, you can then file a suit in court. If you go to court, you must choose which court to go to and what type of lawsuit to bring. You can:

(1) bring an action under Section 1983 of Title 42 of the United States Code (42 U.S.C. § 1983)[5] in state or federal court,

(2) file a tort action in state court (in the New York Court of Claims[6] if you are in New York),

or

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2. *See* Lewis v. Gallivan, 315 F. Supp. 2d 313, 316–317 (W.D.N.Y. 2004) ("[T]he law is well settled that no private citizen has a constitutional right to bring a criminal complaint against another individual.").

3. Note that if you are an incarcerated person in a *federal* institution (a prison run by the federal government), you will need to sue for simple tort violations using the Federal Tort Claims Act ("FTCA"). The FTCA is a law that allows you to sue the federal government for negligent or harmful actions by its employees. Without the FTCA, you could not sue the federal government in tort because the federal government would be "immune" from this kind of suit (unable to be sued). It is important to note that "[u]nder the FTCA, courts apply the law of the state where the accident occurred." Robinson v. U.S. Bureau of Prisons, 244 F. Supp. 2d 57, 64 (N.D.N.Y. 2003); *see also* 28 U.S.C. § 1346(b)(1) (stating that government officials can be sued "in accordance with the law of the place where the act or omission occurred"); Part E(4) of Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 to Obtain Relief From Violations of Federal Law.".

4. The general principles of tort law have also been organized into a "Restatement" by the American Law Institute. The Restatement is a useful resource for learning about tort law in general but is not itself binding law, meaning courts do not have to follow it.

5. Remember that "§" is the symbol for "section." For example, § 1983 means "Section 1983."

6. The New York Court of Claims is a specific New York State court that only hears claims for damages against the State of New York. If the person who injured you was a state official or employee, and you decide to file a tort action in state court in New York, you should file your claim in the New York Court of Claims. The Court of Claims can only award money damages; it cannot issue an *injunction,* or an order from a judge that prevents a person from beginning or continuing specific actions. See Chapter 5 of the *JLM*, "Choosing a Court & Lawsuit," for more information on the Court of Claims. See Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," for more explanation of tort actions.

(3) file an Article 78[7] petition in state court if you are in New York.

More information on all of these types of claims can be found in other chapters of the *JLM*, including Chapter 5, "Choosing a Court and a Lawsuit"; Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief From Violations of Federal Law"; Chapter 17, "The State's Duty to Protect You and Your Property: Tort Actions"; and Chapter 22, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules." If you decide to file a federal court claim, you ***must first*** read *JLM*, Chapter 14, "The Prison Litigation Reform Act," on the Prison Litigation Reform Act ("PLRA"). If you do not follow the steps required by the PLRA, you might lose your right to sue (and possibly your good-time credit also).

B. Your Right to Be Free from Assault

This Part of the Chapter is organized into five different sections. Part B(1) explains the legal definition of assault. It also states which prison assaults are considered unlawful. Part B(2) discusses how the Eighth Amendment, which forbids cruel and unusual punishment, protects you against assaults by both prison guards and other incarcerated people. Part B(3) outlines your rights against harassment. Part B(4) explains why you should not use force to resist, even if you think an order, assault, or search by prison officials is illegal. Finally, Part B(5) explains how state laws and state constitutions protect you from assault.

1. The Legal Concept of Assault

Many people confuse the legal term "assault" with the legal term "battery." They do not mean the same thing in legal language. "Battery" means a violent physical attack.[8] "Assault" means any act—including a threat, verbal abuse, or harassment—that makes a person afraid of a physical attack from another person.[9] For example, an assault and battery charge means you are charged with both making someone afraid that you will attack him (assault) as well as actually physically attacking him (battery). Both assault and battery are torts.

Outside prison, most threats, unwanted touching, and uses of force are torts. They are therefore illegal. But in prison, tort law allows (or "privileges") prison staff to use some force that would not be allowed outside. Therefore, most courts will not find that prison officials violated your rights if they only threatened or harassed you with words. Courts will generally only find that an assault violated your rights (that the act against you was illegal and an actionable tort) if it was battery (you were physically attacked). For more on torts and assault under state tort law, see Part B of Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions."

Constitutional law is similar to tort law in this respect. Verbal threats by prison staff generally do not violate the Constitution.[10] But if a staff member says words or takes some action that makes you

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7. An Article 78 petition is a petition using Article 78 of the New York Civil Practice Law. You cannot use Article 78 to seek damages for assault or other injury. Instead, you can use an Article 78 petition to go to court to challenge decisions made by New York State administrative bodies or officers, like the Department of Corrections and Community Supervision or prison employees, if you think the decision was illegal, arbitrary, or grossly unfair.

8. Battery is "[t]he use of force against another, resulting in harmful or offensive contact." BLACK'S LAW DICTIONARY 173 (10th ed. 2014).

9. Assault is "[t]he threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact; the act of putting another person in reasonable fear ... of an immediate battery ... [or] [a]n attempt to commit battery [with] the specific intent to cause physical injury." BLACK'S LAW DICTIONARY 130 (10th ed. 2014).

10. *See* Cole v. Fisher, 379 Fed. Appx. 40, 43 (2d Cir. 2010) ("[V]erbal harassment, standing alone, does not amount to a constitutional deprivation") (citing Purcell v. Coughlin, 790 F. 2d 263, 265 (2d Cir. 1986)) (internal citations omitted); McBride v. Deer, 240 F. 3d 1287, 1291, n.3 (10th Cir. 2001) (stating that threatening to spray with mace did not violate a constitutional right: "[A]cts or omissions resulting in an inmate being subjected to nothing more than threats and verbal taunts do not violate the Eight Amendment"); Adkins v. Rodriguez, 59 F.3d 1034, 1037 (10th Cir. 1995) (holding that verbal sexual harassment by a prison guard did not violate a

believe that the person will seriously hurt you, courts might find a constitutional violation.[11] Even then, under the Prison Litigation Reform Act ("PLRA"), you cannot sue for compensatory damages[12] (and, in some circuits, punitive damages[13]) in federal court for mental or emotional injury unless you were also physically injured.[14] See *JLM* Chapter 14, "The Prison Litigation Reform Act," for information on the PLRA's physical injury requirement.

(a) You Must Prove That Your Attacker Intended to Touch or Harm You

(i) State Torts and Intent

Assault and battery are state law torts. State courts use different tests to decide whether someone's use of force against you was wrongful (whether that person has committed the torts of assault and battery against you).[15] All states require you to show that the defendant meant to act against you in some way. They take different approaches to the other requirements. In some states, you will have to show that the defendant either acted unlawfully or meant to harm you.[16] In others,

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constitutional right); Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987) (holding that prison official's use of vulgarity [bad language] did not violate a constitutional right); Mateo v. Fisher, 682 F. Supp. 2d 423, 432 (S.D.N.Y. 2010) (finding that calling an incarcerated person "paranoid" and referring him to a mental health evaluation could be harassment but not serious enough to violate a constitutional right); Govan v. Campbell, 289 F. Supp. 2d 289, 299 (N.D.N.Y. 2003) ("A claim under 42 U.S.C. § 1983 is not designed to rectify harassment or verbal abuse." (quoting Gill v. Hoadley, 261 F.Supp.2d 113, 129 (N.D.N.Y. 2003))); Johnson v. Dellatifa, 357 F.3d 539, 546 (6th Cir. 2004) ("[H]arassment and verbal abuse ... do not constitute the type of infliction of pain that the Eighth Amendment prohibits."); Graves v. N.D. State Penitentiary, 325 F. Supp. 2d 1009, 1011–1012 (D.N.D. 2004) (finding that even though a guard's racially derogatory language was "offensive, degrading, and reprehensible," "the use of racially derogatory language will not, by itself, violate the 14th Amendment 'unless it is pervasive or severe enough to amount to racial harassment'" (quoting Blades v. Schuetzle, 302 F.3d 801, 805 (8th Cir. 2002))).

11. *See* Irving v. Dormire, 519 F.3d 441, 448–449 (8th Cir. 2008) (finding that prison officer's multiple death threats partially in response to the incarcerated person starting a lawsuit against officers were serious enough to implicate the 8th Amendment); Northington v. Jackson, 973 F.2d 1518, 1524 (10th Cir. 1992) (finding incarcerated person stated a § 1983 8th Amendment excessive force claim for psychological injuries when plain-clothed corrections officers surprised plaintiff on the street while he was out on work release and, without identifying themselves, threatened at gunpoint to kill him before taking him back to jail; the court held that although the incarcerated person was not physically injured, his alleged psychological injury was not insignificant because "convicted prisoners have a constitutional 'right to be free from the terror of instant and unexpected death' at the hands of their keepers" (citations omitted)); *see also* Hudson v. McMillian, 503 U.S. 1, 16–17, 112 S. Ct. 995, 1004, 117 L. Ed. 2d 156, 172 (1992) (Blackmun, J., concurring) (stating a "guard placing a revolver in an inmate's mouth and threatening to blow [the] prisoner's head off" would be an unnecessary and wanton infliction of pain—although psychological, not physical pain—amounting to an 8th Amendment excessive force violation).

12. Compensatory damages are money damages that try to "make you whole again" after your actual injury or to put you in the same position as you were before the injury occurred. These types of damages might include reimbursement for medical expenses or money for pain and suffering.

13. Punitive damages are damages awarded in addition to compensatory damages, and are meant to punish a defendant who was reckless or acted intentionally.

14. The PLRA prohibits all federal civil actions (constitutional and tort claims) brought in federal court by incarcerated people (convicted felons, misdemeanants, and pretrial detainees) for mental or emotional injury suffered while in custody where there was no related physical injury. 42 U.S.C. § 1997e(e). The Federal Tort Claims Act has a similar limitation for convicted felons (but not pretrial detainees or misdemeanants (person convicted of a misdemeanor)): no convicted felon can "bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act." 28 U.S.C. § 1346(b)(2). See Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," for more information.

15. As described in the Introduction to this Chapter, the tests used by courts today come from past judicial decisions—called the common law—that some states have now made into statutes.

16. *See, e.g.*, Glowacki v. Moldtronics, Inc., 636 N.E.2d 1138, 1140, 264 Ill. App. 3d 19, 22 (Ill. App. 2d Dist. 1994) (dismissing plaintiff's battery action after plaintiff failed to allege either (1) that defendants were involved in illegal activity or (2) that defendants specifically meant to harm him when they exposed him to chemicals at work).

you must show that the defendant deliberately ignored your rights.[17] In a few states, you will only need to add that the defendant touched you without your permission.[18] In New York, courts use the "intentional touching" standard.[19]

All state courts believe that sometimes prison officials have to use force in order to maintain safety and order in the prisons. Therefore, courts often think that a prison official's choice to use physical force on an incarcerated person is not wrongful, even if the same use of force outside prison would be illegal.

In New York, to prove the tort of battery (physical assault), you must show that the defendant meant to do a certain action. But, you do not have to show that the defendant specifically meant to harm you.[20] For example, let's say a prison official handcuffed you very tightly, permanently injuring your wrists and hands. To prove this was battery, you must show that the guard meant to handcuff you. But, you do not have to show that the guard meant to hurt you when he handcuffed you.

(ii) Constitutional Torts and Intent

Proving that an assault violated your constitutional rights under the Eighth Amendment is much more difficult than proving that the assault was a tort in most states. Using the previous example, to prove that an assault against you violated your constitutional rights, you must show that your attacker meant to both handcuff you ***and*** meant to hurt you. See Part B(2)(a)(i) below for a full description of what you need to prove to show that an assault violated your rights under the Eighth Amendment. Under state tort law, you could bring a successful claim of assault and battery if you were injured when prison staff intentionally touched you. You could bring this claim even if you could not prove that the official specifically meant to hurt you. But, if you think you can show the official intended to harm you, you can claim that the official committed both a constitutional violation and the state torts of assault and battery in your suit.

(b) Suing the Prison if You Were Assaulted by Other Incarcerated People

(i) State Tort of Negligence

If you were physically attacked by another incarcerated person and believe that prison officials were partly responsible for the attack, you may also be able to sue the prison and/or the prison officials. But here, you cannot claim assault and battery because the prison officials did not actually attack

17. *See, e.g.*, Ashcraft v. King, 228 Cal. App. 3d 604, 613, 278 Cal. Rptr. 900, 904 (Cal. App. 2d Dist. 1991) ("In an action for civil battery the element of intent is satisfied if the evidence shows defendant acted with a 'willful disregard' for the plaintiff's rights." For example, a defendant disregards your rights in California if they give you one form of medical treatment when you specifically consented to another form).

18. *See, e.g.*, Hughes v. Farrey, 30 A.D.3d 244, 247, 817 N.Y.S.2d 25, 28 (1st Dept. 2006) ("To establish a civil battery a plaintiff need only prove intentional physical contact by defendant without plaintiff's consent; the injury may be unintended, accidental or unforeseen.") (quoting Tower Ins. Co. of N.Y. v. Old N. Blvd. Rest. Corp., 245 A.D.2d 241, 242, 666 N.Y.S.2d 636, 637 (1st Dept. 1997)).

19. *See, e.g.*, Hughes v. Farrey, 30 A.D.3d 244, 247, 817 N.Y.S.2d 25, 28 (1st Dept. 2006) ("To establish a civil battery a plaintiff need only prove intentional physical contact by defendant without plaintiff's consent; the injury may be unintended, accidental or unforeseen.") (quoting Tower Ins. Co. of N.Y. v. Old N. Blvd. Rest. Corp., 245 A.D.2d 241, 242, 666 N.Y.S.2d 636, 637 (1st Dept. 1997)); Allegany Co-Op Ins. Co. v. Kohorst, 254 A.D.2d 744, 744, 678 N.Y.S.2d 424, 425 (4th Dept. 1998) ("'Accidental results can flow from intentional acts. The damage in question may be unintended even though the original act or acts leading to the damage were intentional.'") (quoting Salimbene v. Merchants Mut. Ins. Co., 217 A.D.2d 991, 994, 629 N.Y.S.2d 913, 915–916 (4th Dept 1995)).

20. *See, e.g.*, Hughes v. Farrey, 30 A.D.3d 244, 247, 817 N.Y.S.2d 25, 28 (1st Dept. 2006) ("To establish a civil battery a plaintiff need only prove intentional physical contact by defendant without plaintiff's consent; the injury may be unintended, accidental or unforeseen.") (quoting Tower Ins. Co. of N.Y. v. Old N. Blvd. Rest. Corp., 245 A.D.2d 241, 242, 666 N.Y.S.2d 636, 637 (1st Dept. 1997)).

you.[21] Instead, you can use the law of "negligence."[22] Negligence is different from assault and battery under state tort law. It means that a person did not do enough to fulfill his duty toward you, but not necessarily that he meant to hurt you.[23] If another incarcerated person is attacking you, prison officials are supposed to try to stop the attack. If they do not, you could sue them for negligence. To prove the prison officials' negligence in such a situation, you must show the court that the officials "failed to exercise [or use] reasonable care" in allowing the attack to happen. In other words, you must show that the officials did not act like reasonably careful people to prevent the attack.[24] You will need evidence that: (1) the officials knew (or reasonably should have known) that you would be harmed or that there was a big ("substantial") risk that you would be harmed,[25] and (2) the officials did not act to prevent it.[26]

However, winning a negligence claim against prison officials for an assault by another incarcerated person is difficult.[27] Courts have found negligence in only a few situations: when the attacker is an incarcerated person whom officials knew or should have known was violent;[28] when officials placed the plaintiff (the incarcerated person bringing the suit) near a violent mentally ill incarcerated person;[29]

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21. If an officer participated in the attack along with the other incarcerated people, however, you can also claim assault and battery against the participating officer (in addition to your claim of negligence against the other officers who you believe allowed the attack to happen).

22. See Part B(2) of Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," for more on negligence and negligent torts.

23. Negligence is "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregardful of others' rights . . . [a] tort grounded in this failure, usually expressed in terms of the following elements: duty, breach of duty, causation, and damages." BLACK'S LAW DICTIONARY 1133–1134 (10th ed. 2014).

24. The Restatement (Third) of Torts defines the general rule: "An actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise in the scope of that relationship." Its definition of a "special relationship" includes "a custodian with those in its custody, if: (a) the custodian is required by law to take custody or voluntarily takes custody of another; and (b) the custodian has a superior ability to protect the other." Restatement (Third) of Torts § 40 (2012). The Restatement of Torts is published by the American Law Institute and presents the general principles of tort law.

25. *See, e.g.*, Sanchez v. City of New York, 99 N.Y.2d 247, 255, 784 N.E.2d 675, 680, 754 N.Y.S.2d 621, 626 (N.Y. 2002) (holding that "the State owes a duty of care to inmates for foreseeable risks of harm; and that foreseeability is defined not simply by actual notice but by actual *or constructive* notice—by what the 'State knew or had reason to know' [or] ... what the State 'is or should be aware' of ... The requisite foreseeability is as to a 'risk of harm' ... or 'risk of inmate-on-inmate attack'"; actual notice or "proof of specific notice of time, place or manner of the risk" is *not* required); *see also* Newton v. State, 283 A.D.2d 992, 993, 725 N.Y.S.2d 503, 504 (4th Dept. 2001) (denying plaintiff incarcerated person's claim after finding it was not foreseeable that there would be an attack in one part of the prison because there had been an incident earlier that day in another part of the prison).

26. *See, e.g.*, Sanchez v. City of New York, 99 N.Y.2d 247, 252, 784 N.E.2d 675, 678, 754 N.Y.S.2d 621, 624 (N.Y. 2002) (describing the requirements for a negligence action).

27. *See, e.g.*, Wilson v. State of New York, 303 A.D.2d 678, 679, 760 N.Y.S.2d 51, 52 (2d Dept. 2003) ("While the State's duty to an inmate encompasses protection from the foreseeable risk of harm at the hands of other prisoners ... the State is not an insurer of an inmate's safety. The State will be liable in negligence for an assault by another inmate only upon a showing that it failed to exercise adequate care to prevent that which was reasonably foreseeable.").

28. *See, e.g.*, Blake v. State, 259 A.D.2d 878, 879, 686 N.Y.S.2d 219, 221 (3d Dept. 1999) (affirming the lower court's finding that prison officials were liable for placing plaintiff in the same recreational yard as an incarcerated person who had assaulted another incarcerated person three months prior and with a sharp object that officers had never located) (citing Littlejohn v. State, 218 A.D.2d 833, 834, 630 N.Y.S.2d 407, 408 (3d Dept. 1995)).

29. *See, e.g.*, Bartlett v. Commonwealth, 418 S.W.2d 225, 227–228 (Ky. 1967) (finding that the trial court erred in refusing to admit evidence showing that two incarcerated people who murdered a 15-year-old incarcerated person in a state juvenile facility had records of violence and mental and emotional disability; noting the general rule that the keeper of a prison must exercise ordinary care for the protection of his incarcerated people if there is

when officials placed the plaintiff near an armed incarcerated person;[30] when the plaintiff was exposed to a disturbed incarcerated person overseer or "trustee";[31] when the plaintiff was exposed to an incarcerated person who had a grudge against him or who had threatened him;[32] or sometimes when the prison did not have enough supervisory staff on duty.[33]

(ii) Constitutional "Tort" of Deliberate Indifference

If another incarcerated person assaulted you, you may be able to make a federal constitutional claim of "deliberate indifference" as well as a state tort claim of negligence. But, remember that constitutional violations are harder to prove than state tort claims. "Deliberate indifference" means that the prison officials' actions or inactions were worse than negligence (carelessness). It also means that the actions or inactions were so bad that they violate the Eighth Amendment's constitutional ban on cruel and unusual punishment. You will have to prove that the prison officials actually knew that you were going to be attacked but did nothing or too little to stop the attack (were "deliberately indifferent" to the danger). It is not enough to prove that the officials were negligent and "should have

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reasonable grounds to foresee danger to the incarcerated person). *But see* Luttrell v. Nickel, 129 F.3d 933, 936 (7th Cir. 1997) (finding no negligence on the part of an official who did not separate plaintiff from a mentally disturbed incarcerated person who was taking medication). For examples of courts finding "deliberate indifference" to be a constitutional violation in similar situations, see Haley v. Gross, 86 F.3d 630, 642–643 (7th Cir. 1996) (affirming liability for officials who failed to act during a heated argument between plaintiff and a mentally ill incarcerated person); Glass v. Fields, No. 04-71014, 2007 U.S. Dist. Lexis 37089, at *24 (E.D. Mich. 2007) (finding that the objective component— how serious the risk of harm was—of the deliberate indifference test was met when plaintiff was put in the same cell as a detainee who claimed to be insane and was noted as prone to be violent). *But see* Hann v. State, 137 Misc. 2d 605, 611, 521 N.Y.S.2d 973, 977 (N.Y. Ct. Cl. 1987) (finding that it was not foreseeable that incarcerated person with history of assaultive behavior and who was recently released from psychiatric hospital would attack fellow incarcerated person).

30. *See, e.g.*, Huertas v. State, 84 A.D.2d 650, 650–651, 444 N.Y.S.2d 307, 308–309 (3d Dept. 1981) (finding negligence where, immediately before fatal assault, assailant left his work area with iron bar visible under his clothes, in plain view of five corrections officers); Jackson v. Hollowell, 714 F.2d 1372, 1373–1374 (5th Cir. 1983) (finding prison officials liable when incarcerated person was struck by a pellet that was fired by an armed prison trustee using a sawed-off shotgun). Prison trustees are "inmates ... armed with loaded shotguns and ... entrusted with the responsibility of guarding other inmates." Jackson v. Hollowell, 714 F.2d 1372, 1373 n.2 (5th Cir. 1983).

31. Jackson v. Mississippi, 644 F.2d 1142, 1146 (5th Cir. 1981) (establishing a "constitutional right to be free from cruel and unusual punishment in the form of trusty shooters who were inadequately screened for mental, emotional, or other problems"), *aff'd*, Jackson v. Hollowell, 714 F.2d 1372, 1373 n.2, 1374 (5th Cir. 1983).

32. *See, e.g.*, Rangolan v. County of Nassau, 51 F. Supp. 2d 236, 238 (E.D.N.Y. 1999) (upholding judgment that county jail was negligent as a matter of law for housing an incarcerated person in the same "jail pod" as another incarcerated person he had served as a confidential informant against and who subsequently beat him badly), *vacated in part on other grounds*, 370 F.3d 239 (2d Cir. 2004); Ashford v. D.C., 306 F. Supp. 2d 8, 16 (D.D.C. 2004) (finding incarcerated person did state a common law negligence claim where incarcerated person was severely stabbed by a fellow incarcerated person against whom he had a permanent separation order after being transferred to a new prison not aware of the separation order).

33. Negligence is seldom found in such a case. For an unusual example, see Laube v. Haley, 234 F. Supp. 2d 1227, 1251 (M.D. Ala. 2002) (finding that defendants were liable for deliberate indifference because they had ignored the overcrowding and understaffing of the prison). *But see* Robinson v. U.S. Bureau of Prisons, 244 F. Supp. 2d 57, 65 (N.D.N.Y. 2003) (noting that, to determine the foreseeability of an attack, courts may look at evidence "including staffing levels, the ability of staff to monitor the inmates, past behavior of inmates and prison staff, state regulations regarding the staffing of correctional facilities and the monitoring of inmates, and expert testimony regarding the staffing levels at issue"); Colon v. State, 209 A.D.2d 842, 844, 620 N.Y.S.2d 1015, 1016 (3d Dept. 1994) (reversing court of claims judgment for incarcerated person who claimed the prison failed to provide adequate supervision after being attacked by a fellow incarcerated person in a prison engine repair shop during a supervisor's brief absence. The court found instead that the State provided reasonable supervision and that "unremitting supervision ... was unnecessary and the fact that [the prison official was] not present at the time of the incident, in and of itself, is insufficient to support a finding that the State failed to exercise reasonable care").

known" you were in danger. Part B(2)(a)(ii) below explains more about how to show prison officials' deliberate indifference.[34]

(c) Body Searches and Sexual Attacks As "Assault"

Violent physical attacks are not the only type of assault in prison. Forced sexual contact and illegal body cavity searches interfere with your body. They may also be considered assaults and batteries.[35] Courts use the same civil and constitutional tort laws (including the Eighth Amendment) to decide claims of sexual assault. Part C of this Chapter explains some special legal protections you have against sexual assault.

Courts typically use the Fourth Amendment, not the Eighth Amendment, to decide claims of illegal searches. The Fourth Amendment protects your right to be free from unreasonable searches and seizures.[36] Some illegal body cavity searches may also be a violation of the Eighth Amendment if a court feels the search is so extreme that it counts as cruel and unusual punishment.[37] However, if the official who searched you was acting in order to maintain security or discipline or another reason important to running a prison and the pain you suffered was a side effect, most courts will not find any constitutional wrongdoing.[38] See *JLM*, Chapter 25, "Your Right to Be Free From Illegal Body Searches," for more information on when searches may violate the Eighth Amendment.

(d) When is Assault Prohibited by the Law?

As this Chapter explained above, not all physical touching or physical force is unlawful assault. The difference between lawful and unlawful assault is particularly important for incarcerated people. Actions that would be unlawful outside of prison may be allowed as "lawful force" in prison. For example, prison officers may use lawful force against incarcerated people to maintain order and to make sure rules are obeyed.[39]

Also, because corrections officers are part of the government, they can use the defense of qualified immunity[40] when sued under Section 1983. This means even if you can prove you were assaulted, the

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34. *See* Farmer v. Brennan, 511 U.S. 825, 829, 114 S. Ct. 1970, 1974, 128 L. Ed. 2d 811, 820 (1994) (announcing that deliberate indifference requires showing "the official was subjectively aware of the risk"); Knowles v. N.Y. City Dept. of Corr., 904 F. Supp. 217, 222 (S.D.N.Y. 1995) ("Mere negligence, however, on the part of a prison official will not give rise to a claim under § 1983.").

35. *See, e.g.*, Hammond v. Gordon County, 316 F. Supp. 2d 1262, 1303 (N.D. Ga. 2002) (holding female plaintiff had sufficient evidence to claim assault and battery against male prison official who placed the plaintiff "in apprehension of an unlawful touch when [the guard] pointed a gun at plaintiff and attempted to engage in sexual conduct with her"; also recognizing second plaintiff's claim for intentional infliction of emotional distress when another guard penetrated her vagina with his fingers).

36. The 4th Amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.

37. *See, e.g.*, Calhoun v. DeTella, 319 F.3d 936, 939 (7th Cir. 2003) (stating a cross-gender strip search could violate the 8th Amendment if "the strip search in question was not merely a legitimate search conducted in the presence of female correctional officers, but instead a search conducted in a harassing manner intended to humiliate and inflict psychological pain"); Dellamore v. Stenros, 886 F. Supp. 349, 351 (S.D.N.Y. 1995) (finding that plaintiff subjected to body cavity search without a medical practitioner present stated a colorable claim under the 8th Amendment).

38. *See* Whitman v. Nesic, 368 F.3d 931, 935–936 (7th Cir. 2004) (finding no violation because while nudity during drug tests might be uncomfortable, the evidence did not show that the official had acted for any other purpose besides a legitimate interest in providing for the safety of incarcerated people and the community).

39. N.Y. CORRECT. LAW § 137(5) (McKinney 2014) ("When any inmate, or group of inmates, shall offer violence to any person, or do or attempt to do any injury to property, or attempt to escape, or resist or disobey any lawful direction, the officers and employees *shall use all suitable means* to defend themselves, to maintain order, to enforce observation of discipline, to secure the persons of the offenders and to prevent any such attempt or escape." (emphasis added)).

40. Qualified immunity is defined as "[i]mmunity from civil liability for a public official who is performing a discretionary function, as long as the conduct does not violate clearly established constitutional or statutory rights." BLACK'S LAW DICTIONARY 818 (10th ed. 2014).

officials may not be liable because of qualified immunity. For a detailed discussion of qualified immunity and Section 1983, see Part C(3)(c) ("Qualified Immunity") and Part B ("Using 42 U.S.C. § 1983 to Challenge State or Local Government Action") of Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 to Obtain Relief From Violations of Federal Law."

2. Protection from Assault Under the Eighth Amendment

This Section is about the right of convicted state and federal incarcerated people to be free from assault under the Eighth Amendment.[41] The Eighth Amendment prohibits "cruel and unusual punishment."[42] Under the Eighth Amendment, prison officials cannot use excessive physical force against you.[43] They also cannot purposely let someone else hurt you.[44]

There are two parts of an Eighth Amendment claim. You must prove both of them to show that an assault against you violated the Eighth Amendment. First you must show what the prison official was thinking or knew at the time of the assault (the "subjective" part, explained in Part B(2)(b)). You must also show injuries (if any) you received from an assault by a prison official, or show how a prison official's actions caused you to be in "substantial risk of serious harm" of being attacked by another incarcerated person (the "objective" part, explained in Part B(2)(b)).

To summarize, to show that an assault against you violated the Eighth Amendment, you must prove that the force used against you had two parts:

(1) A subjective part—prison officials must have acted with a state of mind that is guilty enough;[45] and

(2) An objective part— you must have been injured[46] or you must have had a big risk of serious injury.[47]

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41. This Chapter explains how the 8th Amendment of the U.S. Constitution can protect you from assaults and unreasonable body searches. But the 8th Amendment right to be free from cruel and unusual punishment can protect incarcerated people in other ways too, like from general prison conditions such as overcrowding and uncleanliness (*see* Part B(2)(b) of Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law"), and lack of proper medical care (*see* Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care").

42. U.S. CONST. amend. VIII.

43. *See, e.g.*, Smith v. Mensinger, 293 F.3d 641, 648 (3d Cir. 2002) (stating that serious physical injury is not necessary for an excessive force claim under the 8th Amendment) (citing Hudson v. McMillian, 503 U.S. 1, 4, 112 S. Ct. 995, 997, 117 L. Ed. 2d 156, 164 (1992)).

44. *See* Farmer v. Brennan, 511 U.S. 825, 833–834, 114 S. Ct. 1970, 1976–1977, 128 L. Ed. 2d 811, 822–823 (1994) (holding that prison officials may be held liable under the Eighth Amendment for denying humane conditions of confinement only if they know that inmates face substantial risk of serious harm and disregard that risk by failing to take reasonable measures to abate it); *see, e.g.*, Bistrian v. Levi, 696 F.3d 352, 370–371 (3d Cir. 2012) (finding that plaintiff stated a constitutional claim against officials who had placed him in a recreational yard with other incarcerated people whom officials knew were likely to retaliate against plaintiff).

45. Hudson v. McMillian, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992) ("[T]he core judicial inquiry is ... whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."); Sims v. Artuz, 230 F.3d 14, 21 (2d Cir. 2000) (finding the subjective component of the claim to require a showing that the defendant had the necessary level of culpability, shown by actions characterized as wanton in light of the particular circumstances surrounding the challenged conduct (citations omitted)); Wilkins v. Gaddy, 559 U.S. 34, 130 S. Ct. 1175, 175 L. Ed. 2d 995 (2010) (restating earlier cases).

46. *See* Hudson v. McMillian, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992) ("[T]he extent of injury suffered by a prisoner is one factor that may suggest 'whether the use of force could plausibly have been thought necessary' in a particular situation." (quoting Whitley v. Albers, 475 U.S. 312, 321, 106 S. Ct. 1078, 1085, 89 L. Ed. 2d 251, 261–262 (1986))).

47. Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994) (holding that in a claim of failure to protect, "the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm").

(a) Subjective Part—Culpable State of Mind

The subjective part of assault means you must show what the prison official was thinking or knew when you were assaulted. Courts use two different standards (the *Hudson* and *Farmer* standards) for the subjective part. The standard a court will use in your case depends on who assaulted you: a prison official or another incarcerated person. If a prison official hurt you, courts use the *Hudson* standard. This standard looks at whether the guard used force as part of his job to keep the prison safe and orderly, or whether the guard's force was meant to cruelly hurt you for no valid reason. If another incarcerated person hurts you, courts use the *Farmer* standard. This standard looks at whether the prison officials knew about the danger to you but did not stop or act to prevent the assault.[48]

(i) Assault by a Prison Official—The *Hudson* Standard

If you are suing a prison official who injured you, a court will use the "malicious and sadistic" (evil and cruel) standard. This standard was created by the Supreme Court in *Hudson v. McMillian*[49] to determine whether the official's force against you was so bad ("excessive") as to violate the Eighth Amendment.[50] In order to show a constitutional wrong under *Hudson*, an incarcerated person must show that the prison official's force was not "a good-faith effort to maintain or restore discipline," but rather was used "maliciously and sadistically" to hurt the incarcerated person.[51]

Officials are not violating the Eighth Amendment if they use force for valid reasons.[52] Prison officials are generally allowed to use force during a riot or other major prison violence.[53] They are also usually allowed to use force during smaller events when incarcerated people behave violently or

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48. Note that if a prison official injured you in the presence of, or with the knowledge of, other officials, you could sue both the official who harmed you and also the officials and/or supervisors who knew about it and did nothing. The prison officials who knew about your assault but did nothing would be liable under the *Farmer* standard—not the *Hudson* "malicious and sadistic" standard. *See, e.g.*, Blyden v. Mancusi, 186 F.3d 252, 264 (2d Cir. 1999) (finding the deliberate indifference standard applied to prison supervisors if "after learning of the violation through a report or appeal,...[the supervisor] failed to remedy the wrong…created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue…[or] was grossly negligent in managing subordinates who caused the unlawful condition or event." (citations omitted)); Buckner v. Hollins, 983 F.2d 119, 122 (8th Cir. 1993) (applying the deliberate indifference, or *Farmer*, standard, to a claim based on prison official's failure to act); Meriwether v. Coughlin, 879 F.2d 1037, 1048 (2d Cir. 1989) ("[S]upervisory liability may be imposed…when an official has actual or constructive notice of unconstitutional practices and demonstrates 'gross negligence' or 'deliberate indifference' by failing to act.") (citations omitted); Vaughan v. Ricketts, 859 F.2d 736, 741 (9th Cir. 1988) ("[P]rison administrators' indifference to brutal behavior by guards toward inmates [is] sufficient to state an Eighth Amendment claim.") (citations omitted); Pizzuto v. Nassau, 239 F. Supp. 2d 301, 311 (E.D.N.Y. 2003) (finding that prison supervisor was liable for standing by and watching while subordinates beat the incarcerated person).

49. Hudson v. McMillian, 503 U.S. 1, 24, 112 S. Ct. 995, 1008, 117 L. Ed. 2d 156, 177 (1992).

50. This section pertains specifically to claims brought by incarcerated people against prison officials who have violated their Eighth Amendment right against cruel and unusual punishment. If you are a pretrial detainee looking to make a claim, see Chapter 34, Part E of the *JLM*.

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

52. *See* Hudson v. McMillian, 503 U.S. 1, 6, 112 S. Ct. 995, 998, 117 L. Ed. 2d 156, 165 (1992) ("[T]he question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." (quoting Whitley v. Albers, 475 U.S. 312, 320–321, 106 S. Ct. 1078, 1085, 89 L. Ed. 2d 251, 261 (1986)); *see also* Skinner v. Cunningham, 430 F.3d 483, 489 (1st Cir. 2005) (finding that prison officials used reasonable force in forcibly extricating the incarcerated person from his cell after he refused to be handcuffed during a cell search).

53. Whitley v. Albers, 475 U.S. 312, 326, 106 S. Ct. 1078, 1087, 89 L. Ed. 2d 251, 265 (1986) (finding no 8th Amendment violation where incarcerated person was shot as part of a good-faith effort to restore prison security); *see also* Wright v. Goord, 554 F.3d 255, 270 (2d Cir. 2009) (finding that although guard had placed one hand on incarcerated person's abdomen at the site of his colon surgery, there was no evidence that that placement was sadistic or malicious because prisoner did not testify that guard knew or had reason to know that his abdomen was unusually tender, nor did the record reveal any basis for inferring that guard would have been aware that it was a surgical site).

disruptively.[54] But, if the force has no purpose and is simply meant to harm the incarcerated person for no valid reason, then the official may be found to have used too much force.[55] In other words, if the official uses force for the purpose of harming you and not for returning order to the prison, then the official may be found to have used too much force.

To decide if the prison official intended to act maliciously and to harm you (to determine the official's "state of mind"), courts will look at:

(1) the seriousness of your injuries,[56]
(2) if the force was necessary under the circumstances (why the official used force),
(3) the relationship between the need to use force and the amount of force that was actually used,
(4) the size of the threat as a prison official would reasonably see it, and
(5) efforts made by prison guards to decrease the amount of force used.[57]

You should think about each of these factors when you try to prove that prison officials meant to hurt you when they used violence. You need to remember that "not every push or shove, even if it may later seem unnecessary," violates your constitutional rights.[58] Even if an official used force, you may not be able to win in court. Nevertheless, some uses of force may be so extreme that they are unconstitutional, even in an emergency.[59]

The Ninth Circuit (covering Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington) has said that you do not need to show that the officer meant to hurt or punish a specific individual.[60] This means even if the officer meant to hit someone else, he can still be found liable if he hit you instead. For instance, in *Robins v. Meecham*, an incarcerated person was injured by a birdshot a correction officer had fired at another incarcerated person.[61] The court held that even though the officer did not mean to harm or punish Robins (the incarcerated person suing),

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54. *See* Hudson v. McMillian, 503 U.S. 1, 6, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 165 (1992) (finding that during a riot or a lesser disruption, "corrections officers must balance the need to maintain or restore discipline through force against the risk of injury to inmates"); *see also* Bellotto v. County of Orange, 248 Fed. Appx. 232, 235 (2d Cir. 2007) (finding that guards did not use excessive force in forcibly restraining and handcuffing female incarcerated person who was violently banging her head against the wall of her cell and refusing to stop).

55. *See, e.g.*, Estate of Davis by Ostenfeld v. Delo, 115 F.3d 1388, 1394–1395 (8th Cir. 1997) (finding an 8th Amendment excessive force violation when a corrections officer struck a non-resisting incarcerated person in the head and face 20 to 25 times while four other officers restrained his limbs, resulting in serious injury); Locicero v. O'Connell, 419 F. Supp. 2d 521, 428–29 (S.D.N.Y. 2006) (finding that an incarcerated person adequately stated a claim that his 8th amendment rights were violated when he was seriously assaulted by a prison officer, the incarcerated person did not provoke the assault, and the prison facility had prior notice of, but failed to act about, the officer's previous use of excessive force).

56. Courts will examine the extent of your injury to help determine whether an official's decision to use force in a particular situation was reasonable. *See* Hudson v. McMillian, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992) (citing Whitley v. Albers, 475 U.S. 312, 321, 106 S. Ct. 1078, 1085, 89 L.Ed.2d 251, 261 (1986)). Courts also look at the seriousness of your injuries in deciding the objective component of an 8th Amendment violation.

57. *See* Hudson v. McMillian, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992) (citing Whitley v. Albers, 475 U.S. 312, 321, 106 S. Ct. 1078, 1085, 89 L.Ed.2d 251, 261 (1986)).

58. Johnson v. District of Columbia, 528 F. 3d 969, 974 (D.C. Cir. 2008) (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973), *distinguished on other grounds by* Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)).

59. *See* Jones v. Huff, 789 F. Supp. 526, 535–536 (N.D.N.Y. 1992) (finding violations of incarcerated person's 8th Amendment rights when corrections officers slapped, punched, and kicked a handcuffed and naked incarcerated person).

60. *See* Robins v. Meecham, 60 F.3d 1436, 1439–1440 (9th Cir. 1995) ("[T]he Eighth Amendment does not require a specific intent to punish a specific individual. The basic threshold of the Eighth Amendment is that the offending conduct must be "wanton.").

61. Robins v. Meecham, 60 F.3d 1436, 1438 (9th Cir. 1995).

the officer did mean to harm a different incarcerated person.[62] The court said that this was enough to fulfill the intent requirement.[63]

Remember that the Prison Litigation Reform Act would probably also prevent you from making a similar claim because it requires a physical injury, not just a mental injury.[64]

(ii) Assault by Another Incarcerated Person—The *Farmer* Standard

If you are suing a prison official who did not stop or act to prevent another incarcerated person from attacking you, the court will use the "deliberate indifference"[65] standard from *Farmer v. Brennan*.[66] The court will determine whether the prison official's "deliberate indifference" toward you violated the Eighth Amendment.[67] Prison officials may be found liable under the deliberate indifference standard if they:

(1) knew of a big risk of serious harm to the incarcerated person, and

(2) ignored the risk and did not act or do enough to avoid the harm.[68]

Because incarcerated people often cannot protect themselves, courts have decided that the government must take reasonable steps to protect them against violence by other incarcerated people.[69] The Eighth Amendment creates a constitutional right for incarcerated people to be protected from harm by fellow incarcerated people.[70] Courts have mainly used the "deliberate indifference" standard for cases where a prison official does not prevent an incarcerated person from assaulting another incarcerated person. But, courts have also used the standard for when a prison official does not prevent another official from attacking an incarcerated person.[71] These types of lawsuits are also

62. Robins v. Meecham, 60 F.3d 1436, 1440 (9th Cir. 1995).

63. Robins v. Meecham, 60 F.3d 1436, 1440 (9th Cir. 1995).

64. 42 U.S.C. § 1997e(e). *See* Part F of Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," for more information on the PLRA's limitations on actions for mental or emotional injury.

65. Note that "deliberate indifference" is also the legal standard for 8th Amendment violations regarding medical care and general prison conditions, in addition to incarcerated person-on-incarcerated person assaults.

66. Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994) ("[A] prison official must have a 'sufficiently culpable state of mind' ... In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety (internal citations omitted)".)

67. This section pertains specifically to claims brought by incarcerated people against prison officials who have violated their Eighth Amendment right against cruel and unusual punishment. If you are a pretrial detainee looking to make a claim, see Chapter 34 of the *JLM*.

68. *See* Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994).

69. *See* Bistrian v. Levi, 696 F.3d 352, 366 (3d Cir. 2012) (stating that prison officials have a duty to protect incarcerated people from violent actions of fellow incarcerated people) (quoting Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994)); *see also* Berry v. City of Muskogee, 900 F.2d 1489, 1496–1499 (10th Cir. 1990) (finding where incarcerated person was strangled to death in prison by two men whom he had identified as helping him commit the crime for which he was serving time, officials could have known of the danger based on the prior relationship and notification by victim's wife); Gangloff v. Poccia, 888 F. Supp. 1549, 1555 (M.D. Fla. 1995) ("State officials have a duty, under the Eighth Amendment prohibition of cruel and unusual punishment, to protect inmates from each other. This duty, however, does not lead to absolute liability because the Eighth Amendment addresses only punishment") (quoting King v. Fairman, 997 F.2d 259, 261 (7th Cir. 1993); Fisher v. Koehler, 692 F. Supp. 1519, 1559 (S.D.N.Y. 1988) ("Although the state is not obliged to insure an assault-free environment, a prisoner has a constitutional right to be protected from the unreasonable threat of violence from his fellow inmates.") (citing Morgan v. District of Columbia, 263 U.S. App. D.C. 69, 824 F.2d 1049, 1057 (D.C. Cir. 1987)).

70. *See, e.g.*, Blaylock v. Borden, 547 F. Supp. 2d 305, 310 (S.D.N.Y. 2008) (stating that prison officials have a duty to protect prisoners from other prisoners under the 8th Amendment).

71. *See* Buckner v. Hollins, 983 F.2d 119, 123 (8th Cir. 1993) (finding grounds for an 8th Amendment claim when state corrections officer failed to stop an assault by county corrections officer on naked, handcuffed incarcerated person in cell).

known as "failure-to-protect" claims. You can go to court to claim prison officials are ignoring unsafe conditions or a serious threat against you. You can do this even if you have not yet been assaulted.[72]

In *Farmer v. Brennan*, the U.S. Supreme Court held that prison staff showed deliberate indifference when they did not do anything while knowing about a big risk[73] to an incarcerated person's safety.[74] If you were assaulted by another incarcerated person (or prison guard) and believe prison officials' deliberate indifference allowed the assault to happen, you will have to show that those specific officials knew of and ignored an excessive risk to your health and safety.[75] For each individual prison official, you will have to prove to the court that:

(1) The prison official was aware of facts that would imply a substantial risk of serious harm exists; and
(2) That specific prison official knew this implication.[76]

Remember, courts also use the deliberate indifference standard in claims against supervisors who did not do enough to watch over and control their prison staff. Courts also use this standard against officers who stood by and watched an assault.[77]

a. Proving a Substantial Risk to Your Safety

You must first show that there was or is a big ("substantial") risk of serious harm to your safety from another incarcerated person to satisfy the objective part of the *Farmer* test (see Part B(2)(b)(ii) below).

b. Proving the Prison Officials Knew About This Risk

You must also provide evidence that the official knew of the big risk to your safety.[78] You do not have to prove that the official definitely knew you were going to be attacked. You only have to show that the official knew there was a big chance that you could get hurt.[79] You do not have to show that the officials knew you were personally at risk or that the risk came from a particular incarcerated person.[80]

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72. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 831, 114 S. Ct. 1970, 1975, 128 L. Ed. 2d 811, 821 (1994) (describing the alleged 8th Amendment claim as a failure to prevent harm); Helling v. McKinney, 509 U.S. 25, 34, 113 S. Ct. 2475, 2481, L. Ed. 2d 22, 32 (1993) ("[A] prisoner need not wait until he is actually assaulted before obtaining relief ... . [T]he Eighth Amendment protects against sufficiently imminent dangers as well as current unnecessary and wanton infliction of pain and suffering.").

73. Farmer v. Brennan, 511 U.S. 825, 843, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811, 829 (1994) ("The question under the Eighth Amendment is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial 'risk of serious damage to his future health,' and it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk" (internal citation omitted).

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

75. Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994).

76. Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994).

77. *See, e.g.*, Blyden v. Mancusi, 186 F.3d 252, 265 (2d Cir. 1999) (holding correctional officers to a deliberate indifference standard for violence by subordinates).

78. *See* Lewis v. Richards, 107 F.3d 549, 553–554 (7th Cir. 1997) (finding no 8th Amendment violation where incarcerated person failed to present sufficient evidence that officials knew of risk to his safety and consciously disregarded that risk after the incarcerated person was subjected to three separate sexual assaults); Davis v. Scott, 94 F.3d 444, 446–47 (8th Cir. 1996) (finding no 8th Amendment violation where prison informant was attacked after his return to the general population, because there was no "solid evidence" that anyone in the general population posed an "identifiable serious risk" to his safety).

79. *See* Whitston v. Stone County Jail, 602 F.3d 920, 924–925 (8th Cir. 2010) (finding that prison officials could be liable for sexual assault by one incarcerated person against the other even if they did not know about the risk of that specific incarcerated person committing the assault, as long as they knew about the general risk).

80. *See* Farmer v. Brennan, 511 U.S. 825, 843, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811, 829 (1994); *see also* Brown v. Budz, 398 F.3d 904, 914–915 (7th Cir. 2005) (holding deliberate indifference can be established by

For an Eighth Amendment deliberate indifference claim, it is not enough to claim prison officials should have known about the big risk to your safety[81] (although in that case you still may be able to make a state law negligence tort claim as described in Part (B)(1)(a)(i)). These claims require the prison officials to have actually known about the big risk to your safety.[82]

You can show that the officials actually knew about this substantial risk by showing both direct evidence and circumstantial evidence of the threat.[83] Courts think that whether a prison official knew about the risk is a question of fact that depends on the situation.[84] For example, if you have evidence that the risk was around for a long time, something a lot of people knew about, or that the official must have known about the risk, then generally that evidence is enough to show that the official did in fact know about it.[85] You should expect prison officials to try to prove that they did not actually know about the facts showing you were in danger. Or, they may try to prove that even if they did know about it, they had good reason to believe that the risk was minor.[86] In addition to your own complaints about

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knowledge either of a victim's vulnerability or of an assailant's predatory nature; both are not required); Pierson v. Hartley, 391 F.3d 898, 902–903 (7th Cir. 2004) (holding that an incarcerated person could recover for assault by a violent incarcerated person assigned to an open-air dormitory, which allowed unrestricted movement, in violation of prison policy, regardless of whether prison staff knew of the risk to the particular incarcerated person who was injured); Greene v. Bowles, 361 F.3d 290, 294 (6th Cir. 2004) (holding that a trans incarcerated person could recover for assault by a known "predatory inmate" either because leaving her in a unit containing high-security incarcerated people threatened her safety, or because placing the attacker in protective custody created a risk for the other occupants); Lewis v. Siwicki, 944 F.3d 427, 433-432 (2d Cir. 2019) ("The first Farmer factor, substantial risk of serious harm, depends not on the officials' perception of the risk of harm, but solely on whether the facts, or at least those genuinely in dispute on a motion for summary judgment, show that the risk of serious harm was substantial); LaMarca v. Turner, 995 F.2d 1526, 1535–1537 (11th Cir. 1993) (liability can be based on "general danger arising from a prison environment that both stimulated and condoned violence"); Coleman v. Wilson, 912 F. Supp. 1282, 1316 (E.D. Cal. 1995) (risk of harm from systemic medical care deficiencies is obvious); Abrams v. Hunter, 910 F. Supp. 620, 624–625 (M.D. Fla. 1995) (acknowledging potential liability based on awareness of generalized, substantial risk of serious harm from incarcerated people violence), *aff'd*, 100 F.3d 971 (11th Cir. 1996); Knowles v. N.Y. City Dept. of Corr., 904 F. Supp. 217, 221--222 (S.D.N.Y. 1995) (finding a valid claim where prison officials knew of an ethnic "war" among prisoners, that a Hispanic incarcerated person who had been cut had been transferred to plaintiff's jail, and that plaintiff was part of a group at risk because of his accent and appearance).

81. *See* Riccardo v. Rausch, 375 F.3d 521, 526 (7th Cir. 2004) ("'Deliberate indifference' means subjective awareness. It is not enough, the Court held in Farmer, that the guard ought to have recognized the risk. Instead, 'the official must both 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.'" (citations omitted)); Knowles v. N.Y. City Dept. of Corr., 904 F. Supp. 217, 222 (S.D.N.Y. 1995) ("Mere negligence, however, on the part of a prison official will not give rise to a claim under § 1983" (citing Williams v. Vincent, 508 F.2d 541, 546 (2d Cir. 1974))

82. *See* Carter v. Galloway, 352 F.3d 1346, 1349—1350 (11th Cir. 2003) (per curiam) (dismissing medium-security incarcerated plaintiff's claim for assault, after plaintiff was stabbed by his maximum-security cellmate, a known "problematic inmate," after plaintiff complained his cellmate was "acting crazy" but had not specifically told prison officials his cellmate had threatened him as "[s]uch a generalized awareness of risk in these circumstances does not satisfy the subjective awareness requirement").

83. Johnson v. Johnson, 385 F.3d 503, 524 (5th Cir. 2004) ("The official's knowledge of the risk can be proven through circumstantial evidence, such as by showing that the risk was so obvious that the official must have known about it" (internal citation omitted)); *see also* Farmer v. Brennan, 511 U.S. 825, 840, 114 S. Ct. 1970, 1980, 128 L. Ed. 2d 811, 827 (1994) (stating that the "concept of constructive knowledge is familiar enough that the term 'deliberate indifference' would not, of its own force, preclude a scheme that conclusively presumed awareness from a risk's obviousness."). In other words, a finder of fact, like a judge or a jury, may conclude that an official was aware of the risk if the risk was obvious.

84. *See* Farmer v. Brennan, 511 U.S. 825, 842, 114 S. Ct. 1970, 1981, 128 L. Ed. 2d 811, 828 (1994).

85. *See* Farmer v. Brennan, 511 U.S. 825, 842–843, 114 S. Ct. 1970, 1981–1982, 128 L. Ed. 2d 811, 828–829 (1994).

86. *See* Johnson v. Johnson, 385 F.3d 503, 525 (5th Cir. 2004) (noting prison officials defended themselves by trying to show that it was reasonable to believe, based on the information they had at the time, that there was no danger to the incarcerated person or that it was reasonable to disbelieve the incarcerated person's repeated

the risk, you should try to present other evidence that you were in danger to show that the prison officials actually knew of the risk to your safety. Your complaints alone may not prove that prison officials knew about the risk. Courts do not expect guards to believe every protest or complaint an incarcerated person makes.[87]

c. Proving that the Prison Officials Did Not Act Reasonably to Prevent or Stop Assault

Finally, you must prove that the official acted unreasonably or failed to act in a situation where the official knew that you were at a great risk of harm.[88] It is important to understand that even if a prison official knew of a substantial risk to your health and safety, that prison official may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not prevented.[89] For example, in the First Circuit case *Burrell v. Hampshire County*, the court found that the prison guards did not act unreasonably when they did not transfer an incarcerated person who was good at martial arts and who did not have any previous fights with his attacker. The court found this because the incarcerated person misrepresented himself to the officers as having proficiency in martial arts and the officers could not predict that the incarcerated person would be attacked.[90]

d. Examples of *Farmer* Deliberate Indifference Cases

In a Fourth Circuit case, *Brown v. North Carolina Department of Corrections*, a prison staff member told Brown to enter an area to go get cleaning supplies.[91] The staff member knew that another incarcerated person who had a grudge against Brown was in that area of the prison.[92] That incarcerated person assaulted and beat Brown.[93] Based on these facts, the Fourth Circuit held that a reasonable person could say that prison officials had ignored a major risk to Brown.[94]

New York courts have also dealt with claims that guards failed to protect an incarcerated person from other incarcerated people. In *Knowles v. New York City Department of Corrections*, another incarcerated person slashed Knowles in the face while they were in the recreation area.[95] Knowles sued prison officials stating that they had known of the risk to him and ignored it.[96] The guards had

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complaints of sexual abuse); Farmer v. Brennan, 511 U.S. 825, 844, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811, 830 (1994) (stating that prison officials can try to show that they "did not know of the underlying facts" or "believed (albeit unsoundly) that the risk ... was insubstantial or nonexistent.")

87. *See* Riccardo v. Rausch, 375 F.3d 521, 527–528 (7th Cir. 2004) (stating that "[t]he Constitution does not oblige guards to believe whatever inmates say," and that "a prisoner's bare assertion is not enough to make the guard subjectively aware of a risk, if the objective indicators do not substantiate the inmate's assertion").

88. *See* Farmer v. Brennan, 511 U.S. 825, 841–842, 114 S. Ct. 1970, 1981, 128 L. Ed. 2d 811, 828 (1994) (holding that under the 8th Amendment, prison officials could not be liable for inhumane conditions of confinement unless the official had knowledge of the risk to the incarcerated person); *see also* Leibach v. State, 215 A.D.2d 978, 979–980, 627 N.Y.S.2d 463, 463–464 (3d Dept. 1995) (stating that where an attack was planned in secret, and correction staff was not aware of it, staff was not culpable). Please note that if you are a pretrial detainee you must prove that the purposeful force used by the prison official was objectively unreasonable. *See* Kingsley v. Hendrickson, 576 U.S. 389, 397, 135 S. Ct. 2466, 2473, 192 L. Ed. 2d 416, 426 (2015) (objective reasonableness turns on the facts and circumstances of each particular case and a court must make this determination from the perspective of an officer on the scene); *see also* Chapter 34 of the *JLM*, "The Rights of Pretrial Detainees".

89. *See* Farmer v. Brennan, 511 U.S. 825, 844, 114 S. Ct. 1970, 1982–1983, 128 L. Ed. 2d 811, 830 (1994) (emphasizing that there is no 8th Amendment violation if the official "responded reasonably to the risk, even if the harm ultimately was not averted"); *see also* Short v. Smoot, 436 F.3d 422, 428 (4th Cir. 2006) (finding that officials who put a suicidal incarcerated person under video surveillance had acted reasonably and could not be liable under the 8th Amendment).

90. Burrell v. Hampshire County, 307 F.3d 1, 8–9 (1st Cir. 2002).

91. Brown v. N.C. Dept. of Corr., 612 F.3d 720, 722 (4th Cir. 2010).

92. Brown v. N.C. Dept. of Corr., 612 F.3d 720, 722 (4th Cir. 2010).

93. Brown v. N.C. Dept. of Corr., 612 F.3d 720, 722 (4th Cir. 2010).

94. Brown v. N.C. Dept. of Corr., 612 F.3d 720, 723 (4th Cir. 2010).

95. Knowles v. N.Y. City Dept. of Corr., 904 F. Supp. 217, 219 (S.D.N.Y. 1995).

96. Knowles v. N.Y. City Dept. of Corr., 904 F. Supp. 217, 218 (S.D.N.Y. 1995).

only patted down the incarcerated people when they had entered the recreation area, instead of going through the normal strip search procedures.[97] Furthermore, there was evidence that the prison officials knew about a "war" going on between Spanish-speaking and Jamaican incarcerated people. There was also evidence that they knew Knowles was one of the incarcerated people at risk because of the way that he looked and talked.[98] The court held that this was enough evidence to create uncertainty about whether or not the guards were deliberately indifferent to Knowles' safety.[99]

In sum, prison officials may be found liable under the *Farmer* deliberate indifference standard if they (1) know the incarcerated person is facing a substantial risk of serious harm, and (2) ignore the risk by not taking reasonable measures to avoid it. If they meet these requirements, officials may be liable if they do not act to stop another incarcerated person or prison official from attacking you. Prison officials may also be liable if there is a policy allowing a pattern of too much force.[100]

(b) Objective Part

In addition to the subjective part discussed above, remember that you also have to prove a second, objective part. To prove this objective part of an Eighth Amendment violation, you must show either that you were actually injured (if assaulted by a prison official)[101] or that the prison official's actions or inaction put you at a "substantial risk of serious harm" from another incarcerated person, whether or not you were actually assaulted.

(c) Seriousness of Harm in Assaults by Prison Officials

To win a lawsuit against a prison official who assaulted you, you have to show that the attack was "cruel and unusual punishment" under the Eighth Amendment.[102] You can show that a prison official violated your Eight Amendment rights no matter whether your injury was big or small.[103] What matters most is whether the official used force against you as a way to try to keep order in the prison, or whether the purpose of the force was to hurt you.[104] However, a court will still look into how severe your injury was.[105] This is because the kind of injury you have can help a court figure out the strength of the force that the official used. The injury can also help a court figure out whether officials could have thought that the force was necessary to do their job in a certain situation.

Courts look to society's standards of good behavior to decide whether the official's actions were bad enough.[106] In general, prison officials violate society's standards whenever they maliciously, evilly, or

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97. Knowles v. N.Y. City Dept. of Corr., 904 F. Supp. 217, 218–219 (S.D.N.Y. 1995).

98. Knowles v. N.Y. City Dept. of Corr., 904 F. Supp. 217, 222 (S.D.N.Y. 1995).

99. Knowles v. N.Y. City Dept. of Corr., 904 F. Supp. 217, 222 (S.D.N.Y. 1995).

100. *See* Matthews v. Crosby, 480 F.3d 1265, 1270–1275 (11th Cir. 2007) (holding that a prison warden's knowledge of the violent propensities of some of his prison guards and his failure to act to prevent them from assaulting prisoners could count as deliberate indifference); Ruiz v. Estelle, 503 F. Supp. 1265, 1302 (S.D. Tex. 1980) (finding 8th Amendment violations where prison officials encouraged staff to indulge in excessive physical violence by rarely investigating reports of violence and failing to take corrective disciplinary action against officers whom they knew to have brutalized prisoners), *aff'd in part, rev'd in part*, 688 F.2d 266 (5th Cir. 1982), *and* 679 F.2d 1115 (5th Cir. 1982).

101. Hudson v. McMillian, 503 U.S. 1, 8, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992) (quoting Wilson v. Seiter, 501 U.S. 294, 298, 111 S. Ct. 2321, 2326, 2329, 1115 L. Ed. 2d 271, 278 (1991)); *see also* Wright v. Goord, 554 F.3d 255, 268–269 (2d Cir. 2009).

102. U.S. CONST. amend. VIII.

103. Wilkins v. Gaddy, 559 U.S. 34, 37, 130 S. Ct. 1175, 1178, 175 L. Ed. 2d 995, 999 (2010) (citations omitted).

104. Wilkins v. Gaddy, 559 U.S. 34, 37, 130 S. Ct. 1175, 1178, 175 L. Ed. 2d 995, 999 (2010) (citations omitted).

105. Wilkins v. Gaddy, 559 U.S. 34, 37, 130 S. Ct. 1175, 1178, 175 L. Ed. 2d 995, 999 (2010) (citations omitted).

106. Hudson v. McMillian, 503 U.S. 1, 2, 25, 112 S. Ct. 995, 996, 1008, 117 L. Ed. 2d 156, 157, 178 (1992); Estelle v. Gamble, 429 U.S. 97, 102–103, 97 S. Ct. 285, 290, 50 L. Ed. 2d 251, 259 (1976); *see also* Wright v. Goord, 554 F.3d 255, 268–269 (2d Cir. 2009).

cruelly use force to cause harm "whether or not significant injury is evident."[107] But, "not … every malevolent [cruel] touch by a prison guard [raises] a federal cause of action."[108]

The Supreme Court has said that "cruel and unusual punishment" does not include uses of very minor amounts of force. Courts have used the Latin phrase "*de minimis*" to describe this small amount of force. A small amount of force is not the same thing as a small injury.[109] "*De minimis*" means that a fact or thing is "so insignificant that a court may overlook it in deciding an issue or case."[110] Some examples of injuries courts have thought were *de minimis* are bumping, discomfort, sore wrists,[111] cuts and swelling to the wrists,[112] being slammed against a wall,[113] and being hit by swinging keys.[114] Some examples of force courts have called *de minimis* are hitting an incarcerated person once on the head,[115] spraying an incarcerated person with water,[116] pressing a fist against an incarcerated person's neck,[117] and bruising an incarcerated person's ear during a routine search.[118]

Because what counts as a constitutional violation changes depending on the specific situation, courts have not defined exactly what type or degree of harm you need to show in order to win on an Eighth Amendment claim. The following cases will give you some examples of injuries courts have said do or do not go against the Eighth Amendment.

In *Hudson v. McMillian*, the incarcerated person suffered blows that caused "bruises, swelling, loosened teeth, and a cracked dental palate."[119] The Supreme Court found that the violence against

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107. Hudson v. McMillian, 503 U.S. 1, 9, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992) (internal quotations omitted).

108. Hudson v. McMillian, 503 U.S. 1, 9, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992).

109. Wilkins v. Gaddy, 599 U.S. 34, 37—38, 130 S. Ct. 1175, 1178—1179, 175 L. Ed. 2d 995, 999 (2010) ("An inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury."); Williams v. Curtin, 631 F.3d 380, 383 (6th Cir. 2011) (stating that coughing and shortage of oxygen, even if *de minimis*, is not enough to dismiss an 8th Amendment claim).

110. *De Minimus*, BLACK'S LAW DICTIONARY (10th ed. 2014).

111. Fillmore v. Page, 358 F.3d 496, 504–505 (7th Cir. 2004) (holding that incidental bumping, discomfort, and sore wrists were *de minimis* and do not meet the constitutional threshold).

112. Watson v. Riggle, 315 F. Supp. 2d 963, 969–970 (N.D. Ind. 2004) (holding injuries to incarcerated person's wrists, including a cut and some swelling, caused when guards removed his handcuffs were *de minimis*); *cf.* Liiv v. City of Coeur D'Alene, 130 Fed. Appx. 848, 852 (9th Cir. 2005) (clarifying that while past cases, such as Wall v. County of Orange, 364 F.3d 1107, 1112 (9th Cir. 2004), have "recognized that excessively tight handcuffing can constitute a Fourth Amendment violation," a finding of such violation requires either actual injury to the wrists or a complaint to the officers involved that the handcuffs were too tight).

113. Govan v. Campbell, 289 F. Supp. 2d 289, 300 (N.D.N.Y. 2003) (holding that incarcerated person's claims guard slammed him against the wall and rubbed up against him was "*de minimis*" and insufficient to state a constitutional violation).

114. Norman v. Taylor, 25 F.3d 1259, 1263–1264 (4th Cir. 1994) (requiring incarcerated person to establish more than *de minimis* injury by deputy's swinging of keys at the incarcerated person to maintain claim of excessive force); White v. Holmes, 21 F.3d 277, 281 (8th Cir. 1994) (requiring incarcerated person to establish more than *de minimis* injury caused by prison librarian throwing keys at prisoner and flailing her arms at prisoner's head). *But see* United States. v. LaVallee, 439 F.3d 670, 687–688 (10th Cir. 2006) (rejecting the view that *de minimis* injury is conclusive evidence that *de minimus* force was used).

115. Olson v. Coleman, 804 F. Supp. 148, 150–151 (D. Kan. 1992) (holding that single blow that struck incarcerated person on the head while he was handcuffed was not excessive use of force), *vacated on other grounds*, No. 92-3281, 1993 U.S. App. LEXIS 10086, at * 3 (D. Kan. April 28, 1993) (*unpublished*).

116. Jackson v. Culbertson, 984 F.2d 699, 700 (5th Cir. 1993) (holding that guard's spraying incarcerated person with water because he started a fire was a *de minimis* use of physical force and was thus too trivial to make out a violation of 8th Amendment rights).

117. Candelaria v. Coughlin, 787 F. Supp. 368, 374–375 (S.D.N.Y. 1992) (finding that guard pressing his fist against incarcerated person's neck, resulting in no physical injury, was *de minimis* force for 8th Amendment purposes), *aff'd*, 979 F.2d 845 (2d Cir. 1992).

118. Siglar v. Hightower, 112 F.3d 191, 193–194 (5th Cir. 1997) (finding no 8th Amendment violation where plaintiff suffered bruised ear during routine search; court deemed this a *de minimis* use of force).

119. Hudson v. McMillian, 503 U.S. 1, 4, 112 S. Ct. 995, 997, 117 L. Ed. 2d 156, 164 (1992).

Hudson and his injuries were serious enough to satisfy the "objective part" of the Eighth Amendment. This provided the basis for a constitutional claim. The Supreme Court, in finding a constitutional violation in *Hudson*, also thought that it was important that the officers meant to embarrass the incarcerated person.

Soon after the Supreme Court decided *Hudson*, a district court in New York used the *Hudson* guidelines to determine whether the force used by corrections officers was constitutional. In that case, corrections officers failed to stop other officers from unnecessarily beating an incarcerated person.[120] The beating badly bruised and injured the incarcerated person, including causing a fracture to his left eye. The same officers who did not stop the beating later ripped off the incarcerated person's clothes because they thought he was stripping too slowly. Even though the incarcerated person had originally disobeyed orders, the court found the officers liable for not trying to stop the other officers from beating the incarcerated person.[121] The court looked at several incidents in this case. In one instance, the court said an officer was liable because he had kicked an incarcerated person in the buttocks for no reason.[122] Again, as in *Hudson*, the court found a constitutional violation partly because the officers intended to humiliate the incarcerated person.

In a Third Circuit case, officers hit and kicked an incarcerated person, Giles, while he was restrained on the ground.[123] Giles had claimed that the officers continued to do this even after he had stopped resisting them.[124] The Third Circuit stated that if Giles' claim were true, the officers' actions would be an Eighth Amendment violation.[125]

In *Lewis v. Downey*, a prison officer used a Taser gun after an incarcerated person did not respond to an order to get up from bed.[126] The Seventh Circuit stated that these facts were serious enough that a jury should decide about the officer's state of mind in using the Taser gun.[127] The Fourth Circuit decided that an incarcerated person sprayed with mace and then restrained on a bare-metal bed frame for over eight hours, without access to medical care or a toilet, had an Eight Amendment claim.[128]

You do not always need to have experienced a severe physical injury to bring a claim against a prison official. The Fifth Circuit has held that an incarcerated person who was beaten by corrections officers, resulting in a sprained ankle, suffered a serious enough injury to have a successful Eighth Amendment claim.[129] The court stated that there is no minimum injury required for Eighth Amendment claims of excessive force.[130] Even though a sprained ankle may not seem like a bad injury, in the Fifth Circuit decided it was serious enough not to be *de minimis*. Similarly, the Third Circuit has said that you could still have an Eighth Amendment claim even if your injury is not that serious.[131]

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120. Jones v. Huff, 789 F. Supp. 526, 535–536 (N.D.N.Y. 1992).

121. Jones v. Huff, 789 F. Supp. 526, 535–536 (N.D.N.Y. 1992) (finding that kicks and punches were not part of a good-faith effort to restore discipline and could not have been thought necessary since the incarcerated person was already pinned down by two other officers, and that stripping the incarcerated person "was done maliciously with the intent to humiliate him").

122. Jones v. Huff, 789 F. Supp. 526, 532, 536–537 (N.D.N.Y. 1992).

123. Giles v. Kearney, 571 F.3d 318, 327 (3d Cir. 2009).

124. Giles v. Kearney, 571 F.3d 318, 327 (3d Cir. 2009).

125. Giles v. Kearney, 571 F.3d 318, 327 (3d Cir. 2009).

126. Lewis v. Downey, 581 F.3d 467, 470 (7th Cir. 2009).

127. Lewis v. Downey, 581 F.3d 467, 478 (7th Cir. 2009).

128. Williams v. Benjamin, 77 F.3d 756, 764–765 (4th Cir. 1996).

129. Flowers v. Phelps, 956 F.2d 488, 489–490 (5th Cir. 1992), *vacated in part on other grounds*, 964 F.2d 400 (5th Cir. 1992).

130. Flowers v. Phelps, 956 F.2d 488, 491 (5th Cir. 1992); *see also* Bourne v. Gunnels, 921 F.3d 484, 492 (5th Cir. 2019) ("An inmate need not establish a 'significant injury' to pursue an excessive force claim because ;[i]njury and force … are only imperfectly correlated, and it is the latter that ultimately counts',"). *But see* West v. United States, 729 F. App'x 145, 148 (3d Cir. 2018) (holding that being "pushed out of a cell" was not a sufficient physical injury), *reh'g denied* (May 9, 2018).

131. Brooks v. Kyler, 204 F.3d 102, 108 (3d Cir. 2000) ("[T]he absence of significant resulting injury is not a per se reason for dismissing a claim based on alleged wanton and unnecessary use of force against a prisoner.").

Mental and emotional injuries are different from physical ones. After the Prison Litigation Reform Act ("PLRA"), you can no longer bring claims in federal civil court for mental or emotional injuries that are not related to physical injury. This means that if you bring a claim in federal civil court for mental or emotional injury that did not happen in relation to physical injury, the PLRA requirements may now prevent you from getting compensatory damages (and in some courts, punitive damages as well).[132]

(iii) Substantial Risk of Serious Harm from Other Incarcerated People

To prove the objective part in a *Farmer v. Brennan* deliberate indifference claim about an incarcerated person assault, you must show you faced an objective, "substantial risk of serious harm." You can make a deliberate indifference claim even if you were never injured or attacked as long as you can show there was a big risk that you would get hurt. For a prison official's actions (or failure to act) to be against the Eighth Amendment, "the deprivation alleged must be, objectively, 'sufficiently serious.'" You also "must show that [you are] incarcerated under conditions posing a substantial risk of serious harm."[133]

It is important that you understand that prison officials will not be responsible anytime another incarcerated person hurts you.[134] In other words, if you never faced a big risk (or cannot prove you did), then you cannot prove prison officials were deliberately indifferent to that risk. For example, the Eighth Circuit decided that the plaintiff, an incarcerated person who was assaulted by his cellmate, did not have an Eighth Amendment failure-to-protect claim because no one, including the victim, thought that the cellmate was dangerous. Therefore, the court rejected the incarcerated person's lawsuit because he had failed to show a "substantial risk of serious harm."[135]

In *Farmer*, the Court did not explain how serious the risk must be in order to be "substantial."[136] Courts consider whether society thinks the risk that the incarcerated person complains of is so bad that it is against our society's standards to make anyone take such a chance.[137] In other words, the incarcerated person must show that today's society does not accept the risk he faced.[138] Courts do not consider the general, everyday risk of assault from other incarcerated people to be a "substantial risk" by itself.[139]

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132. See Part F of Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," for further information on the PLRA and its actual injury requirement.

133. Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994).

134. Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994).

135. Berry v. Sherman, 365 F.3d 631, 634–635 (8th Cir. 2004); *see also* Riccardo v. Rausch, 375 F.3d 521, 526–527 (7th Cir. 2004) (holding that the incarcerated person plaintiff had not faced a substantial risk from his cellmate, who later assaulted him, because while the incarcerated person was at risk of attack from the Latin Kings, his cellmate attacked him not for that reason but out of a personal fantasy: "The risk from which [the prisoner plaintiff] Riccardo sought protection was not realized; for all this record shows, the (objectively evaluated) risk to Riccardo of sharing a cell with Garcia was no greater than the risk of sharing a cell with any other prisoner.").

136. Farmer v. Brennan, 511 U.S. 825, 834 n.3, 114 S. Ct. 1970, 1977 n.3, 128 L. Ed. 2d 811, 823 n.3 (1994) (noting that the Court did not reach the question of "[a]t what point a risk of inmate assault becomes sufficiently substantial for Eighth Amendment purposes").

137. *See* Hudson v. McMillian, 503 U.S. 1, 8, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992) ("[T]he Eighth Amendment's prohibition of cruel and unusual punishments 'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society,' and so admits of few absolute limitations."); Wright v. Goord, 554 F.3d 255, 268 (2d Cir. 2009) ("The objective component of a claim of cruel and unusual punishment focuses on the harm done, in light of 'contemporary standards of decency.'").

138. *See, e.g.*, Helling v. McKinney, 509 U.S. 25, 35, 113 S. Ct. 2475, 2481, 125 L. Ed. 2d 22, 32–33 (1993) (finding that being exposed to a cellmate who smoked five packs of cigarettes a day created, in theory, a potentially valid claim under the 8th Amendment due to unreasonable health risk).

139. Jones v. Marshall, 459 F. Supp. 2d 1002, 1008 (E.D. Cal. 2006) ("[T]he legal standard must not be applied

Remember that after you show you faced substantial risk of serious harm, you must show that prison officials knew about the risk but were ignored it (see Part B(2)(a)(ii)(3) and (4)).

3. Harassment by Prison Officials

This Section explains which different types of harassment violate the Eighth Amendment. Harassment can be verbal, physical, or sexual. Harassment may be about race, sex, disability, language, national origin, sexual orientation, or other characteristics. New York State defines harassment as "[e]mployee misconduct meant to annoy, intimidate, or harm an inmate."[140] Generally, verbal harassment alone does not violate the Eighth Amendment unless you are also physically threatened at the same time. Sexual harassment is any unwanted sexual attention. Generally, sexual comments by themselves are not enough for an Eighth Amendment violation.[141] If you are being harassed, you should first try to file a grievance through the inmate grievance system, discussed in *JLM* Chapter 15, "Inmate Grievance Procedures."

(a) Verbal Harassment Alone

You cannot have an Eighth Amendment claim for verbal assault only.[142] Courts do not think verbal abuse, including racial and sexual comments, is unconstitutional. For example, the Ninth Circuit has held that an incarcerated person did not have an Eighth Amendment claim when a guard verbally harassed the incarcerated person in a sexual and racial way and briefly exposed the guard's genitals.[143] Similarly, the Sixth Circuit decided that an incarcerated person had no constitutional claim against a guard who banged his cell door, threw food trays, made aggravating and insulting comments, and behaved in a racially prejudicial manner because harassment and verbal abuse are not Eighth Amendment violations.[144]

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to an idealized vision of prison life, but to the prison as it exists.") (quoting Berg v. Kincheloe, 794 F.2d 457, 462 (9th
Cir. 1986)).

140. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.2(e) (2006).

141. *See* Adkins v. Rodriguez, 59 F.3d 1034, 1037–1038 (10th Cir. 1995) (finding prison official's alleged verbal sexual harassment of incarcerated person did not violate the 8th Amendment because it was not objectively sufficiently serious and the prison official did not act with deliberate indifference to the incarcerated person's health or safety). When other forms of harassment are combined with comments of a sexual nature, they may constitute cruel and unusual punishment in violation of the 8th Amendment. *See, e.g.*, Berry v. Oswalt, 143 F.3d 1127, 1133 (8th Cir. 1998) (holding that allegations of attempted non-routine pat-downs combined with sexual comments and propositions that caused fear and frustration met the objective prong of the 8th Amendment claim). See Parts B(3)(a) and (c) of this Chapter for more information on verbal and sexual harassment.

142. Webster v. City of New York, 333 F. Supp. 2d 184, 201 (S.D.N.Y. 2004) ("Being subjected to verbally abusive language does not rise to the level of a constitutional claim in an Eighth Amendment context."); Minifield v. Butikofer, 298 F. Supp. 2d 900, 904–905 (N.D. Cal. 2004) (holding incarcerated person did not state a constitutional claim for sexual harassment, where a prison official twice unzipped his pants and told incarcerated person to grab his penis, because the Ninth Circuit has "specifically differentiated between sexual harassment that involves verbal abuse and that which involves allegations of physical assault, finding the latter [sic] to be in violation of the constitution"; also noting the incarcerated person had not alleged any physical injury, and under the Prison Litigation Reform Act, "[f]ailure to allege and establish an appropriate physical injury is ground for dismissal" (citations omitted)); Jones v. Brown, 300 F. Supp. 2d 674, 681 (N.D. Ind. 2003) (holding pretrial detainee had no constitutional claim, where guard incorrectly told him criminal charges had been dismissed, when in fact they had been referred to the prosecutor and eventually became part of a plea bargain, because verbal abuse and harassment are not sufficient).

143. Austin v. Terhune, 367 F.3d 1167, 1171–1172 (9th Cir. 2004) ("Although prisoners have a right to be free from sexual abuse, whether at the hands of fellow inmates or prison guards, the Eighth Amendment's protections do not necessarily extend to mere verbal sexual harassment." (citations omitted)).

144. Johnson v. Dellatifa, 357 F.3d 539, 546 (6th Cir. 2004) ("[T]he allegations, if true, demonstrate shameful and utterly unprofessional behavior [but] they are insufficient to establish an Eighth Amendment violation … [H]arassment and verbal abuse … do not constitute the type of infliction of pain that the Eighth Amendment prohibits." (citation omitted)).

(b) Verbal Harassment With Physical Threats

Simple verbal harassment does not violate the Eighth Amendment. However, courts have held that when these assaults come along with very serious physical threats (such as believable death threats), you may have a claim for psychological injury.[145] However, the Prison Litigation Reform Act states that incarcerated people may not bring a federal civil action for mental or emotional injury suffered while in custody "without a prior showing of physical injury."[146] Different courts define "physical injury" differently. But, typically they hold that "de minimus" injuries (very minor injuries, like a small cut or bruise) do not count as a "physical injury."[147] Also, not all of these courts allow you to receive the same type of damages.[148] This means that if you can only show a psychological injury, you will not be able to get damages. [149] The court can still grant you injunctive relief (a court order to prevent officials or incarcerated people from harassing you) if you can show that this conduct is likely to happen again in the future.[150] For more information on injunctive relief, see Part L of Chapter 14 of the *JLM*, "The Prison Litigation Reform Act."

(c) Sexual Harassment

There is no single definition of sexual harassment in the prison context. However, the Bureau of Justice Statistics defines nonconsensual sexual acts as "unwanted contacts with another inmate or unwilling contacts with staff that involved oral sex anal sex, vaginal sex, handjobs, and other sexual acts."[151] Both men and women can be sexually harassed.[152] Because prison officials have so much power over incarcerated people, a corrections officer may try to force an incarcerated person into sexual

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145. *See, e.g.*, Northington v. Jackson, 973 F.2d 1518, 1524 (10th Cir. 1992) (finding alleged death threats accompanied by the brandishing of lethal weapons would, if true, violate the 8th Amendment).

146. 42 U.S.C. § 1997e(e).

147. *See* generally Pierre v. Padgett, 808 F. App'x 838, 843 (11th Cir. 2020) (noting that "in order to satisfy section 1997e(e) the physical injury must be more than de minimis, but need not be significant,"); West v. United States, 729 F. App'x 145, 148 (3d Cir. 2018), *reh'g denied* (May 9, 2018) (finding that "more than a de minimis physical injury must be alleged as a predicate to allegations of mental or emotional injury,"); McAdoo v. Martin, 899 F.3d 521, 525 (8th Cir. 2018) (holding that a plaintiff can only receive damages if they have "more than a de minimis injury").

148. *See generally* Pierre v. Padgett, 808 F. App'x 838, 843 (11th Cir. 2020) (finding that only nominal damages are available in suits involving psychological injury, but not other kinds of damages); Small v. Brock, 963 F.3d 539, 543 (6th Cir. 2020) (noting that Section 1997e(e) of the PLRA only prevents recovery of compensatory damages). *But see* Toliver v. City of New York, 530 F. App'x 90, 93 n.2 (2d Cir. 2013) (quoting Thompson v. Carter, 284 F.3d 411, 416 (2d Cir. 2002) ("Because Section 1997e(e) is a limitation on recovery of damages for mental and emotional injury in the absence of a showing of physical injury, it does not restrict a plaintiff's ability to recover compensatory damages for actual injury, nominal or punitive damages, or injunctive and declaratory relief.").

149. For a more detailed explanation about the types of damages that various courts allow one to receive for psychological injuries under the PLRA, see Aref v. Lynch, 833 F.3d 242, 262–267 & n.15 (D.C. Cir. 2016) (describing the varying laws for recovering damages under the PLRA in more detail).

150. *See* Hutchins v. McDaniels, 512 F.3d 193, 196–198 (5th Cir. 2007) (noting that "the physical injury requirement does not bar declaratory or injunctive relief for violations of a prisoner's Constitutional rights"); Zehner v. Trigg, 133 F.3d 459, 461–463 (7th Cir. 1997) (finding that in a suit for mental and emotional injuries because of exposure to asbestos, a incarcerated person cannot sue for monetary damages but can sue for other kinds of relief).

151. NPREC, Report and Standards, *available at* https://www.bjs.gov/content/pub/pdf/svsfpri07.pdf (last visited Oct. 21, 2019). Bureau of Justice Statistics, Sexual Victimization in Prisons and Jails Reported by Inmates, 2011—12, *available at* https://www.bjs.gov/content/pub/pdf/svpjri1112.pdf (last visited Oct. 21, 2019).

152. *See* Boddie v. Schnieder, 105 F.3d 857, 861 (2d Cir. 1997) (finding that, in principle, sexual abuse of a male incarcerated person by a female corrections officer could potentially violate the 8th Amendment); Liner v. Goord, 196 F.3d 132, 135–136 (2d Cir. 1999) (remanding case to consider whether a sexual assault claim violated the 8th Amendment).

conduct by threatening them with disciplinary action or some other punishment. This can be considered cruel and unusual punishment that violates the Eighth Amendment.

Courts look to see if an act of sexual harassment or assault is against "evolving standards of decency" to decide if the act violated an incarcerated person's Eighth Amendment rights.[153] In other words, a court will look at what society believes is acceptable and good behavior to decide whether an attacker's behavior went against that standard. Sexual assault is a clear violation. But, comments of a sexual nature by themselves are usually not enough to violate the Eighth Amendment.[154] When other forms of harassment are combined with comments of a sexual nature, they may constitute cruel and unusual punishment in violation of the Eighth Amendment.[155]

If a prison official sexually harassed you, you can file a lawsuit both against that official and the prison. But, keep in mind that it is difficult to make an Eighth Amendment claim for sexual harassment against a correctional institution. It is difficult because you must prove that the administrators showed "deliberate indifference" toward the harassment.[156] In other words, you must show that the prison administrators knew or should have known of the risk of harassment, and ignored it. Showing this knowledge is difficult unless you have evidence that you told the administrators about the problem or asked them for help.

(d) Reporting Harassment in New York

New York law defines harassment as "employee misconduct meant to annoy, intimidate or harm an inmate."[157] It creates a special procedure for reporting harassment.[158] The procedure says that if you think you are the victim of prison employee misconduct or harassment, you should tell the prison employee's direct supervisor (but be aware that this is not a requirement for filing a formal grievance).[159] You should also file a formal grievance with the clerk of the Inmate Grievance Resolution Committee ("IGRC").[160] The Committee will give this grievance to the prison superintendent for review.[161] After receiving the grievance, the superintendent will decide within twenty-five (25) calendar days if the employee's conduct was harassment.[162] If you do not get an answer from the superintendent within this time, you can appeal the grievance to the Central Office Review Committee ("CORC").[163]

If you are a victim of sexual harassment, you should use the confidential procedure your prison has in place to bring a formal complaint. You should keep copies of these complaints so that you can later prove that administrators knew about the problem and were deliberately indifferent to your complaint.

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153. *See, e.g.*, Wood v. Beauclair, 692 F.3d 1041, 1045 (9th Cir. 2012) (describing "evolving standards of decency") (internal citations omitted).

154. *See* Adkins v. Rodriguez, 59 F.3d 1034, 1037–1038 (10th Cir. 1995) (finding that a prison official's alleged verbal harassment of a incarcerated person did not violate the 8th Amendment because it was not objectively sufficiently serious and the prison official did not act with deliberate indifference to the incarcerated person's health or safety).

155. *See, e.g.*, Berry v. Oswalt, 143 F.3d 1127, 1133 (8th Cir. 1998) (holding that allegations of attempted non-routine pat-downs combined with sexual comments and propositions that caused fear and frustration violated the 8th Amendment).

156. *See* Daskalea v. District of Columbia, 227 F.3d 433, 441, 343 U.S. App. D.C. 261, 269 (D.C. Cir. 2000) (stating that a municipality can be found liable when its policy or custom inflicts the injury; finding that something constitutes a policy or custom when it arises out of deliberate indifference).

157. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.2(e) (2020).

158. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.8 (2020).

159. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.8(a) (2020).

160. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(a) (2020). Chapter 15 of the *JLM* includes information on how to file a grievance complaint.

161. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.8(b) (2020).

162. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.8(f) (2020).

163. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.8(g) (2020).

4. Force Used to Carry Out an Illegal Order

If you refuse to follow an order from a prison official, even if that order is illegal, prison officials can use force to make you obey. Courts have held that incarcerated people must follow orders so that prisons can be run in a safe and orderly way.[164] Even if you believe an order violates your constitutional rights, courts say you do not have the right to resist the order.[165]

For example, in *Jackson v. Allen*, an incarcerated person resisted prison guards because he thought they were going to use cruel and unusual punishment against him in violation of the Eighth Amendment.[166] The guards used force on him to overcome his resistance. The incarcerated person won his case against the guards, but only because they used too much force. The district court said that the incarcerated person did not have a strong enough reason to resist the guards because guards have a legal right to make incarcerated people obey their orders and use force if necessary. The court stated that an incarcerated person in this situation can later try to get damages in court for the unconstitutional punishment, but should not resist the order itself. Again, this is only if the officials used a reasonable and necessary amount of force for that situation.[167] But, the court did say there was one exception to the general rule that incarcerated people may never resist orders. An incarcerated person may resist an illegal order to protect himself from "immediate, irreparable and permanent physical or mental damage or death."[168] The court did not give specific examples of when an incarcerated person could legally refuse an order. The court just said that there would be exceptions only for extreme situations.

5. Protection Under State Constitutions and Statutes and Federal Statutes

You have already read how state tort law and federal constitutional law protect your rights against assault. State constitutions and statutes also protect your right to be free from assault. For example, the New York State Constitution, like the federal Eighth Amendment, prohibits cruel and unusual punishment.[169] Like the federal Fifth and Fourteenth Amendments, the New York Constitution does not allow you to lose your liberty without due process of law.[170]

New York State laws give incarcerated people more protections. New York statutes say that prison officials cannot hit incarcerated people except under emergency circumstances: "[N]o officer or other employee of the department shall inflict any blows whatever upon any inmate, unless in self-defense, or to suppress a revolt or insurrection."[171] See Chapter 2 of the *JLM*, "Introduction to Legal Research," for information on how to find similar laws in your state.

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164. Griffin v. Comm'r of Pa. Prisons, No. 90-5284, 1991 U.S. Dist. LEXIS 17951, at *11 (E.D. Pa. Dec. 6, 1991) (*unpublished*) ("Even if plaintiff considered the order illegal, plaintiff should not have refused to follow it because it is critical to the orderly administration of a prison that prisoners follow orders."), *aff'd*, 961 F.2d 208 (3d Cir. 1992).

165. Pressly v. Gregory, 831 F.2d 514, 518 n.3 (4th Cir. 1987) (holding the incarcerated person could not resist being taken into custody by claiming that it violated his civil rights when his habeas petition was still pending).

166. Jackson v. Allen, 376 F. Supp. 1393, 1394 (E.D. Ark. 1974); *see also* Smith v. Sec'y, Fla. Dept. of Corrections, 358 Fed.Appx. 60, 64 (11th Cir. 2009) (finding a rule that prisoners comply with all orders issued by guards is constitutional, even though the rule might mean prisoners will have to comply with illegal orders); Gossett v. Stewart, 2012 U.S. Dist. LEXIS 34374 (D. Ariz. Mar. 13, 2012).

167. Jackson v. Allen, 376 F. Supp. 1393, 1395 (E.D. Ark. 1974).

168. Jackson v. Allen, 376 F. Supp. 1393, 1395 (E.D. Ark. 1974).

169. N.Y. Const. art. I, § 5.

170. N.Y. Const. art. I, § 6. In general, you have two types of due process rights under the Constitution. Your right to procedural due process means government proceedings must treat you fairly. It limits the ways the government can take away your property, liberty, and life. Your right to substantive due process prevents government interference with other rights individuals have that the government cannot take away—rights such as privacy, speech, and religion. Many Chapters in the *JLM* deal with these two types of due process.

171. N.Y. CORRECT. LAW § 137(5) (McKinney 2014). See Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," for information on how to bring tort actions against state employees.

In addition, federal statutes can also protect the rights of federal incarcerated people to be free from assault. The Federal Bureau of Prisons owes a duty of care to people in federal custody. This duty can be the basis for a suit against prison officials if you are attacked by other incarcerated people.[172] But, a court will look at state tort law to decide if the officials have failed their duties. So, researching the laws of the state in which the prison sits is still necessary.[173]

C. Sexual Assault and Rape

This Part of the Chapter explains the federal and state laws available if you have been sexually assaulted for both incarcerated men and women. Sexual assault and rape are both types of assaults. "Sexual assault" means any physical contact of a sexual nature, such as fondling your genitals (your private parts). If you have been sexually assaulted, you can make a claim using the laws described above, in Part B of this Chapter.

If you were attacked by a prison official, you can make an Eighth Amendment claim and a state tort law claim for assault and battery. Prison officials have the right to use lawful force to maintain order and security within the prison. They do not have the right to sexually abuse you.[174] Any bodily contact between you and a prison official must be (1) lawful force necessary to maintain security and (2) must connect to helping the official run the prison. A guard cannot claim that he is maintaining order or disciplining you for breaking a rule to force you to have sexual relations with him or to touch him in a sexual way.[175] If a prison official does this, you can seek the protection of the law.[176]

Consensual sex (sex that both people agree to) between an incarcerated person and a prison official is not an Eighth Amendment violation. However, from a legal standpoint, consensual sex between an incarcerated person and prison official is " unquestionably inappropriate."[177] Federal law specifically criminalizes all sexual contact between corrections officers and incarcerated people in federal prisons, as Part C(2) explains below. Many states, including New York, have similar state laws,[178] as Part C(3) explains.

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172. 18 U.S.C. § 4042(a)(2); *see* United States v. Muniz, 374 U.S. 150, 164–165, 83 S. Ct. 1850, 1859, 10 L. Ed. 2d 805, 816 (1963) (holding that the duty of care owed to federal prisoners is fixed by 18 U.S.C. § 4042, regardless of any conflicting state rules).

173. Parrott v. United States, 536 F.3d 629, 637 (7th Cir. 2008) (finding that Indiana tort law governs whether the duty of care is breached in a suit brought under the Federal Tort Claims Act). See footnote 3 of this Chapter for more information on the Federal Tort Claims Act under which such claims must be brought.

174. *See* Women Prisoners v. District of Columbia, 877 F. Supp 634, 665 (D.C. Cir. 1994), *vacated in part on other grounds*, 93 F.3d 910, 320 U.S. App. D.C. 247 (D.C. Cir. 1996) ("Rape, coerced sodomy, unsolicited touching of women prisoners' vaginas, breasts and buttocks by prison employees are 'simply not part of the penalty that criminal offenders pay for their offenses against society.'") (quoting Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994)).

175. *See* Women Prisoners v. District of Columbia, 877 F. Supp. 634, 665 (D.C. Cir. 1994), *vacated in part on other grounds*, 93 F.3d 910, 320 U.S. App. D.C. 247 (D.C. Cir. 1996) (noting that although security concerns sometimes trump privacy interests, the evidence did not show any justification for the invasion of incarcerated people's privacy or for vulgar sexual remarks).

176. *See* Women Prisoners v. District of Columbia, 877 F. Supp. 634, 665–666 (D.C. Cir. 1994), *vacated in part on other grounds*, 93 F.3d 910, 320 U.S. App. D.C. 247 (D.C. Cir. 1996) (holding that the District of Columbia was liable under U.S.C. 42 § 1983 for 8th Amendment violations); *see also* Hovater v. Robinson, 1 F.3d 1063, 1068 (10th Cir. 1993) ("[A]n inmate has a constitutional right to be secure in her bodily integrity and free from attack by prison guards") (citing Alberti v. Klevenhagan, 790 F.2d 1220, 1224 (5th Cir. 1986)).

177. *See, e.g.*, Phillips v. Bird, Civil Action No. 03-247-KAJ, 2003 U.S. Dist. LEXIS 22418, at *16 (D. Del. Dec. 1, 2003) (*unpublished*).

178. Just Detention International's website has useful resources, including information on laws, organizations, and practitioners who can help you in each state. Visit https://justdetention.org/service/ (last visited Oct. 21, 2019) to find local resources.

If another incarcerated person sexually assaulted you, you can claim that prison officials violated the Eighth Amendment if they knew that you were at risk of harm but did nothing about it.[179] You could also make a state law negligence claim against prison officials.

1. What to Do If You Are Sexually Assaulted

If you are raped or sexually assaulted, you should tell someone immediately and ask to go to the hospital. There, you should be tested for sexually transmitted infections, and women should also be tested
for pregnancy. The health professional should collect your clothing, fingernail scrapings, pubic hair samples, blood samples, hair strands, and swab samples from the back of your throat and your rectum and/or vagina.[180] If you would like to speak with someone after the sexual assault or rape, the prison may provide counseling.

You may also want to file a report about the sexual assault and press criminal charges. Many incarcerated people are afraid that prison officials will punish them if they file grievances, especially if they are complaining about staff. You may be afraid that your complaint will not be kept private or that you will be harassed or threatened. It can be difficult to report a sexual assault or rape. But, you should know that any sexual contact by a corrections officer is wrong. You have a right not to go through such abuse. It is also wrong for the prison guards to punish you or act against you for reporting the assault. Although, retaliation does happen.

If you bring a civil suit, it is important to know that the court allows claims based on physical abuse, but not. claims based only on emotional damage.[181] You could claim, however, that you experienced both physical and emotional damage. This makes the collection of physical evidence of sexual assault even more important. See Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," for more information on the PLRA.

(a) Eighth Amendment Claims for Sexual Assault

Courts use the Eighth Amendment deliberate indifference standard to determine if a prison official is liable for failing to prevent sexual assaults.[182]

If you were assaulted by a prison official, you can claim that the assault was "cruel and unusual punishment" violating your Eighth Amendment rights. Conduct violates the Eighth Amendment if it is against the "evolving standards of decency that mark the progress of a maturing society."[183] Courts have found that sexual assaults violate the Eighth Amendment because "rape, coerced sodomy,

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179. Farmer v. Brennan, 511 U.S. 825, 847, 114 S. Ct. 1970, 1984, 128 L. Ed. 2d 811, 847 (1994) ("[A] prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.").

180. *See* Linda M. Petter & David L. Whitehill, *Management of Female Sexual Assault*, 58 Am. Family Physician 920 (1998) (providing medical recommendations for rape and sexual assault victims), *available at* http://www.aafp.org/afp/980915ap/petter.html (last visited Oct. 21, 2019).

181. 42 U.S.C. §1997e(e) ("[N]o Federal civil action may be brought by a prisoner confined in a jail, prison or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.").

182. Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994) (holding that to violate the 8th Amendment, a prison official must have a "sufficiently culpable state of mind" which means one of "deliberate indifference" to incarcerated person's health or safety) (citing Wilson v. Seiter, 501 U.S. 294, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991)).

183. Hudson v. McMillian, 503 U.S. 1, 8, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992) (quoting Rhodes v. Chapman, 452 U.S. 337, 346, 101 S. Ct. 2392, 2399, 69 L. Ed. 2d 59, 68 (1981)) (internal quotation marks omitted).

unsolicited touching of women prisoners' vaginas, breasts and buttocks by prison employees are 'simply not part of the penalty that criminal offenders pay for their offenses against society.'"[184]

In making your Eighth Amendment claim, you must show the same two parts as for any assault by a prison official: (1) the subjective part that the prison official has a state of mind that is guilty enough, and (2) the objective part that the harm is serious enough.[185] Showing these two parts is usually easier with sexual assault than with physical assault. Courts have said that sexual assaults are usually both malicious and harmful. As the Second Circuit has explained, a claim of sexual abuse may meet both the subjective and objective parts of the Eighth Amendment because sexual abuse can cause severe physical and mental harm.[186]

(b) Sexual Abuse of Incarcerated Women

While both incarcerated men and women have been sexually assaulted and/or raped, incarcerated women are particularly vulnerable.[187] Although all incarcerated people's rights to privacy are very limited because of the nature of prison and incarceration,[188] courts are sometimes more sympathetic to female incarcerated people because of the greater chance of sexual abuses by prison guards. For example, some courts have found searches of incarcerated women by male guards to be unconstitutional, even if searches of male incarcerated people by female guards would be allowed under the same circumstances.[189] To help prevent sexual abuse of incarcerated women, some prisons have tried to hire only female corrections officers for women's prisons.[190]

2. Federal Law

While a prison official is allowed to touch an incarcerated person for security reasons (for example, while performing a legal search), he is never allowed to have sexual contact with an incarcerated person. Federal law criminalizes sexual intercourse or any type of sexual contact between people with "custodial, supervisory or disciplinary" authority (like guards and wardens) and incarcerated people in federal correctional facilities.[191] It is a *felony* to use or threaten force to engage in sexual intercourse

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184. Women Prisoners of D.C. Dept. of Corr. v. District of Columbia, 877 F. Supp. 634, 665 (D.D.C. 1994) (quoting Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994)), *vacated in part on other grounds*, 9 F.3d 910, 320 U.S. App. D.C. 247 (D.C. Cir. 1996)).

185. Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994). See Part B(2) of this Chapter for more information on the objective and subjective parts of 8th Amendment violations.

186. Boddie v. Schnieder, 105 F.3d 857, 861 (2d Cir. 1997); *see also* Hammond v. Gordon County., 316 F. Supp. 2d 1262, 1301 (N.D. Ga. 2002) (holding that an incarcerated person had satisfied both the objective and subjective components of her 8th Amendment claim by alleging she had sexual intercourse with a prison guard, even though the guard claimed it was consensual).

187. Human Rights Watch, All Too Familiar: Sexual Abuse of Women in U.S. State Prisons (1996) ("[The female prisoner population is] a population largely unaccustomed to having recourse against abuse; all the more necessary, then, for the state to present the available means of recourse clearly and in an accessible fashion."), *available at* https://www.hrw.org/report/1996/12/01/all-too-familiar/sexual-abuse-women-us-state-prisons (last visited Oct. 21, 2019).

188. *See* Hudson v. Palmer, 468 U.S. 517, 527–528, 104 S. Ct. 3194, 3200–3201, 82 L. Ed. 2d 393, 403–404 (1983) (finding that the interest in ensuring institutional security necessitates a limited right of privacy for incarcerated people).

189. *See, e.g.*, Jordan v. Gardner, 986 F.2d 1521, 1531 (9th Cir. 1993) (holding that prison policy requiring male guards to conduct non-emergency, suspicionless, clothed body searches on female incarcerated people was cruel and unusual punishment in violation of the 8th Amendment). See Part C(2)(e) of Chapter 25 of the *JLM*, "Your Right To Be Free From Illegal Body Searches," for more information about cross-gender body searches.

190. *See, e.g.*, Ind. Code Ann. §§ 36-8-3-19, 36-8-10-5 (West 2016). California protects all incarcerated people from being searched by officers of the opposite sex. Cal. Penal Code § 4021(b) (West 2011). Michigan provides that if incarcerated people are subject to body cavity searches by officers of the opposite sex, an officer of the same sex must also be present. MICH. COMP. LAWS ANN. § 764.25b(5) (West 2000).

191. 18 U.S.C. § 2243. For an example of criminal prosecution of a federal prison guard for violating this statute, see United States v. Vasquez, 389 F.3d 65, 77 (2d Cir. 2004) (affirming the conviction of a defendant prison

(or sexual contact) in a federal prison.[192] This means it is always illegal in a federal prison for prison officials to have sexual contact with incarcerated people. These laws only protect federal incarcerated people. Laws protecting state incarcerated people are discussed in the next Subsection.

In 2003, the federal government passed the Prison Rape Elimination Act, the first federal law about sexual assault in prisons. The Act calls for the collection of national statistics about sexual assault in federal, state, and local prisons. It also develops guidelines for states on addressing incarcerated people rape, creates a review panel to hold annual hearings, and provides grants to states to fight the problem.[193] With this Act, the federal government recognized that sexual assault in prisons is a major problem.[194]

3. State Law

In many states, including New York and California, any sexual conduct between a prison employee and an incarcerated person—even with the incarcerated person's consent—is a form of rape.[195] A New York State statute makes any sexual relations between incarcerated people and prison employees illegal. Specifically, the law says incarcerated people cannot legally "consent" to sexual relations with prison employees.[196] Thus, by state statute, New York State prison employees are criminally liable (responsible) for rape, sodomy, sexual misconduct, or sexual abuse if they have sexual contact with or commit a sexual act with incarcerated people. In other words, courts will consider any sexual contact between a prison employee and an incarcerated person a crime. Courts will consider this a crime even if the incarcerated person believed he or she agreed to such contact. Consent is not a valid defense for the prison official's acts.

Other states that criminalize sexual contact between prison employees and incarcerated people include Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Virginia, Washington, West Virginia, and Wisconsin.[197] States that have laws that do

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guard for five counts of sexual abuse of incarcerated people and one count of misdemeanor abusive sexual contact, and sentencing of defendant to 21 months imprisonment).

192. 18 U.S.C. § 2241.

193. Prison Rape Elimination Act of 2003, 34 U.S.C. §§ 30301–30309 (2012). The National Prison Rape Elimination Commission ("NPREC") released an official report and guidelines in mid-2009. NPREC, Report and Standards, *available at* https://www.ncjrs.gov/pdffiles1/226680.pdf (last visited Oct. 21, 2019).

194. The U.S. Department of Justice ("DOJ") also released a report examining the DOJ's efforts to deter sexual abuse of federally incarcerated people by federal corrections officers, and made recommendations to help the DOJ prevent this sexual abuse (including better staff training and increased medical and psychological help for victims of abuse). Dept. of Justice, Office of the Inspector General, The Department of Justice's Efforts to Prevent Staff Sexual Abuse of Federal Inmates (2009), *available at* http://www.justice.gov/oig/reports/plus/e0904.pdf (last visited Oct. 21, 2019).

195. CAL. PENAL CODE § 289.6 (West 2014); N.Y. PENAL LAW § 130.05(3)(e)–(f) (McKinney 2014).

196. N.Y. PENAL LAW §§ 130.05(3) (e)–(f) (McKinney 2014).

197. ALASKA STAT. §§ 11.41.425(a)(2), 11.41.427(a)(1) (West 2007); ARIZ. REV. STAT. ANN. § 13-1419 (2010); ARK. CODE ANN. § 5-14-126(a)(1)(A) (2006 & Supp. 2009); Cal. Penal Code § 289.6 (West 2014); COLO. REV. STAT. § 18-3-404(f) (West 2013); Conn. Gen. Stat. Ann. §§ 53a-71(a)(5), 53a-73a(a)(1)(F) (West 2012); DEL. CODE ANN. tit. 11, § 1259 (2007); D.C. Code §§ 22-3013, 22-3014, and 22-3017 (West 2017); FLA. STAT. ANN. § 944.35(3) (West 2010); GA. CODE ANN. § 16-6-5.1 (West 2016); HAW. REV. STAT. ANN. §§ 707-731(1)(c), 707-732(1)(e) (West 2008); IDAHO CODE ANN. § 18-6110 (2004 & Supp. 2008); 720 ILL. COMP. STAT. ANN. 5/11-9.2 (West 2010); IOWA CODE ANN. § 709.16(1) (West 2016); KAN. STAT. ANN. § 21-5512 (2012); KY. REV. STAT. ANN. § 510.120 (LexisNexis 2008); La. Rev. Stat. Ann. § 14:134.1 (2018); ME. REV. STAT. ANN. tit. 17-A, § 253(2)(E) (2006); MD. CODE ANN., CRIM. LAW § 3-314 (West 2002); MICH. COMP. LAWS ANN. §§ 750.520c (1)(i–k) (West 2004); MINN. STAT. ANN. § 609.344(1)(m), 609.345(1)(m) (West 2009); MISS. CODE ANN. § 97-3-104 (West 2008); MO. ANN. STAT. § 566.145 (West 2012); MONT. CODE ANN. § 45-5-502(5)(a) (West 2009); NEV. REV. STAT. ANN. § 212.187 (West 2015); N.H. REV. STAT. ANN. § 632-A:4(III) (2016); N.J. STAT. ANN. § 2C:14-2(c)(2) (West 2015); N.M. STAT. ANN. § 30-9-11(E)(2) (West 2016); N.D. CENT. CODE ANN. § 12.1-

not refer specifically to prison employees but may also criminalize prison employees' sexual contact with incarcerated people include Nebraska, North Carolina, Oklahoma, Texas, and Wyoming.[198]

Some states have also taken steps to protect incarcerated people from retaliation for reporting sexual misconduct by prison staff. For example, California has made it illegal for prison guards to retaliate against incarcerated people who report them for sexual assault.[199] Of course, even with such laws, retaliation still occurs and is a real concern. But, if your state law does not allow retaliation, the fact that the law forbids this behavior strengthens your legal claim.

D. Assault on LGBTQ Incarcerated People

This Part of the Chapter discusses special issues for lesbian, gay, bisexual, transgender, and/or queer people. Chapter 30 of the *JLM*, "Special Information for Lesbian, Gay, Bisexual, Transgender, and/or Queer Incarcerated People," explains these issues in more detail. You can sue before you are assaulted if you feel officials are ignoring a large risk that you will be seriously harmed.

Most LGBTQ incarcerated people who have been assaulted by other incarcerated people make Eighth Amendment deliberate indifference claims under *Farmer*.[200] Although in one case, a court recognized a Fourteenth Amendment Equal Protection claim as well.[201] To make a claim that you are vulnerable to attack (in order to satisfy a deliberate indifference claim), you have to present evidence that you may be a target of assault.[202]

It is important to report any threats against you so that prison officials know about specific problems. For example, if you seem vulnerable because you are gay, transgender, and/or gender-nonconforming, then you should report to prison officials any harassment or threats of rape by other incarcerated people. When you report harassment or threats to prison officials, you need to have some specific evidence or examples (for example, that an incarcerated person who has raped other incarcerated people is threatening you) because suspicions alone are not enough.[203] With such evidence, incarcerated people who are LGBTQ may be able to make a deliberate indifference Eighth Amendment claim that prison officials should have considered the previous threats and tried to prevent an attack. Of course, you will still have to prove that prison officials did not act reasonably to try to prevent the assault.

20-06 (West 2008); OHIO REV. CODE ANN. § 2907.03(A)(6,11) (West 2006); OR. REV. STAT. ANN. §§ 163.452, 454 (West 2015); 18 PA. STAT. AND CONS. STAT. ANN. § 3124.2 (West 2015); R.I. GEN. LAWS § 11-25-24 (2002); S.C. CODE ANN. § 44-23-1150 (2017); S.D. CODIFIED LAWS § 24-1-26.1 (2013); UTAH CODE ANN. § 76-5-412 (West 2015); VA. CODE ANN. § 18.2-64.2 (West 2012); WASH. REV. CODE ANN. §§ 9A.44.160, 170, 180 (West 2015); W. VA. CODE ANN. § 61-8B-10 (LexisNexis 2005 & Supp. 2009); and WIS. STAT. ANN. § 940.225 (West 2005). These laws vary significantly in detail, and you should consult the law of the state in which you are imprisoned. *See* Human Rights Watch, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* 39–40 (1996), *available at* https://www.hrw.org/report/1996/12/01/all-too-familiar/sexual-abuse-women-us-state-prisons (last visited Oct. 21, 2019).

198. NEB. REV. STAT. ANN. § 28-322.03 (2009); N.C. GEN. STAT. ANN. § 14-27.31 (West 2014); OKLA. STAT. ANN. tit. 21 § 1114 (West 2015); TEX. PENAL CODE ANN. § 22.011 (West 2019); WYO. STAT. ANN. § 6-2-303 (West 2007 & Supp. 2018). *See* Human Rights Watch, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* 40 (1996), *available at* https://www.hrw.org/report/1996/12/01/all-too-familiar/sexual-abuse-women-us-state-prisons (last visited Oct. 21, 2019).

199. CAL. CODE REG. tit. 15, § 3401.5(f) (2003).

200. Farmer v. Brennan, 511 U.S. 825, 828–829, 114 S. Ct. 1970, 1974–1975, 128 L. Ed. 2d 811, 820 (1994) (recognizing as actionable an 8th Amendment claim for a prison's "deliberate indifference" to a prominent risk of assault).

201. Johnson v. Johnson, 385 F.3d 503, 532–533 (5th Cir. 2004) (holding that incarcerated person's sexual-orientation-based equal protection claims were properly pleaded and actionable).

202. *See* Purvis v. Ponte, 929 F.2d 822, 825–827 (1st Cir. 1991) (per curiam) (finding that the 8th Amendment is not violated when an incarcerated person alleged general fear of "gay bashing" and suspicions that homophobic cellmates threatened his safety, because the incarcerated person presented no evidence of the likelihood that violence would occur and officials had tried placing him with 6 different cellmates).

203. Riccardo v. Rausch, 375 F.3d 521, 527–528 (7th Cir. 2004) ("The Constitution does not oblige guards to believe whatever inmates say ... [A] prisoner's bare assertion is not enough to make the guard subjectively aware of a risk, if the objective indicators do not substantiate the inmate's assertion.").

You should also note that you may be able to get special protection even if you are not gay but are still more vulnerable to physical and sexual assaults by other incarcerated people because of how you look.[204] If you fear you will be assaulted, you may request to be placed in special housing or protective custody. This request unfortunately usually also means you will lose certain privileges. Prison officials may also put you, without your consent, in protective custody or even solitary confinement because they believe that is the only way to protect you.[205]

1. Special Protections for LGBTQ People

In general, courts have recognized that gay or "effeminate" men are often assaulted in prison, especially when placed in the general population,[206] and may need special consideration either at sentencing or after incarceration.[207] Courts are still creating the law in this area. But, the Supreme Court has expressly said that a sentencing court may consider "susceptibility to abuse" in prison as a factor for a downward departure (a decrease from what the sentence would otherwise be) in extraordinary or unusual circumstances.[208] Where the judge believes there is a serious risk you could be assaulted in prison or where prison officials say that they can protect you only by putting you in protective custody or solitary confinement, you can request better protective custody conditions or a shorter sentence. For example, several courts have ordered reduced sentences for incarcerated people at risk of assault because of their sexual orientation or appearance.[209]

Special treatment for LGBTQ incarcerated people was considered by the Second Circuit in *United States v. Lara*.[210] In this case, the incarcerated person had a youthful appearance and bisexual orientation that made him extremely vulnerable to physical attack. Prison officials were able to protect him only by putting him in solitary confinement, so the court reduced his sentence.[211] A year after

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204. *See, e.g.*, United States v. Gonzalez, 945 F.2d 525, 526–527 (2d Cir. 1991) (ruling in favor of decreasing incarcerated person's sentence because of his feminine appearance).

205. *See, e.g.*, City of New York Department of Corrections, Directive 6007R-A: Protective Custody (May 24, 2010), *available at* http://www.nyc.gov/html/doc/downloads/pdf/6007R-A.pdf (last visited Oct. 21, 2019); New York Department of Corrections and Community Supervision, Directive 4948: Protective Custody Status (Mar. 13, 2015) *available at* http://www.doccs.ny.gov/Directives/4948.pdf (last visited Oct. 21, 2019).

206. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 848, 114 S. Ct. 1970, 1984, 128 L. Ed. 2d 811, 832 (1994) (noting that placing a young, "effeminate" man into general population could threaten his safety); Johnson v. Johnson, 385 F.3d 503, 517–519 (5th Cir. 2004) (holding that officials must use all possible administrative means to protect incarcerated people from sexual abuse); Taylor v. Mich. Dept. of Corr., 69 F.3d 76, 83–84 (6th Cir. 1995) (holding a warden liable for providing inadequate protection against physical and sexual abuse of a vulnerable incarcerated person).

207. United States v. Gonzalez, 945 F.2d 525, 526–527 (2d Cir. 1991) (holding that shortening the prison sentence for an incarcerated person was possible by balancing the government's interest in incarcerating criminals with the goal of diminishing the likelihood that the incarcerated person would be assaulted).

208. Koon v. United States, 518 U.S. 81, 111, 116 S. Ct. 2035, 2053, 135 L. Ed. 2d 392, 421 (1996). Note that *Koon*, however, dealt with incarcerated people who were susceptible to abuse because they were ex-police officers, not because of their sexual orientation or appearance. *See also* United States v. LaVallee 439 F.3d 670, 708 (10th Cir. 2006) (allowing a reduced sentence for police officers because of their clearly demonstrated increased "susceptibility to abuse" in prison, but also noting that police officers will not get reduced sentences solely because of their increased "susceptibility").

209. *See, e.g.*, United States v. Lara, 905 F.2d 599, 601–602 (2d Cir. 1990) (reducing a sentence for a bisexual incarcerated person after prison officials put him in solitary confinement because solitary confinement was the only way the officials could protect him from assault); United States v. Gonzalez, 945 F.2d 525, 526–527 (2d Cir. 1991) (approving the trial court's grant of a downward sentencing departure to a nineteen-year-old "effeminate-looking" heterosexual incarcerated person based on the likelihood of assault by other incarcerated people, even though no such attack had yet occurred); *cf.* United States v. Parish, 308 F.3d 1025, 1032–1033 (9th Cir. 2002) (upholding downward departure because incarcerated person was particularly susceptible to abuse). Note, however, that the Federal Sentencing Commission has discouraged, but not prohibited, the use of physical appearance in determining an incarcerated person's potential for victimization and thus reduction in sentence. *See* Koon v. United States, 518 U.S. 81, 107, 116 S. Ct. 2035, 2050, 135 L. Ed. 2d 392, 418 (1996).

210. United States v. Lara, 905 F.2d 599 (2d Cir. 1990).

211. United States v. Lara, 905 F.2d 599, 603 (2d Cir. 1990).

Lara, the Second Circuit also decided *United States v. Gonzalez*.[212] In *Gonzalez*, the court similarly reduced the sentence of a nineteen-year-old incarcerated person who was young, "effeminate," and likely to be victimized by his fellow incarcerated people.[213] Unlike in *Lara*, however, the incarcerated person in *Gonzalez* was not gay or bisexual but still vulnerable to homophobic attacks since the way he looked did not fit traditional views of masculinity.[214] In other words, as long as an incarcerated person looks like he might be gay, he is at a greater risk of attack, even if he is not actually gay. The *Gonzalez* court also found that the incarcerated person could get a shorter sentence even though he had not been attacked. Oppressive conditions without an actual attack may be enough to get a shorter sentence.[215]

2. Examples of Legal Claims Brought by LGBT Incarcerated People.

In *Farmer v. Brennan*, a transgender incarcerated woman was placed in the general male prison population and was later beaten and raped by another incarcerated person.[216] The Supreme Court held that the incarcerated person may have had an Eighth Amendment claim. The Court sent the case back to the lower court to determine if prison officials acted with deliberate indifference by failing to protect him.[217]

In *Young v. Quinlan*, other incarcerated people sexually assaulted an incarcerated person who looked small, young, and "effeminate." Officials ignored his requests for protection.[218] The Third Circuit said that the officials had violated the Eighth Amendment.[219] Similarly, the Sixth Circuit in *Taylor v. Michigan Department of Corrections* held that an incarcerated person who was small and vulnerable looking with a youthful appearance, low IQ, and a seizure disorder had an Eighth Amendment claim for being placed in a sixty-person prison camp barracks where he was raped.[220] The Seventh Circuit also recognized an Eighth Amendment claim in *Pope v. Shafer* when an incarcerated person was assaulted after officials ignored the incarcerated person's and internal affairs officers' specific reports of threats against him and refused transfer requests.[221]

In *Greene v. Bowles*, a transsexual incarcerated person was placed in protective custody to prevent attacks from other incarcerated people, but was then severely beaten by another incarcerated person in the protective custody unit.[222] The Sixth Circuit recognized an Eighth Amendment deliberate indifference claim because the warden admitted that he knew that the attacker was a "predatory inmate," that the plaintiff was in protective custody because of her status as a vulnerable incarcerated person, and that both attacker and plaintiff were being housed in the same unit.[223] Importantly, the Sixth Circuit held that vulnerable incarcerated people (such as those who are, or are perceived as, gay, transgender, or "effeminate") who have been attacked can prove prison officials knew of the substantial risk to their safety in two different ways:

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212. United States v. Gonzalez, 945 F.2d 525 (2d Cir. 1991).

213. United States v. Gonzalez, 945 F.2d 525, 526 (2d Cir. 1991).

214. United States v. Gonzalez, 945 F.2d 525, 526–527 (2d Cir. 1991) ("[E]ven if Gonzalez is not gay or bisexual, his physical appearance, insofar as it departs from traditional notions of an acceptable masculine demeanor, may make him as susceptible to homophobic attacks as was the bisexual defendant before us in *Lara*.").

215. United States v. Gonzalez, 945 F.2d 525, 527 (2d Cir. 1991); *cf.* Koon v. United States, 518 U.S. 81, 111, 116 S. Ct. 2035, 2053, 135 L. Ed. 2d 392, 421 (1996) (finding that the court did not abuse its discretion in granting a downward sentencing departure based on convicted police officers' susceptibility to abuse in prison).

216. Farmer v. Brennan, 511 U.S. 825, 830, 114 S. Ct. 1970, 1975, 128 L. Ed. 2d 811, 821 (1994).

217. Farmer v. Brennan, 511 U.S. 825, 848–849, 114 S. Ct. 1970, 1985, 128 L. Ed. 2d 811, 833 (1994).

218. Young v. Quinlan, 960 F.2d 351, 362–363 (3d Cir. 1992).

219. Young v. Quinlan, 960 F.2d 351, 362–365 (3d Cir. 1992).

220. Taylor v. Mich. Dept. of Corr., 69 F.3d 76, 77 (6th Cir. 1995).

221. Pope v. Shafer, 86 F.3d 90, 91–92 (7th Cir. 1996).

222. Greene v. Bowles, 361 F.3d 290, 292 (6th Cir. 2004).

223. Greene v. Bowles, 361 F.3d 290, 294 (6th Cir. 2004).

(1) by proving the officials knew of the plaintiff's vulnerable status and of the general risk to the plaintiff's safety from other incarcerated people, even if the officials did not know of any specific danger; or

(2) by proving that the officials knew that a predatory incarcerated person, without separation or other protective measures, could be dangerous to others, including the plaintiff.[224]

If you are a vulnerable incarcerated person attacked by a predatory incarcerated person, this makes it easier for you to prove that prison officials knew of the risk to your safety. But, you do not have to prove a particular incarcerated person presented a specific threat to your safety.[225]

In another important case, *Johnson v. Johnson*, an African-American homosexual incarcerated person sued prison officials after prison gangs sexually assaulted him and bought and sold him as a sexual slave for over eighteen months, even though the plaintiff had asked for protection.[226] The Fifth Circuit said the plaintiff had a deliberate indifference claim because the officials continued to house him with the general population even though he repeatedly asked for protection. The prison officials' response—that Johnson must "learn to f*** or fight"—"was not a reasonable response and ... contravene[d] clearly established law."[227] The Court further held that "[a]lthough it is not clear exactly what type of action an official is legally required to take under *Farmer* ... an official may not simply send the inmate into the general population to fight off attackers."[228]

In his lawsuit, Johnson also claimed that the prison officials' actions violated his Equal Protection rights under the Fourteenth Amendment.[229] Specifically, he claimed that, because of his sexual orientation, the officials failed to protect him like they protected other incarcerated people.[230] The Fifth Circuit recognized this claim, noting that "if they actually did deny Johnson protection because of his homosexuality ... that decision would certainly not effectuate any legitimate [governmental] interest" and would be in violation of the Equal Protection Clause.[231] You should note that the *Johnson* court accepted the plaintiff's sexual-orientation-based equal protection claim without proof that other non-homosexual incarcerated people were treated differently. But, remember that the law is still developing.

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224. Greene v. Bowles, 361 F.3d 290, 294 (6th Cir. 2004) ("[W]here a specific individual poses a risk to a large class of inmates, that risk can also support a finding of liability even where the particular prisoner at risk is not known in advance.").

225. Greene v. Bowles, 361 F.3d 290, 294 (6th Cir. 2004) ("[A] prison official cannot 'escape liability ... by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault.") (quoting Farmer v. Brennan, 511 U.S. 825, 842–843, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811, 829 (1994)); *see also* Curry v. Scott, 249 F.3d 493, 507–508 (6th Cir. 2001) (finding that where a particular prison guard had a history of racially motivated harassment of African American incarcerated people, deliberate indifference could be demonstrated by a factual record, without threat to a particular incarcerated person), *overruled in part on other grounds by* Jones v. Bock, 549 U.S. 199, 216, 127 S. Ct. 910, 921, 166 L. Ed. 2d 798, 813 (2007).

226. Johnson v. Johnson, 385 F.3d 503, 512 (5th Cir. 2004).

227. Johnson v. Johnson, 385 F.3d 503, 527 (5th Cir. 2004).

228. Johnson v. Johnson, 385 F.3d 503, 527 (5th Cir. 2004); *see also* Farmer v. Brennan, 511 U.S. 825, 832–833, 114 S. Ct. 1970, 1976–1977, 128 L. Ed. 2d 811, 822–823 (1994) (explaining that jailers must "take reasonable measures to guarantee the safety of the inmates" and "are not free to let the state of nature take its course" (internal quotation and citation omitted)); James v. Hertzog, 415 Fed. Appx. 530, 532 (5th Cir. 2011) (*unpublished*) (Noting that "The Supreme Court has not recognized sexual orientation as a suspect class; however, if the State violates the Equal Protection Clause by creating a disadvantage for homosexuals, the State's conduct must have "a rational relationship to legitimate governmental aims.'") (internal quotation marks removed).

229. U.S. CONST. amend. XIV ("No State shall ... deny to any person within its jurisdiction the equal protection of the laws."). See Chapter 30 of the *JLM*, "Special Information for Lesbian, Gay, Bisexual, and Transgender Incarcerated People" for more information on the Equal Protection Clause.

230. Johnson v. Johnson, 385 F.3d 503, 512 (5th Cir. 2004) (noting Johnson's claim that officials told him "'[w]e don't protect punks on this farm'—'punk' being prison slang for a homosexual man").

231. Johnson v. Johnson, 385 F.3d 503, 532 (5th Cir. 2004); *see* Farmer v. Brennan, 511 U.S. 825, 833, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994) ("[G]ratuitously allowing the beating or rape of one prisoner by another serves 'no legitimate penological objective.'") (citation omitted).

E. Legal Remedies Available for Victims of Unlawful Assault

This Part explains what you can do, legally, if you have been the victim of an unlawful assault. Part E(1) explains how you should first complain using your prison's Inmate Grievance Program. Part E(2) describes how you can then file a Section 1983 suit if you believe prison officials or other government employees (including police officers) violated any of your constitutional rights. Part E(3) explains how you can also file a state tort claim. Finally, Part E(4) describes *class actions* (when groups of plaintiffs bring suit together).

Remembering that different laws apply in state and federal prisons is important. If you are in a federal prison, then it doesn't matter what state the prison is in because all federal prisons use federal law. If you are in state prison, you can use both state and federal laws. But remember each state creates its own laws. Research the laws of your state and how incarcerated people in your state file suits in that state's courts. Federal constitutional rights are protected regardless of whether you are in a state or a federal prison. But, the legal claims you make and how you make them will be different depending on whether you are in state or federal court.

1. Inmate Grievance Program

If you believe your rights have been violated, you should first file an administrative grievance. See Chapter 15 of the *JLM*, "Inmate Grievance Procedures," for further information. It is very important that you fully complete any administrative grievance processes before filing a lawsuit. If you do not, the court will probably reject your claim because you did not "exhaust" (complete) all administrative remedies first.[232]

2. 42 U.S.C. § 1983

If you think that prison officials have violated your Eighth Amendment rights, you may sue the officials or guards using Section 1983 of Title 42 of the United States Code (42 U.S.C. § 1983). Section 1983 is a federal law that allows you to sue state officials who have violated your constitutional rights while acting "under color of any statute, ordinance, regulation, custom or usage, of any state."[233] You can sue federal officials in a similar suit, called a *Bivens* action.[234]

You can also use Section 1983 to sue local officials as long as you can show that they too acted under "color of state law." You may be able to sue local officials under state tort law as well. But note that you can only sue municipalities (towns, cities, or counties) under Section 1983 if your injury was the result of an official municipal policy or custom.[235] This means that to sue a city or a county, you will have to show that the "execution of [the] government's policy or custom ... inflict[ed] the injury."[236]

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232. *See, e.g.*, Johnson v. Johnson, 385 F.3d 503, 515–523 (5th Cir. 2004) (dismissing an incarcerated person's claims that prison officials had failed to protect him from repeated sexual assaults due to his failure to exhaust administrative remedies).

233. 42 U.S.C. § 1983.

234. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) (holding that the federal agent's warrantless entry of arrestee's apartment on narcotics charges without probable cause allowed arrestee to state a federal cause of action under the 14th Amendment). See Part E of Chapter 16 of the *JLM*, "Using 42 U.S.C. §1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," for more information on *Bivens* actions.

235. *See, e.g.*, Williams v. Kaufman County., 352 F.3d 994, 1013–1014 (5th Cir. 2003) (holding that a county could be held liable for unlawful searches of detainees when the relevant policymaker, in this case the sheriff, authorized the policy).

236. Irwin v. City of Hemet, 22 Cal. App. 4th 507, 525, 27 Cal. Rptr. 2d 433, 442 (Cal. Ct. App. 1994) (quoting Monell v. Dept. of Soc. Servs., 436 U.S. 658, 694, 98 S. Ct. 2018, 2037–2038, 56 L. Ed. 2d 611, 638 (1978)). In *Irwin*, a California court found that a complaint alleging that the City of Hemet's adoption of a policy or custom not to train its jailers in suicide screening and prevention was the proximate cause of an incarcerated person's suicide, may not be summarily dismissed without determination as to whether or not the city adopted a policy or custom to

In other words, a local government will be held liable only if an injury can be shown to be a direct result of the local government's official policy, either express or implied.[237] Therefore, a local government is not liable under Section 1983 "for an injury inflicted solely by its employees or agents" who were not following official local policy or custom,[238] even though the local officials may be individually liable under Section 1983.

You should read Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," to learn more about Section 1983 claims. Part E(1) of Chapter 16 explains *Bivens* actions and Part C(3)(c) gives more information on qualified immunity.

3. Tort Actions

Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," explains how to bring a tort action in New York's Court of Claims.[239] If you were assaulted, you can bring a state law tort action against those who assaulted you, their supervisors, and maybe the state itself.

It is very important to read Chapter 17 because there is a time limit for filing a lawsuit in the Court of Claims. If you do not file before the deadline, then you cannot sue in the New York State court system. Both New York State incarcerated people and incarcerated people from outside New York should read Chapter 17 for more information on how to bring a tort claim in state court.

4. Class Action Suits

Class actions are a type of lawsuit in which many plaintiffs sue together for similar violations of their rights.[240] Courts generally allow class actions where the following conditions are present:

(1) there are too many plaintiffs for the court to try each case individually,

(2) each plaintiff's case is similar in fact and law,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (group of plaintiffs suing),

(4) the representative parties will fairly and adequately protect the interests of the class,[241] and

(5) most of the claims would not be brought otherwise because each plaintiff's individual damages are too small.[242]

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inadequately train jailers. For an example of such a municipal policy or custom, see Blihovde v. St. Croix County, 219 F.R.D. 607, 613 (W.D. Wis. 2003) (involving claims arising from a policy of strip searches for arrestees entering a jail).

237. Blihovde v. St. Croix County., 219 F.R.D. 607, 618 (W.D. Wis. 2003) ("Even when there is no express policy, a municipality may be liable when there is a 'custom' of unconstitutional conduct.") (citing Monell v. Dept. of Soc. Servs., 436 U.S. 658, 691, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611, 635 (1978)); *see also* Walker v. Sheahan, 526 F.3d 973, 977 (7th Cir. 2008) (dismissing a § 1983 claim for lack of evidence of a practice of using excessive force and following a "code of silence"); Amnesty Am. v. Town of West Hartford, 361 F.3d 113, 125–127 (2d Cir. 2004) (reviewing the law of municipal liability in a damage suit for excessive force).

238. Irwin v. City of Hemet, 22 Cal. App. 4th 507, 525, 27 Cal. Rptr. 2d 433, 442 (Cal. Ct. App. 1994) (quoting Monell v. Dept. of Soc. Servs., 436 U.S. 658, 694, 98 S. Ct. 2018, 2037–2038, 56 L. Ed. 2d 611, 638 (1978)).

239. Remember the New York Court of Claims is a specific state court in New York that only deals with claims against the State of New York. If the person who injured you was a state official or employee and you decide to file a tort action in state court in New York, you should file your claim in the New York Court of Claims. The New York Court of Claims can only award money damages; it cannot issue an injunction. See Part C(4) of Chapter 5 of the *JLM*, "Choosing a Court and a Lawsuit: An Overview of the Options," for more information on the Court of Claims and Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," for more detailed information on tort actions.

240. See Chapter 5 of the *JLM*, "Choosing a Court and a Lawsuit: An Overview of the Options" on class actions in general and Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," for more detailed information on § 1983 class actions.

241. *See* FED. R. CIV. P. 23.

242. *See, e.g.*, Tardiff v. Knox County, 365 F.3d 1, 7 (1st Cir. 2004) (holding that class action status probably

If a pattern of excessive force against incarcerated people exists within a prison, a class action suit may be brought on behalf of all the incarcerated people. This suit can be brought against the wardens or administrators in charge of the overall operations of the prison.[243] Defendants in such an action are charged with "abdicating their duty to supervise and monitor the use of force and deliberately permitting a pattern of excessive force to develop and persist."[244] In cases where injunctive relief is sought against prison officials for patterns of excessive force, "the subjective prong of the Eighth Amendment is satisfied by a showing of deliberate indifference" rather than by the *Hudson v. McMillian* standard of maliciousness.[245]

F. Conclusion

This Chapter described the legal meaning of "assault" and explained your right to be free from physical and sexual assault in prison. There are different sources of law offering you protection against guard and incarcerated person assault, and different ways to obtain relief for rights violations. Remember to complete administrative grievance processes before filing suit. Otherwise, courts might not allow you to continue.

is the only feasible means for arrestees to pursue strip search claims); Amchem Prods., Inc., v. Windsor, 521 U.S. 591, 617, 117 S. Ct. 2231, 2246, 138 L. Ed. 2d 689, 709 (1997) (noting that the policy underlying class actions is to make it possible for individuals with small claims to aggregate those claims in order to vindicate their rights).

243. *See, e.g.*, Ingles v. Toro, 438 F. Supp. 2d 203, 208–209 (S.D.N.Y. 2006) (approving settlement of a class action over excessive use of force by New York City prison guards; the city agreed to pay injured incarcerated people $2.2 million and revise its use-of-force directive and investigatory procedures, install new video cameras to watch guards and incarcerated people, and train guards in appropriate defensive techniques); Madrid v. Gomez, 889 F. Supp. 1146, 1254–1260 (N.D. Cal. 1995) (granting injunction in class action on behalf of all inmates at a facility where a pattern of unnecessary and wanton infliction of pain and constitutionally inadequate medical and mental health care was shown as cruel and unusual conditions of confinement for mentally ill incarcerated people in a security housing unit); *see also* Mark Mooney, *Inmates Win 1.5M in Rikers Abuse Settlement*, Daily News, Feb. 14, 1996, at 12, available at https://www.nydailynews.com/archives/news/inmates-win-1-5m-rikers-abuse-settlement-article-1.750312 (last visited Oct. 20, 2019) (discussing a class action suit by 15 incarcerated people that involved allegations of abuse by corrections officers and that was settled by New York City for $1.5 million).

244. Madrid v. Gomez, 889 F. Supp. 1146, 1249 (N.D. Cal. 1995).

245. Madrid v. Gomez, 889 F. Supp. 1146, 1250 (N.D. Cal. 1995).