Chapter 31

SECURITY CLASSIFICATION AND GANG VALIDATION*

A. Introduction

Upon entering the prison system, all incarcerated people are assigned a security classification. This classification is reevaluated regularly. Your security classification largely determines where you are incarcerated and what sort of treatment you receive while in prison. A lower security classification is better because it means that you have more freedoms and fewer restrictions. You can think of "gang validation" as a subset of security classification. Gang validation is the process that prison officials use to identify incarcerated people that they suspect of being members of gangs or "Security Threat Groups" ("STGs"). If prison officials validate you as a member of a gang, it means that they have classified you as someone who poses a particular security risk. As a result, you may be isolated from other incarcerated people.

Part B of this Chapter discusses general security classifications. It starts with a description of the guidelines for classification of incarcerated people in the Federal Bureau of Prisons ("BOP") and in New York State, California, and Florida. It then explains some of the legal challenges that incarcerated people have raised to classification decisions in the past. Keep in mind that these challenges have been largely unsuccessful. Part B ends with a description of administrative options for challenging a particular security classification. Part C outlines gang validation and begins with a general discussion of the process. It follows with a summary of the ways that incarcerated people have used the Fourteenth Amendment, the Eighth Amendment, the Fifth Amendment, and Equal Protection claims to challenge their validation as gang members. Because these legal challenges have been largely unsuccessful, the Chapter concludes with some suggestions for challenging gang validation using administrative options.

B. General Security Classification

1. Introduction

In all states, you will be assigned a security classification shortly after entering the prison system. This Chapter focuses on the classification guidelines used in the Federal Bureau of Prisons ("BOP"), in New York's Department of Corrections and Community Supervision ("DOCCS"), in California's Department of Corrections and Rehabilitation ("CDCR"), and in Florida's Department of Corrections ("FDOC"). It also focuses on court challenges that incarcerated people have made to their classification under these guidelines. Most other state prisons use similar classification systems to evaluate incarcerated people. Courts in most jurisdictions are reluctant to interfere in what they view as a prison's internal administrative matters. However, you should investigate the details of your own state's procedures.

You should be able to obtain a copy of the classification manual for the system in which you are incarcerated. The classification manual should allow you to verify that the standards used to evaluate you are accurate. However, in some states, such as New York, the classification manual is primarily a set of guidelines for entering data into a computer program. Without access to that computer program, the classification manual will not be very useful, although you may still find it helpful to examine the classification standards in greater detail.

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2. Federal Bureau of Prisons Classification Guidelines[1]

(a) Security Level Score

In the federal prison system, new incarcerated people are assigned a security level score by a Community Corrections Manager in the BOP. Regional and Central Office Designators use this score to assign new incarcerated people to an institution with a corresponding level of security. An institution's security level is determined by the security measures in place at the institution.[2]

An incarcerated person will have an initial program review about seven months after arriving at the institution, following initial classification. At this time, the incarcerated person will be given a custody classification score. This score refers to how much the staff must supervise the incarcerated person within and beyond the institution. It determines, among other things, the types of work assignments and activities that an incarcerated person may participate in, and the level of staff supervision required.[3] Note that the *custody* classification score is different from the *security* classification score. The security classification score is used to match an incarcerated person with a specific type of institution based on the institution's security features.

An incarcerated person's custody classification must be reviewed at least every twelve months and is usually reviewed at the same time as program reviews.[4] Additionally, an incarcerated person's security level and custody level will usually be reviewed when a new sentence is imposed, when a sentence is reduced, when a disciplinary action occurs, or when there is a change in external factors that might affect the security or custody level.[5]

The calculation of a new incarcerated person's security level score is based on the person's Pre-Sentence Investigation Report ("PSI"), a copy of the judgment from the person's case, and the Individual Custody and Detention Report provided by the U.S. Marshals Service. When there is no PSI, a Post-Sentence Investigation Report will be prepared. In some cases, a Magistrate Information Sheet may be used. The BOP considers several factors when determining the security level score:

(1) The "level of security and supervision the inmate requires";
(2) The "level of security and staff supervision the institution is able to provide";
(3) The incarcerated person 's program needs (including substance abuse, medical/mental health treatment, educational training, group counseling and other programs); and
(4) Various administrative factors, including the level of overcrowding in an institution, its distance from the incarcerated person's release residence, and any recommendations that the judge may have offered.[6]

When considering these factors, the BOP uses a detailed scoring system that includes elements based on the severity of the current offense, any past offenses, and other relevant details. Scores in

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1. The Federal Bureau of Prisons classification guidelines are documented in U.S. Department of Justice, Federal Bureau of Prisons, Change Notice 5100.08, CN-1 (2019) and Program Statement 5100.08, Inmate Security Designation and Custody Classification (2006), *available at* http://www.bop.gov/policy/progstat/5100_008cn.pdf (last visited Feb. 21, 2020).

2. U.S. Dept. of Justice, Fed. Bureau of Prisons, Change Notice 5100.08, CN-1 (2019) and Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 3, at 3 (2006), *available at* https://www.bop.gov/policy/progstat/5100_008cn.pdf (last visited Feb. 21, 2020).

3. U.S. Dep. of Justice, Fed. Bureau of Prisons, Change Notice 5100.08, CN-1 (2019) and Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 6, at 1 (2006), *available at* https://www.bop.gov/policy/progstat/5100_008cn.pdf (last visited Feb. 21, 2020).

4. U.S. Dept. of Justice, Fed. Bureau of Prisons, Change Notice 5100.08, CN-1 (2019) and Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 6, at 1 (2006) *available at* https://www.bop.gov/policy/progstat/5100_008cn.pdf (last visited Feb. 21, 2020).

5. U.S. Dept. of Justice, Fed. Bureau of Prisons, Change Notice 5100.08, CN-1 (2019) and Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 6, at 1 (2006) *available at* https://www.bop.gov/policy/progstat/5100_008cn.pdf (last visited Feb. 21, 2020).

6. U.S. Dept. of Justice, Fed. Bureau of Prisons, Change Notice 5100.08, CN-1 (2019) and Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 1, at 1–2 (2006) *available at* https://www.bop.gov/policy/progstat/5100_008cn.pdf (last visited Feb. 21, 2020).

various elements are entered into a database known as SENTRY. This database then calculates an incarcerated person's security level score. For a detailed breakdown of this calculation, you should refer to the BOP Program Statement.

(b) Other Safety Factors

In addition to the scoring system, the BOP may also check if any of 11 "public safety factors" are present in the incarcerated person's case. These public safety factors are:

(1) validated membership in a "disruptive group" identified in the Central Inmate Monitoring System (males only),
(2) current term of confinement in the "Greatest Severity" range according to the Offense Severity Scale (males only),
(3) sex offender status,
(4) Central Inmate Monitoring assignment of threat to government official,
(5) deportable alien status,
(6) remaining sentence length (males only),
(7) violent behavior (females only),
(8) involvement in a serious escape,
(9) prison disturbance,
(10) juvenile violence, and
(11) serious telephone abuse.[7]

If any of these factors are present, they will raise an incarcerated person's security classification despite a score that would, on its own, produce a lower classification.[8] At maximum, three of these factors will be applied to an incarcerated person. If more than three of the factors apply, those that would provide the greatest public safety and security threat are considered.[9] These factors may be waived at the discretion of the Regional Director.

In addition, the Regional Director may find that any of 11 "management variables" apply, which would result in an incarcerated person's placement at an institution that is not at the same security level as the incarcerated person's security level score.[10] Examples of Management Variables include population management, medical or psychiatric history, and greater security concerns.[11] Thus, management variables generally relate to administrative considerations that might result in an incarcerated person's placement in a specific institution, while the public safety actors relate to the BOP's concern with the threat an incarcerated person poses to society.

Custody classification evaluations are calculated in a similar way. They use a scoring system based primarily upon an incarcerated person's criminal history and behavior within the institution. The warden has discretion to assign an incarcerated person a custody level different from the one indicated by the scoring system. If the warden does this, an explanation must be noted on the incarcerated person's custody classification form. The warden may use public safety factors and management variables in this determination.

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7. U.S Dept. of Justice, Fed. Bureau of Prisons, Change Notice 5100.08, CN-1 (2019) and Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 5, at 7–10 (2006), *available at* https://www.bop.gov/policy/progstat/5100_008cn.pdf (last visited Feb. 21, 2020).

8. U.S. Dept. of Justice, Fed. Bureau of Prisons, Change Notice 5100.08, CN-1 (2019) and Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 2, at 4 (2006), *available at* https://www.bop.gov/policy/progstat/5100_008cn.pdf (last visited Feb. 21, 2020).

9. U.S. Dept. of Justice, Fed. Bureau of Prisons, Change Notice 5100.08, CN-1 (2019) and Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 5, at 7 (2006), *available at* https://www.bop.gov/policy/progstat/5100_008cn.pdf (last visited Feb. 21, 2020).

10. U.S. Dept. of Justice, Fed. Bureau of Prisons, Change Notice 5100.08, CN-1 (2019) and Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 5, at 1 (2006), *available at* https://www.bop.gov/policy/progstat/5100_008cn.pdf (last visited Feb. 21, 2020).

11. U.S. Dept. of Justice, Fed. Bureau of Prisons, Change Notice 5100.08, CN-1 (2019) and Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 5, at 3–5 (2006), *available at* https://www.bop.gov/policy/progstat/5100_008cn.pdf (last visited Feb. 21, 2020).

There are different scoring systems for calculating the security levels of male and female incarcerated people. Persons under the age of 18 are not subject to this classification system. In addition, certain special cases have special designation procedures, including military incarcerated people and some medical or mental health cases. Please consult the Program Statement for a full list of descriptions of these special cases.

3. New York's Classification Guidelines

In New York, incarcerated people are assigned an initial classification score at a reception facility. Reclassification hearings occur periodically. In New York State, the initial reclassification screening occurs six months after an incarcerated person is taken into custody. Subsequent reclassifications take place every three months after that.[12] The counselor assigning the classification enters numerical factors into a computer program, which then calculates a score. The information used to determine the factor values comes from evidence in the Commitment Paper, the Presentence Report ("PSR"), warrants, the Division of Criminal Justice Services ("DCJS") Summary Case History ("Rap Sheet"), sentencing minutes (when available), your interview, and, if you have served a prior DOCCS term, any available Department records of that term.[13] Counselors may rely on both official and unofficial documents, although evidence from unofficial documents "should be evaluated in relation to official documents and used where appropriate."[14] If a counselor cannot resolve inconsistencies between documents, the counselor is supposed to use the "most cautious alternative."[15]

New York's Security Classification Guidelines identify two types of security risks: (1) public risk, which is the likelihood that an incarcerated person will escape and be a danger to the public; and (2) institutional risk, which is the likelihood that an incarcerated person will be dangerous to staff, other incarcerated people, or himself while incarcerated. The Guidelines use three main factors to determine public risk: (1) history of criminal violence; (2) history of escape and abscondence (hiding to avoid legal proceedings); and (3) time until earliest possible release.[16] The Guidelines identify one main factor that determines institutional risk: institutional disciplinary history.[17]

These characteristics are all evaluated by point scores. The point scores are then combined to produce your security classification. More specific descriptions of each of the characteristics can be found in the State of New York DOCCS Classification Manual. The Classification Manual also describes the procedures used for assigning point values and the way in which a score is calculated from these values.[18]

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12. State of New York, Department of Corrections and Community Supervision, Office of Classification and Movement, Classification Manual, II-85 (1996) (formerly Department of Correctional Services). To acquire a copy of this manual, you may need to file a request under the New York State Freedom of Information Law. You can also email or write to the *JLM* to receive a copy received under this law. Please refer to Chapter 7 of the *JLM*, "Freedom of Information," for more information on Freedom of Information requests. Please note that, since the publication of the Classification Manual, the New York Department of Correctional Services has been reorganized as the New York Department of Corrections and Community Supervision. However, the Office of Classification and Movement still stands and may be contacted at: The Office of Classification and Movement, New York State Department of Corrections and Community Supervision, The Harriman State Campus – Building #2, 1220 Washington Avenue, Albany, NY 12226-2050. Additionally, please note that some sections of the Classification Manual itself are outdated (for instance, the section on LGBTQ+ incarcerated people).

13. State of New York, Department of Corrections and Community Supervision, Office of Classification and Movement, Classification Manual, II-43 (1996) (formerly Department of Correctional Services).

14. State of New York, Department of Corrections and Community Supervision, Office of Classification and Movement, Classification Manual, II-43 (1996) (formerly Department of Correctional Services).

15. State of New York, Department of Corrections and Community Supervision, Office of Classification and Movement, Classification Manual, II-43 (1996) (formerly Department of Correctional Services).

16. State of New York, Department of Corrections and Community Supervision, Office of Classification and Movement, Classification Manual, II-1 (1996) (formerly Department of Correctional Services).

17. State of New York, Department of Corrections and Community Supervision, Office of Classification and Movement, Classification Manual, II-1 (1996) (formerly Department of Correctional Services); *see also* N.Y. COMP. CODES R. & REGS. tit. 7, app. 1-E (2020).

18. State of New York, Department of Corrections and Community Supervision, Office of Classification and Movement, Classification Manual, II-1–2 (1996) (formerly Department of Correctional Services).

In addition to these main characteristics, you should know that there are thirty-four additional characteristics that are difficult to assign point values to, or that are not used very often. These additional characteristics can affect the classification you receive and may qualify you for a higher classification level, even if you receive a point total that might alone produce a lower classification.[19] For instance, a security characteristic that falls in the "other characteristics" category is an incarcerated person who has been involved in sexual violence against someone of the same gender.[20] This is labeled as a "high institutional risk", but is normally not counted within the same point system.[21] If there is discrepancy between the point number and the perceived security classification, the counselor responsible for determining the security classification must "us[e] his knowledge of the case material and of the [incarcerated person] to adjust the security classification and explain the adjustment."[22]

Some of these additional characteristics included in the Manual have been updated in other materials that the DOCCS uses to guide its actions. Characteristics of LGBTQ+ incarcerated people are one such subject area. Updating the information from the Classification Manual, a 2014 Respectful Classification Practices with LGBTI Inmates Trainer's Manual outlines that "lesbian or gay," "bisexual," "transgender male," and "transgender female" characteristics can be incorporated if an incarcerated person self-reports the information, but the characteristic of "gender-nonconforming" may be applied "based on [the] Offender Rehabilitation Coordinator's observation." Additionally, there is a new Gender Identity Interview Form, updated in 2020, that the New York DOCCS uses for LGBTQ+ incarcerated people regarding their classifications.[23]

You should also be aware that the characteristics for male and female incarcerated people may have different elements.[24] Male and female incarcerated people's scores are evaluated against different classification schemes. The elements for minor and adult incarcerated people may also differ. Finally, there are some cases in which the counselor will feel that the point score does not accurately represent your security risk. He is allowed to adjust the security classification in those cases, although he must provide an explanation for doing so.[25] Most other state prison systems have similar provisions that let a counselor or other official assign you a security classification that differs from the one produced from the scoring system.[26]

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19. State of New York, Department of Corrections and Community Supervision, Office of Classification and Movement, Classification Manual, II-1 (1996) (formerly Department of Correctional Services).

20. *Erica King and Maureen Baker*, State of New York, Department of Corrections and Community Supervision, Respectful Classification Practices with LGBTI Inmates Trainer's Manual, Handout 3:1, *available at* https://www.prearesourcecenter.org/sites/default/files/library/nysdoccslgbtirespectfulclassificationtrainermanualfinal102914.pdf (last visited Nov. 21, 2020).

21. *Erica King and Maureen Baker*, State of New York, Department of Corrections and Community Supervision, Respectful Classification Practices with LGBTI Inmates Trainer's Manual, Handout 3:1, *available at* https://www.prearesourcecenter.org/sites/default/files/library/nysdoccslgbtirespectfulclassificationtrainermanualfinal102914.pdf (last visited Nov. 21, 2020).

22. State of New York, Department of Corrections and Community Supervision, Office of Classification and Movement, Classification Manual, II-1 (1996) (formerly Department of Correctional Services).

23. State of New York, Department of Corrections and Community Supervision, Form No. 115.41GI, Gender Identity Interview Form (last updated June 2020), *available at* https://doccs.ny.gov/system/files/documents/2020/06/115.41gi-06-20.pdf (last visited Nov. 21, 2020).

24. State of New York, Department of Corrections and Community Supervision, Office of Classification and Movement, Classification Manual, II-3 (1996) (formerly Department of Correctional Services).

25. State of New York, Dept. of Correctional Services, Office of Classification and Movement, Classification Manual, II-3–4 (1996) (formerly Department of Correctional Services).

26. *See, e.g.*, State of California, Dept. of Corr. & Rehabilitation, Operations Manual §§ 61010.8, 61020.13 (2020), *available at* http://www.cdcr.ca.gov/regulations/adult-operations/dom-toc (last visited Feb. 22, 2020) (authorizing department officials to depart from the classification scoring system in individual cases); 103 MASS. CODE REGS. 420.07(3)(f) (1995) (authorizing override of scored classification level); N.J. ADMIN. CODE § 10A: 9-2.14(a) (West 2019) (providing for override of the initial classification or reclassification determination); OR. ADMIN R. 291-078-0020(5) (2011) (providing for either decreases or increases in the level of supervision from that

4. California's Classification Guidelines

In California, new incarcerated people are assigned a classification score when they are committed to state prison.[27] This classification determines the type of institution in which the incarcerated person is placed. In California, there are four levels of prisons. Level 1 houses the least dangerous incarcerated people, and Level 4 houses the most dangerous. In order to fill out an incarcerated person classification score sheet, a counselor will first review documents, such as probation reports, and then interview the incarcerated person.[28] A committee will then conduct a hearing to determine your classification.[29] The committee will review the counselor's score sheet and consider various factors during the hearing, including: 1) background information such as your age at first arrest, current prison term, street gang affiliation, mental illness, prior sentences, and prior incarcerations; and 2) your prior behavior while incarcerated.[30] These factors are assigned point scores. Your total score will determine your classification. Sometimes, the law requires a mandatory minimum score for certain sentences or crimes, which will replace your score if it is below the mandatory minimum.[31] In other cases, prison officials can adjust your score if necessary for safety or other institutional needs, such as prison overcrowding.[32] A score of 0–18 means placement in a Level 1 institution; a score of 19–27 means placement in a Level 2 institution; a score 28–51 means placement in a Level 3 institution; and a score higher than 51 means placement in a Level 4 institution.[33]

The committee will reclassify you and recalculate your score at least once a year.[34] When possible, the committee should give you notice before any hearing so that you have time to prepare.[35] At the hearing, the committee will consider two things: 1) your favorable behavior since the last review, such as six month periods without any serious disciplinary actions and six month periods with average or above average performance in certain programs; and 2) any unfavorable behavior since the last review, such as serious misbehavior, assault, possession of a deadly weapon, drug distribution, or starting a riot.[36] Favorable behavior will reduce your score, and unfavorable behavior will increase your score. Remember, a lower score means a lower classification and placement in a less secure institution.

5. Florida's Classification Guidelines

In Florida, two groups make security classification decisions: the Institutional Classification Team ("ICT") and the State Classification Office ("SCO").[37] The ICT includes the warden or assistant warden, the classification supervisor, and the chief of security. It is responsible for making work, program, housing, and incarcerated person status decisions at a facility and for making other recommendations

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determined through the risk assessment score).

27. CAL. PENAL CODE § 5068 (2012).

28. State of California, Dept. of Corr. & Rehabilitation, Operations Manual § 61010.9 (2020), *available at* https://www.cdcr.ca.gov/regulations/adult-operations/dom-toc/ (last visited Feb. 22, 2020). To acquire a print copy, you may need to file a request under the Freedom of Information Act. Please refer to Chapter 7 of the *JLM*, "Freedom of Information," for more information on FOIA requests.

29. CAL. CODE REGS. tit. 15, §§ 3375–79 (2019).

30. CAL. CODE REGS. tit. 15, § 3375.3 (2019).

31. CAL. CODE REGS. tit. 15, § 3375.3(d) (2019); *see also* State of California, Dept. of Corr. & Rehabilitation, Operations Manual § 61010.11.5 (2020), *available at* https://www.cdcr.ca.gov/regulations/adult-operations/dom-toc/ (last visited Feb. 22, 2020).

32. State of California, Dept. of Corr. & Rehabilitation, Operations Manual § 61010.8 (2020), *available at* https://www.cdcr.ca.gov/regulations/adult-operations/dom-toc/ (last visited Feb. 22, 2020).

33. State of California, Dept. of Corr. & Rehabilitation, Operations Manual § 61010.11.7 (2020), *available at* https://www.cdcr.ca.gov/regulations/adult-operations/dom-toc/ (last visited Feb. 22, 2020).

34. CAL. CODE REGS. tit. 15, § 3376(d)(2); *see also* State of California, Dept. of Corr. & Rehabilitation, Operations Manual § 61020.14 (2020), *available at* https://www.cdcr.ca.gov/regulations/adult-operations/dom-toc/ (last visited Feb. 22, 2020).

35. CAL. CODE REGS. tit. 15, § 3375(e) (2019).

36. CAL. CODE REGS. tit. 15, § 3375.4 (2019).

37. FLA. ADMIN. CODE ANN. r. 33-601.209 (2014).

to the SCO.[38] The SCO is responsible for reviewing recommendations made by the ICT.[39] When a new incarcerated person arrives, the ICT uses the Custody Assessment and Reclassification computer program ("CARS") to prepare an automated custody classification questionnaire using all available sources to determine the appropriate degree of supervision. This includes information such as your criminal history and sentence.[40] When the questionnaire is completed, a computer generated numerical score is used to place you in one of five security classification levels: maximum, close, medium, minimum, and community. These are called "custody grades" by the Florida Department of Corrections.[41] The most restrictive custody grade is maximum custody status, which usually refers to incarcerated people who are sentenced to death.[42] The least restrictive custody grade is a community custody status, which makes an incarcerated person eligible for placement in a community residential facility.[43] Changes can be made to an incarcerated person's custody grade for various reasons, including changes in charges due to plea bargaining, public interest concerns, family environment, military record, age, and health.[44] Other factors that may affect your custody status include sex offenses, alien status, escape, and gain time credits.[45] The SCO can also start a new custody assessment when they decide it is "necessary for the safety of the public or the needs of the department."[46]

The ICT will meet to review your custody status, assess your adjustment, and determine whether any changes may be necessary. You must appear at any review or assessment unless a documented permanent medical condition makes you unable to participate. You should receive notice at least forty-eight (48) hours in advance unless you have waived your right to notice in writing. Assessments will occur at least every twelve months.[47] Custody grades can be increased or decreased throughout your sentence. If your behavior is favorable, your custody grade should decrease as the time remaining on your sentence decreases.

6. Classification of Female Incarcerated People

While many state correctional agencies use the same classification guidelines for male and female prisons, some states, including Idaho, Massachusetts, New York, and Ohio, as well as the BOP, apply different guidelines or weigh factors differently. For example, as stated in Part B(2)(b) of this Chapter, the BOP only considers "violent behavior" as a public safety factor for female incarcerated people. Factors specific to male incarcerated people include the severity of the offense, membership in a disruptive group and the remaining length of the sentence. Because there are more men in prison than women, there are also more prisons built for male incarcerated people. Thus, in many states- female incarcerated people with different classification levels are housed together. Female incarcerated people may also be over-classified or placed in a higher security level than necessary. The majority of

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38. FLA. ADMIN. CODE ANN. r. 33-601.209(3) (2014). In private prisons (prisons that are not operated by the government), a Department of Corrections representative must also be on the ICT when the ICT is reviewing custody decisions.

39. FLA. ADMIN. CODE ANN. r. 33-601.209(2) (2014).

40. FLA. ADMIN. CODE ANN. r. 33-601.210(2)(b)–(c) (2014).

41. FLA. ADMIN. CODE ANN. r. 33-601.210(2)(a) (2014).

42. *See* Florida Dept. of Corr., Inmate Orientation Handbook: Reception Center Processing 8 (2016), *available at* http://www.dc.state.fl.us/pub/files/InmateOrientationHandbook.pdf (last visited Feb. 21, 2020).

43. *See* Florida Dept. of Corr., Inmate Orientation Handbook: Reception Center Processing 8 (2016), *available at* http://www.dc.state.fl.us/pub/files/InmateOrientationHandbook.pdf (last visited Feb. 21, 2020)

44. FLA. ADMIN. CODE ANN. r. 33-601.210(2)(d)(1)–(9) (2014).

45. FLA. ADMIN. CODE ANN. r. 33-601.210(2)(h) (2014) (listing the exceptions to the rule that incarcerated people convicted of crimes involving sex acts are not ordinarily eligible for community or minimum custody status); FLA. ADMIN. CODE ANN. r. 33-601.210(2)(k) (2014) (specifying certain conditions under which alien incarcerated people shall not be assigned to a custody status any lower than close custody); FLA. ADMIN. CODE ANN. r. 33-601.210(4)(e) (2014) (stating that a prison may alter the regular schedule for assessments and reviews in cases of escape or other unusual occurrences); FLA. ADMIN. CODE ANN. r. 33-601.210(4)(k) (2014) ("Additional gain time is to be considered at the time of any scheduled or unscheduled review.").

46. FLA. ADMIN. CODE ANN. r. 33-601.210(2)(g) (2014).

47. FLA. ADMIN. CODE ANN. r. 33-601.210(4)(c) (2014).

classification systems were designed for male incarcerated people and fail to predict the needs of female incarcerated people.[48] In 2000, a group of female incarcerated people sued the Michigan Department of Corrections ("MDOC") and reached a settlement concerning the classification of female incarcerated people. The MDOC agreed to make changes to the classification system as it was applied to female incarcerated people and to conduct research regarding the changes.[49] If you are considering bringing a similar lawsuit to challenge the use for females of a classification system designed for males, you should read this case closely. You should also consider contacting an advocacy organization such as the Women's Prison Association or the California Coalition for Women Prisoners.[50]

7. Legal Challenges to Classification Decisions

Generally, legal claims made to improve the conditions of imprisonment are filed under 42 U.S.C. § 1983 ("Section 1983"). Because your security classification determines the conditions of your imprisonment, most incarcerated people who challenge their security classification file their claims under Section 1983. The U.S. Constitution and other federal statutes provide a broad range of individual rights. Section 1983 is a federal statute that protects you from violations of these rights by allowing you to sue the individuals responsible in federal court.[51] It is important to note, however, that there is little federal law on the issue of classification. Instead, state law generally governs these matters. You should look to the law of your own state and individual prison regulations, and when it is possible you should always try to have the regulations enforced in state court. You can look to federal court if a state remedy does not exist, or if the federal remedy would override the state remedy.[52]

For detailed instructions on how to file a claim under Section 1983, see 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." It is also important that you read Chapter 14 of the *JLM* on the Prison Litigation Reform Act ("PLRA"). The PLRA requires you to exhaust administrative remedies before filing suit and imposes substantial penalties if you fail to do so.[53]

One possible legal challenge to classification decisions is a due process challenge. The Due Process Clause of the Fourteenth Amendment protects individuals, including incarcerated people, from the loss of "life, liberty, or property" at the hands of the government without due process of law.[54] But the

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48. *See* PATRICIA L. HARDYMAN & PATRICIA VAN VOORHIS, U.S. DEPT. OF JUSTICE, THE NAT'L INST. OF CORR., DEVELOPING GENDER-SPECIFIC CLASSIFICATION SYSTEMS FOR WOMEN OFFENDERS viii (2004) *available at* https://s3.amazonaws.com/static.nicic.gov/Library/018931.pdf (last visited Feb. 21, 2020).

49. *See* State Bar of Michigan's Prisons and Corrections Section, *Litigation Update: Female Prisoners' Portion of Cain Case Settled,* PRISONS & CORR. FORUM, (State Bar of Michigan's Prisons and Corr. Section), Spring/Summer 2000, at 6–7, *available at* https://higherlogicdownload.s3.amazonaws.com/MICHBAR/61a5ea9f-95b2-431b-9931-cd1d84a2cff9/UploadedImages/pdfs/spring00.pdf (last visited Feb. 21, 2020) (the *Cain* settlement agreement included provisions agreeing to: hire an expert to evaluate the type, quantity, or quality of misconducts issued to male and female incarcerated people; ensure that female incarcerated people have access to legal assistance; provide an unmonitored telephone to allow incarcerated people to participate in court ordered hearings; and settle outstanding claims).

50. Women's Prison Association, *available at* http://www.wpaonline.org/ (last visited Feb. 22, 2020); California Coalition for Women Prisoners, *available at* http://www.womenprisoners.org/ (last visited Feb. 22, 2020). For more information about the settlement, see the earlier class action suit, Cain v. Dept of Corr., 548 N.W.2d 210, 451 Mich. 470 (Mich. 1996).

51. *See*, *e.g.*, Monroe v. Pape, 365 U.S. 167, 172, 81 S. Ct. 473, 476, 5 L. Ed. 2d 492, 497 (1961) (applying § 1983 to illegal search of civilian home and detention of citizen by police), *overruled in unrelated part by* Monell v. Dept of Soc. Servs. of the City of New York, 436 U.S. 658, 695, 98 S. Ct. 2018, 2038, 56 L. Ed. 2d 611, 638 (1978).

52. *See*, *e.g.*, Monroe v. Pape, 365 U.S. 167, 174, 81 S. Ct. 473, 477, 5 L. Ed. 2d 492, 498 (1961) (explaining that one aim of § 1983 is "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice"), *overruled in unrelated part by* Monell v. Dept of Soc. Servs. of the City of New York, 436 U.S. 658, 695, 98 S. Ct. 2018, 2038, 56 L. Ed. 2d 611, 638 (1978).

53. Most importantly, if you do not exhaust your administrative remedies, your case will be dismissed rather than stayed (held pending exhaustion). For more information on the exhaustion requirement, see Part E of Chapter 14 of the *JLM*, "The Prison Litigation Reform Act."

54. U.S. Const. amend. XIV, § 1. For a more detailed discussion of liberty interests and the degree of due process rights owed to incarcerated people, see Chapter 18 of the *JLM*, "Your Rights at Prison Disciplinary

Constitution itself does not provide incarcerated people the right to be housed at any particular classification level. Therefore, an incarcerated person must rely on state law to create a liberty interest that receives protection under the Due Process Clause of the Fourteenth Amendment.[55] In 1995, in *Sandin v. Conner*, the Supreme Court created a new standard for determining whether conditions of imprisonment violate due process.[56] The new standard emphasizes the nature of the deprivation suffered by the incarcerated person. You should be careful researching this issue, however, as much of the case law on incarcerated person classification was decided under an old standard. You must make sure that the cases you research use the current *Sandin* standard.

In *Sandin*, the Court held that state-created liberty interests "will be generally limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life,"[57] and that the hardship imposed upon the incarcerated person must be of "real substance."[58] Following *Sandin*, courts have been extremely reluctant to find that a particular security classification constitutes a deprivation of a constitutional liberty interest. Two key considerations are the conditions of segregation and the duration of segregation.[59] Incarcerated people have not been successful in convincing courts that the officials' decision to classify them in a particular way constituted an "atypical and significant" deprivation of liberty. Incarcerated people have had more success, however, challenging long-term placement in administrative segregation.[60]

Proceedings."

55. Sandin v. Conner, 515 U.S. 472, 483–484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 429 (1995) ("States may under certain circumstances create liberty interests which are protected by the Due Process Clause.").

56. Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995) (finding no liberty interest in incarcerated person's administrative segregation absent "atypical and significant hardship in relation to the ordinary incidents of prison life.").

57. Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995).

58. Wolff v. McDonnell, 418 U.S. 539, 557, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935, 951 (1974). Generally, hardships of "real substance" involve some physical injury or other deprivation related to an incarcerated person's person. Otherwise, the unfair treatment may not be recognized as a constitutional liberty interest. *See*, *e.g.*, Harper v. Showers, 174 F.3d 716, 719 (5th Cir. 1999) (finding due process claim meritless because incarcerated person had no protectable interest in custodial classification and did not allege physical injury in claim for damages); Martin v. Scott, 156 F.3d 578, 580 (5th Cir. 1998) (holding that under ordinary circumstances administrative segregation will never be grounds for a constitutional claim because it does not constitute deprivation of a constitutional liberty interest) (citing Pichardo v. Kinker, 73 F. 3d 612, 612–613)(5th Cir. 1996).

59. In recent years, a number of circuit courts have addressed the question of classification rights under *Sandin* and have found a violation of a protected liberty interest in only limited cases. *See*, *e.g.*, Iqbal v. Hasty, 490 F.3d 143, 161 (2d Cir. 2007), (holding that an incarcerated person has a protected liberty interest "only if the deprivation . . . is atypical and significant and the state has created the liberty interest by statute or regulation") (quoting Sealey v. Giltner, 116 F.3d 47, 52 (2d Cir. 1997)); *rev'd on other grounds by* Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1954 (2009); Morales v. Chertoff, No. 06-12752, 2006 U.S. App. LEXIS 31846, at *3–4 (11th Cir. Dec. 27, 2006) (*unpublished*) (finding that the issue of custodial classification does not implicate an atypical or significant deprivation); Portley-El v. Brill, 288 F.3d 1063, 1065 (8th Cir. 2002) (holding that "administrative and disciplinary segregation are not atypical and significant hardships under *Sandin*"); Leamer v. Fauver, 288 F.3d 532, 546 (3d Cir. 2002) (holding that, "[u]nder *Sandin*, the mere fact of placement in administrative segregation is not in itself enough to implicate a liberty interest"); Hatch v. District of Columbia, 184 F.3d 846, 856 (D.C. Cir. 1999) (finding that, following *Sandin*, "a deprivation in prison implicates a liberty interest protected by the Due Process Clause only when it imposes an 'atypical and significant hardship' on an incarcerated person in relation to the most restrictive confinement conditions that prison officials, exercising their administrative authority to ensure institutional safety and good order, routinely impose on inmates serving similar sentences"); Freitas v. Ault, 109 F.3d 1335, 1337–1338 (8th Cir. 1997) (holding that administrative detention and prison transfer without a hearing do not meet the "atypical and significant hardship" required to implicate a liberty interest).

60. *See* Giano v. Selsky, 238 F.3d 223, 226 (2d Cir. 2001) (quoting Colon v. Howard, 215 F.3d 227, 231 (2d Cir. 2000)) (finding that an aggregated period of confinement in administrative segregation of 762 days is a "sufficient departure from the ordinary incidents of prison life to require procedural due process protections under *Sandin*"). In New York, at least, when looking at whether placement in administrative segregation constitutes an "atypical and significant" hardship, federal courts will combine separate special housing unit ("SHU") and disciplinary segregation sentences where they constitute a sustained period of confinement. Sims v. Artuz, 230 F.3d 14, 23–24 (2d Cir. 2000) (finding that two 365-day placements in administrative segregation, combined with

One reason it is so difficult to succeed on a Fourteenth Amendment claim is that even where the court finds a liberty interest, an incarcerated person will still lose his case if the prison's policies satisfy due process (remember that the Fourteenth Amendment does not protect you from any deprivation of liberty, but only those undertaken without due process of law). In *Wilkinson v. Austin*, the Supreme Court found that incarcerated people had a protected liberty interest in avoiding placement in a Supermax facility which imposed "atypical and significant hardships" on the incarcerated people such as twenty three hours in their cells, non-contact visits, and indefinite placement.[61] While the Court recognized the liberty interest for incarcerated people, it still held that the prison's procedural policies satisfied due process.[62] The Court also clarified that the liberty interest protected—an interest in avoiding transfer to a higher level of confinement—is not created by the Constitution, but instead produced by state policies and regulations.[63]

Classification that affects parole eligibility may also establish a liberty interest. For example, you may have an argument that you would be eligible for parole, were it not for your incorrect classification. In *Wilkinson*, the Court considered the fact that incarcerated people lost their eligibility for parole while incarcerated at the Supermax facility in addition to the factors listed above (duration of confinement and conditions of confinement). The Court found that together they resulted in atypical and significant hardships.[64]

You may also be able to challenge your classification in state court on the grounds that prison officials gave you an unfair classification based on their evaluation of the information contained in the Commitment Paper, the Pre-Sentence Report ("PSR"), warrants, the DCJS Summary Case History ("Rap Sheet"), sentencing minutes, the interview, or any available Department records of a prior DOCS term. It may be possible to convince the court that some of the information contained in these documents was incorrect, or that a clerical error was made in transferring the information from these documents onto a classification worksheet or into a computer program. If an error like this was made, any security classification based on them was not only unfair, but also invalid, because it would be based on false information.[65] Be aware that you may face difficulties in obtaining these documents for review, and that you may be unsuccessful in doing so even if you bring the matter to court.[66]

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several other shorter sentences, could constitute "atypical and significant" hardship). This means they will consider time spent in administrative segregation, regardless of whether it was in a different facility, if the confinement is continuous. In *Giano*, for instance, the court combined the incarcerated person's 92-day confinement at one institution with his 670-day confinement at another. Giano v. Selsky, 238 F.3d 223, 226 (2d Cir. 2001). *But see* Smart v. Goord, No. 04 Civ. 8850 (RWS), 2008 U.S. Dist. LEXIS 16053, at *7–8 (S.D.N.Y. Mar. 3, 2008) (*unpublished*) (finding no due process violation and refusing to aggregate (combine) sentences because the two periods were not identical and not due to the same rationale, as one was for the plaintiff's own protection while the other for possession of contraband).

61. Wilkinson v. Austin, 545 U.S. 209, 220, 125 S. Ct. 2384, 2393, 162 L. Ed. 2d 174, 188 (2005).

62. Wilkinson v. Austin, 545 U.S. 209, 230, 125 S. Ct. 2384, 2398, 162 L. Ed. 2d 174, 193 (2005).

63. Wilkinson v. Austin, 545 U.S. 209, 221–222, 125 S. Ct. 2384, 2393, 162 L. Ed. 2d 174, 189 (2005).

64. Wilkinson v. Austin, 545 U.S. 209, 224, 125 S. Ct. 2384, 2395, 162 L. Ed. 2d 174, 190 (2005) (finding that each factor on its own may not be enough to constitute "atypical and significant hardship" but taken together they do); *see also* Neal v. Shimoda, 131 F.3d 818, 828–830 (9th Cir. 1997) (holding that classification as a sex offender deprived incarcerated person of a liberty interest where refusing sex offender treatment made one ineligible for parole).

65. Udzinski v. Coughlin, 188 A.D.2d 716, 717, 592 N.Y.S.2d 801, 802 (3d Dept. 1992) (ordering that petitioner's crime and sentence report, upon which his security classification was based, be corrected because Department of Correctional Services employees inaccurately transcribed information from pre-sentence report into their own documents).

66. New York State's pre-sentence reports must be confidential (meaning that reports "may not be made available to any person or public or private agency"), except where disclosure is permitted or required by statute or "specific authorization of the court." N.Y. CRIM. PROC. LAW § 390.50 (McKinney 2018). Where there is no relevant statutory provision, an incarcerated person may obtain a copy of the report "upon a proper factual showing for the need thereof." Shader v. People, 233 A.D.2d 717, 717, 650 N.Y.S.2d 350, 351 (3d Dept. 1996). *See, e.g.,* Kilgore v. People, 274 A.D.2d 636, 636, 710 N.Y.S.2d 690, 691 (3d Dept. 2000) (finding petitioner's "bare assertion" that he required the

Again, there is little federal law in this area, but state law may allow suits based on violations of state law and state-created liberty interests or prison regulations. Even in state courts, however, it may still be difficult to succeed on your claim. In California, courts have deferred to the classification decisions of prison officials, limiting judicial intervention to instances when "actions by prison officials are arbitrary, capricious, irrational, or an abuse of the discretion granted those given the responsibility for operating prisons."[67]

8. Administrative Options

Courts generally do not like to interfere with security classification. Therefore, the most realistic approach to lowering your classification may be through your prison's internal appeals process. Keep in mind that an unsuccessful federal lawsuit could have consequences for you under the Prison Litigation Reform Act ("PLRA").[68] Additionally, the PLRA requires that you exhaust administrative options before bringing a legal action under Section 1983.[69] Be sure to read Chapter 14 of the *JLM*, "The Prison Litigation Reform Act."

No matter where you are incarcerated, your security classification should be periodically reviewed. You should notify your assigned counselor of any information that you think could impact your security classification, such as a change in your rap sheet. You should also give copies of any relevant documents to your counselor. You will need to research the administrative rules in your prison regarding appeals of security classification. For example, in California you are able to contest classification decisions resulting in adverse effects (such as an increased custody level) during your reclassification hearing, and are then able to appeal your score and hearing results to your prison's Classification Committee.[70]

Finally, if you are incarcerated in New York and you have exhausted all of the internal administrative options, you can begin an Article 78 court proceeding. Article 78 provides a way to challenge administrative decisions in court. Article 78 only applies to the state of New York, but if you are imprisoned elsewhere, you should research whether or not your state has a similar law.[71] For detailed instructions on bringing an Article 78 proceeding, see Chapter 22 of the *JLM*, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules." *There are very strict rules and time limits* to remember when bringing an Article 78 proceeding, so it is important that you read Chapter 22 carefully.

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pre-sentence report in order to properly prepare for an appearance before the Board of Parole insufficient to constitute a showing of need for the report); *cf.* Gutkaiss v. People, 49 A.D.3d 979, 979–980, 853 N.Y.S.2d 677, 678 (3d Dept. 2008) (finding that the petitioner had made a proper factual showing entitling him to a copy of the report where "petitioner had notice of an impending hearing before the Board and his presentence report was one of the factors to be considered by the Board in determining his application for release"). *See also* CAL. CODE REGS. tit. 15, § 3375(j)(1)–(4) (requiring that incarcerated people in California, intending to challenge any information collected in their intake forms, provide necessary documentation to support their challenge).

67. *In re* Wilson, 202 Cal. App. 3d 661, 667, 249 Cal. Rptr. 36, 40 (1988) (finding basis for the incarcerated person's classification as a sex offender, even when the related charges were dismissed and, therefore, that prison officials did not act arbitrarily or capriciously when they classified the incarcerated person as a sex offender).

68. For example, if you do not exhaust your administrative remedies, your case will be dismissed rather than stayed (held pending exhaustion). See Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," for more information on PLRA.

69. The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a).

70. State of California, Dept. of Corr. & Rehabilitation, Operations Manual § 62010.4.2.1 (2020), *available at* https://www.cdcr.ca.gov/regulations/adult-operations/dom-toc/. (last visited Feb. 23, 2020).

71. *See, e.g.,* FLA. STAT. ANN. §120.68 (2019); CAL. GOV'T CODE § 53069.4(b)(1) (Deering 2019). Similar to Article 78 of the New York Civil Practice Law and Rules, most state statutes contain strict time limitations on when you can challenge administrative proceedings in court, so be sure to read your own state's rules carefully.

C. Gang Validation

1. Definition and Discussion

Gang validation is the process by which prison officials determine that an incarcerated person is an associate or a member of a gang or Security Threat Group ("STG"). Once prison officials make that decision, the incarcerated person is often "administratively segregated," meaning that he is housed separately from, and receives different treatment than incarcerated people who have not been validated as gang members or associates. Although the specific procedures vary from state to state, Arizona, California, Colorado, Connecticut, Florida, Illinois, Massachusetts, Michigan, Nebraska, Oregon, Tennessee, Texas, and Wisconsin all segregate suspected gang members from the rest of the prison population.[72] Please note that this is not an exclusive list of state procedures related to gangs and other associations. Some states' administrative codes may be difficult to find , and some might follow practices that are not explicitly mentioned in the code but may be found in a policy directive. While a state prison system may use a standard written definition of what constitutes a gang member, the process for actually proving that someone is a gang member, and the amount of proof required, may vary by state.[73] Generally, the only way to be declassified as a gang member is to "debrief." "Debriefing" is a process that may involve informing prison officials of the identities and activities of fellow gang members. Debriefing can place the suspected gang member's well-being at risk and expose him to retaliation. This Section discusses the problems that individuals who have tried to challenge their gang validation in court have experienced, and it offers some suggestions for challenging gang validation through administrative proceedings rather than in court.

California's system of gang validation is one of the most developed and punitive in the country. California has been segregating suspected gang members since at least 1984, and other states have studied California in developing gang validation procedures of their own.[74] In California, and states with similar procedures, you are validated as a gang member if you are found to meet three or more factors.[75] These factors include, among others, gang tattoos, correspondence to or from known gang members or correspondence that contains references to gang activity, wearing gang colors, association with known gang members, possession of gang-related literature, possession of a photograph of known gang members, and identification by a fellow incarcerated person as a gang member. Misconduct is not necessarily required to be labeled a gang member.

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72. *See* State of Arizona, Department of Corrections, Department Order No. 806, Security Threat Groups (STGs) (2009), *available at* https://corrections.az.gov/sites/default/files/0806.pdf (last visited Feb. 19, 2020); CAL. CODE REGS. tit. 15, § 3335 (2020); State of Colorado, Department of Corrections, Policies Nos. 600-01 & 600-09 (2019), *available at* https://www.colorado.gov/pacific/cdoc/policies-1 (last visited Feb. 19, 2020); State of Connecticut, Department of Correction, Administrative Directive No. 6.14, Security Risk Groups (2013), *available at* https://portal.ct.gov/-/media/DOC/Pdf/Ad/ad0614pdf.pdf?la=en (last visited Feb. 19, 2020);FLA. ADMIN. CODE, 33-601.800 (2)(a) (2016); ILL. ADMIN. CODE tit. 20, § 505.40 (2020); 103 MASS. CODE REGS. 421.09 (2020); State of Michigan, Department of Corrections, Policy Directive No. 04.04.113, Security Threat Groups (2015), *available at* http://www.michigan.gov/documents/corrections/04_04_113_482417_7.pdf (last visited Feb. 19, 2020); 72 NEB. ADMIN. CODE § 1-003.02(D) (2019);; OR. ADMIN. R. 291-069-0270 (2019); State of Tennessee, Department of Correction, Administrative Policy No. 404.10, Administrative Segregation, Placement, Review, and Release (2017), *available at* https://www.tn.gov/content/dam/tn/correction/documents/404-10.pdf (last visited Feb. 19, 2020); State of Texas, Department of Criminal Justice, Offender Orientation Handbook 31 (2017), *available at* http://www.tdcj.state.tx.us/documents/Offender_Orientation_Handbook_English.pdf (last visited Feb. 19, 2020); WIS. ADMIN. CODE DOC § 308.04(2)(d) (2019).

73. Claire Johnson et al., Nat'l Crim. Just. Reference Serv., *Prosecuting Gangs: A National Assessment*, in NIJ RESEARCH IN BRIEF 1, 2–3 (NCJ Publication No. 151785, 1995), *available at* https://www.ncjrs.gov/pdffiles1/Digitization/151785NCJRS.pdf (last visited Feb. 19, 2020).

74. Scott N. Tachiki, *Indeterminate Sentences in Supermax Prisons Based Upon Alleged Gang Affiliations: A Reexamination of Procedural Protection and a Proposal for Greater Procedural Requirements*, 83 CAL. L. REV. 1115, 1129 (1995).

75. Madrid v. Gomez, 889 F. Supp. 1146, 1242 (N.D. Cal. 1995) (quoting the California Department of Corrections Operations Manual § 55070.19.2, which requires at least three "original, independent source items of documentation indicative of actual membership" in a gang).

Florida uses the term Security Threat Group ("STG") which includes "formal or informal ongoing groups, gangs, organization[sic] or associations consisting of three or more members who have a common name or common identifying signs, colors, or symbols; a group whose members/associates engage in a pattern of gang activity or department rule violation; or whose potential work together could pose a threat to the prison."[76] Similar to California, Florida defines a "criminal gang member" as a person who meets two or more factors. These factors include, among others, self-identification as a criminal gang member, identification as a criminal gang member by a parent or guardian, identification by a documented reliable informant, adopting the style of dress of a criminal gang, adopting the use of a hand sign identified as used by a criminal gang, having a tattoo identified as used by a criminal gang, and associating with one or more known criminal gang members.[77]

New York State uses the label "Security Risk Group" and defines a gang as "a group of individuals, having a common identifying name, sign, symbol or colors who have engaged in a pattern of lawlessness" such as violence, destruction of property, threats, intimidation, harm, or drug smuggling. Incarcerated people are prohibited from wearing, possessing, or distributing gang materials or insignia (identifying marks or symbols of the gang) or participating in gang-related activities or meetings.[78] In a recent New York case, an incarcerated person unsuccessfully challenged his classification as a member of a Security Risk Group ("SRG") based on the observation of him greeting another incarcerated person with gang signs. In that case, the court found gang validation and classification as a member of a SRG to be "merely an observation tool" that does not result in a loss of liberty.[79]

Most of the case law on gang validation comes from California, where incarcerated people have been most active in using the courts to challenge their classification as gang members. For that reason, the following discussion addresses claims regarding gang validation that have been filed in California, both in state and federal court. Federal courts have generally not been receptive to incarcerated person claims. They have not decided whether incarcerated people have a constitutionally protected "liberty interest" in being classified a particular way. Instead, federal courts have found that the due process afforded to incarcerated people by the California system would be sufficient even if such an interest was found to exist.[80] For this reason, courts have rejected Fourteenth Amendment claims that a gang member classification violates an incarcerated person's right to due process.[81] The courts have also rejected Eighth Amendment claims that the "debriefing" requirement subjects an incarcerated person to cruel or unusual punishment,[82] and claims that classification as a gang member violates an incarcerated person's Fifth Amendment protection from self-incrimination.[83] Courts have generally

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76. FLA. ADMIN. CODE, 33-601.800 (1)(s) (2016).

77. FLA. STAT. § 874.03(2)-(3) (2019).

78. N.Y. COMP. CODES R. & REGS. tit. 7, § 270.2(B)(6)(iv) (2020).

79. Arriaga v. City of New York, No. 06 Civ. 2362 (PKC) (HBP), 2008 U.S. Dist. LEXIS 41433, at *20–21 (S.D.N.Y. May 20, 2008) (*unpublished*), *aff'd*, No. 08-3410-pr, 2010 U.S. App. LEXIS 6168 (2d Cir. Mar. 25, 2010) (*unpublished*).

80. Castañeda v. Marshall, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *22 (N.D. Cal. Mar. 10, 1997) (*unpublished*) (finding no due process violation because the incarcerated person received notice of his classification and continuing placement in the security housing unit, and his placement there was based on reliable information), *aff'd*, No. 97-15538, 1998 U.S. App. LEXIS 8184 (9th Cir. Apr. 24, 1998) (*unpublished*); Galvaldon v. Marshall, No. C-95-1674-MHP, 1997 U.S. Dist. LEXIS 21500, at *17–23 (N.D. Cal. Nov. 12, 1997) (*unpublished*) (finding no due process violation because the incarcerated person had an opportunity to present his views to the Criminal Activities Coordinator, the incarcerated person's status was based on sufficient and reliable evidence, and his status was given periodic review).

81. Castañeda v. Marshall, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *22 (N.D. Cal. Mar. 10, 1997) (*unpublished*); Galvaldon v. Marshall, No. C-95-1674-MHP, 1997 U.S. Dist. LEXIS 21500, at *17–23 (N.D. Cal. Nov. 12, 1997) (*unpublished*).

82. Castañeda v. Marshall, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *25–26 (N.D. Cal. Mar. 10, 1997) (*unpublished).*

83. Griffin v. Gomez, No. C-92-1236 EFL, 1995 U.S. Dist. LEXIS 9263, at *17–18 (N.D. Cal. June 29, 1995) (*unpublished*), *aff'd in part and remanded on other grounds*, No. 95-16684, 1998 U.S. App. LEXIS 3152 (9th Cir. Feb. 24, 1998) (*unpublished*); Castañeda v. Marshall, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *23–24 (N.D. Cal. Mar. 10, 1997) (*unpublished*); Medina v. Gomez, No. C-93-1774 TEH, 1997 U.S. Dist. LEXIS 12208,

found that prison officials should be granted broad discretion in such administrative matters, and courts in California have dismissed most gang validation complaints at the summary judgment stage (meaning that the incarcerated person was not able to reach the full trial stage).

Before you bring any action, you should consider the possibility that the court where you argue your case will follow the lead of the California courts. You should also consider the implications that dismissal of your case could have for you under the Prison Litigation Reform Act.[84] Finally, before taking any action, it is important that you also read Part B of this Chapter, which is devoted to general security classification and contains additional information that you may find relevant.

2. Fourteenth Amendment Claims

The Due Process Clause of the Fourteenth Amendment protects individuals, including incarcerated people, from loss of "life, liberty, or property" at the hands of government without due process of law.[85] However, courts in California have found that administrative segregation does not violate the Due Process Clause. They have generally determined that it is not necessary to decide whether an incarcerated person has a valid state-created liberty interest in being free from administrative confinement because the due process provided to incarcerated people by the California system would be sufficient even if this liberty interest were found to exist.[86]

In California, courts consider adequate the due process provided in classification and administrative segregation proceedings. The courts have found that California procedures provide the incarcerated person with some notice of the charges against him. The procedures also provide him with an opportunity to present his views to the official charged with deciding whether or not to transfer him to administrative segregation. Due process requires that, following an incarcerated person's administrative segregation, officials must engage in some sort of periodic review of his confinement.[87] Although prison officials are not required by due process to provide the names of their sources of information in validating a suspected gang member, if they fail to do so, the record must contain a prison official's statement that safety considerations prevented the disclosure of the informant's name.[88]

The Ninth Circuit has found that the Due Process Clause does *not* require:

(1) Detailed written notice of charges,
(2) Representation by counsel or counsel-substitute,
(3) An opportunity to present witnesses,
(4) A written description of the reasons for placing the incarcerated person in administrative segregation, or

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at *15-16 (N.D. Cal. Aug. 14, 1997) (*unpublished*).

84. For example, if you do not exhaust your administrative remedies, your case will be dismissed rather than stayed (held pending exhaustion). See Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," for more information on the PLRA.

85. U.S. Const. amend. XIV, § 1. For a more detailed discussion of liberty interests and the degree of due process rights owed to incarcerated people, see Chapter 18 of the *JLM*, "Your Rights at Prison Disciplinary Hearings."

86. Castañeda v. Marshall, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *22 (N.D. Cal. Mar. 10, 1997) (*unpublished*); Galvaldon v. Marshall, No. C-95-1674-MHP, 1997 U.S. Dist. LEXIS 21500, at *17–23 (N.D. Cal. Nov. 12, 1997) (*unpublished*).

87. Rojas v. Cambra, No. C 96-2990 VRW, 1997 U.S. Dist. LEXIS 7610, at *11 (N.D. Cal. May 20, 1997) (*unpublished*); Castañeda v. Marshall, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *13 (N.D. Cal. Mar. 10, 1997) (*unpublished*); *see also* Hewitt v. Helms, 459 U.S. 460, 477 n.9, 103 S. Ct. 864, 874 n.9, 74 L. Ed. 2d 675, 692 n.9 (1983) (noting that prison administrators must engage in some sort of periodic review of whether the incarcerated person remains a security threat), *as modified by* Sandin v. Conner, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995).

88. *See* Zimmerlee v. Keeney, 831 F.2d 183, 186 (9th Cir. 1987) (holding that due process requires the affirmative statement of a prison official where safety considerations prevent the disclosure of the informant's name and additional facts to show that the information was reliable); Castañeda v. Marshall, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *16 n.6 (N.D. Cal. Mar. 10, 1997) (*unpublished*) (finding that prison officials must include a statement that the informant's name was not included for safety purposes).

(5) The disclosure of the identity of any person providing information leading to the placement of the incarcerated person in administrative segregation.[89]

Placement in segregation for an indeterminate period based upon gang membership does not require any procedures beyond those required in regular administrative segregation cases.[90] However, an incarcerated person may not be confined separately for gang affiliation unless the record contains at least some factual information from which prison officials can reasonably conclude that the information supporting segregation is reliable.[91] In California, under statute, information is considered reliable if one or more of the following elements are met:

(1) The confidential source has previously given information that has proven to be true,
(2) Other confidential sources have independently provided the same information,
(3) The information provided by the confidential informant is self-incriminating,
(4) Part of the information provided is corroborated (confirmed) through investigation or information provided by non-confidential sources,
(5) The confidential informant is the victim, or
(6) This source successfully completed a polygraph examination.[92]

Finally, a further due process claim that you might make is that your validation as a gang member has been made in retaliation for some other unrelated legal activity that you have engaged in, such as filing an appeal. To state the "*prima facie* case,"[93] you must show that retaliation for the exercise of protected conduct was the "substantial" or "motivating" factor behind the prison officials' actions.[94] Additionally, you must show that the retaliatory action did not advance legitimate prison management or incarcerated person treatment goals (referred to as "penological goals"),[95] or was not "narrowly tailored" enough to achieve such goals. Targeting of incarcerated people for gang validation without a good reason is not an action that is narrowly tailored to achieve legitimate penological goals. For example, you might try to argue that gang validations without good cause actually misdirect prison resources away from other proceedings and compromise prison security.[96] Once you have established a *prima facie* case of retaliation and demonstrated that the retaliatory action does not advance a legitimate penological goal, the burden shifts to the prison officials. They must establish that they

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89. Toussaint v. McCarthy, 801 F.2d 1080, 1100–1101 (9th Cir. 1986); Medina v. Gomez, No. C-93-1774 TEH, 1997 U.S. Dist. LEXIS 12208, at *9 (N.D. Cal. Aug. 14, 1997) (*unpublished*); Castañeda v. Marshall, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *13 (N.D. Cal. Mar. 10, 1997) (*unpublished)*.

90. Madrid v. Gomez, 889 F. Supp. 1146, 1274–1275 (N.D. Cal. 1995) (holding that, in order to satisfy due process, an incarcerated person cannot be segregated for gang affiliation unless the record contains "some factual information" sufficient to satisfy the reliability standard used in other administrative segregation proceedings); *see* Rojas v. Cambra, No. C 96-2990 VRW, 1997 U.S. Dist. LEXIS 7610, at *8–10 (N.D. Cal. May 20, 1997) (*unpublished*).

91. Madrid v. Gomez, 889 F. Supp. 1146, 1274 (N.D. Cal. 1995); *see* Koch v. Lewis, 96 F. Supp. 2d 949, 965 (D. Ariz. 2000) (noting that there must be some reliable evidence of current gang/STG membership before the state may impose indefinite administrative segregation), *vacated as moot*, Koch v. Schriro, 399 F.3d 1099 (9th Cir. 2005)*; accord***,** Taylor v. Rodriguez, 238 F.3d 188, 193 (2d Cir. 2001) (holding that there must be specific facts to support administrative segregation based on gang membership).

92. CAL. CODE REGS. tit. 15, § 3321(c) (2020).

93. To state a *prima facie* case is to state sufficient facts to allow the judge or jury to find in your favor if everything you said is true and undisputed.

94. Koch v. Lewis, 96 F. Supp. 2d 949, 956 (D. Ariz. 2000). See Chapter 24 of the *JLM*, "Your Right To Be Free from Assault by Prison Guards and Other Prisoners," for more information on your rights against retaliation**.**

95. See 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," and Chapter 27 of the *JLM*, "Religious Freedom in Prison," for more information on the "legitimate penological goals" language and the *Turner* standard.

92. *See* Koch v. Lewis, 96 F. Supp. 2d 949, 956 (D. Ariz. 2000) ("[I]nstituting STG proceedings without good cause would misdirect prison resources away from proceedings involving a legitimate compromise to prison security."). While an argument of wasting prison resources was effective in *Koch*, many other courts have held that gang validation supports the goal of prison security. *See, e.g.,* Stewart v. Alameida, 418 F. Supp.2d 1154, 1163 (N.D. Cal. 2006) (finding the prison's regulations on gang validation did not violate the incarcerated person's rights because the regulations were reasonably related to the valid penological interest of security).

would have validated you as a gang member even if you had not engaged in the legally protected conduct.

3. Eighth Amendment Claims

The Eighth Amendment of the Constitution prohibits "the unnecessary and wanton infliction of pain"[97] and punishment that is grossly disproportionate (out of proportion) to the severity of the crime.[98] California courts have rejected that the debriefing process[99] constitutes an Eighth Amendment violation because it could subject an incarcerated person to retaliation from other gang members, thereby placing his life and well-being at risk. They have generally found this allegation to be speculative. Courts will not allow this argument to go forward without evidence of a particular threat to the incarcerated person bringing the case, or without evidence that prison officials are not concerned about the incarcerated person's well-being.[100]

4. Fifth Amendment Claims

The Fifth Amendment of the Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself."[101] Debriefing generally requires an incarcerated person to disclose information regarding himself and other gang members and their gang-related activities. Prison administrators have argued, and courts have agreed, that debriefing is necessary to determine whether an incarcerated person is telling the truth about no longer being a part of the gang. Prison officials have also argued that debriefing helps to determine if a gang member's information is reliable and helps to gather further information about the gang.[102]

California courts have held that the debriefing requirement does not violate Fifth Amendment protection against self-incrimination because the information acquired in debriefing is not (under California's policy) used in later criminal proceedings.[103] Courts have held that the right against self-incrimination "does not arise in the debriefing processing," and therefore that prison officials are not required to provide incarcerated people with immunity.[104] Remember that the right against self-incrimination is a personal protection and may not be invoked to prevent the implication of others, such as other people involved in the gang.

Keep in mind, however, that if you are incarcerated in California, the policies surrounding debriefing provide you with only thin protection. Although the regulations state that debriefing is "not for the purpose of acquiring incriminating evidence against the subject,"[105] they do not explicitly forbid the evidence from being used in later legal proceedings. Partly as a result of incarcerated people

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97. Rhodes v. Chapman, 452 U.S. 337, 346, 101 S. Ct. 2392, 2399, 69 L. Ed. 2d 59, 68 (1981) (quoting Gregg v. Georgia, 428 U.S. 153, 173, 96 S. Ct. 2909, 2925, 49 L. Ed. 2d 859, 875 (1976)).

98. Rhodes v. Chapman, 452 U.S. 337, 346, 101 S. Ct. 2392, 2399, 69 L. Ed. 2d 59, 68 (1981) (citing Coker v. Georgia, 433 U.S. 584, 592, 97 S. Ct. 2861, 2866, 53 L. Ed. 2d 982, 989 (1977) (plurality opinion)).

99. For more on debriefing, see Part C(4) of this Chapter.

100. Berg v. Kincheloe, 794 F.2d 457, 459 (9th Cir. 1986) (stating that an incarcerated person may bring a §1983 claim under the Eighth Amendment if it is shown that prison officials acted with "deliberate indifference" to a serious threat of harm to an incarcerated person by another incarcerated person); *followed by* Pollard v. GEO Group, Inc., 629 F.3d 843, 863 (9th Cir. 2010), *rev'd on other grounds sub nom.* Minneci v. Pollard, 565 U.S. 118, 132 S. Ct. 617, 181 L. Ed. 2d 606 (2012).

101. U.S. Const. amend. V.

102. Madrid v. Gomez, 889 F. Supp. 1146, 1241 (N.D. Cal. 1995) ("Because prison gang members 'join for life,' the CDC considers debriefings necessary to prove the renunciations of gang memberships are genuine.").

103. Griffin v. Gomez, No C-92-1236 EFL, 1995 U.S. Dist. LEXIS 9263, at *8–11 (N.D. Cal. June 29, 1995) (*unpublished*), *aff'd in part and remanded in part on other grounds*, No. 95-16684, 1998 U.S. App. LEXIS 3152 (9th Cir. Feb. 24, 1998) (*unpublished*); Castañeda v. Marshall, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *23–24 (N.D. Cal. Mar. 10, 1997) (*unpublished*), *aff'd*, No. 97-15538, 1998 U.S. App. LEXIS 8184 (9th Cir. Apr. 24, 1998) (*unpublished*); Medina v. Gomez, No. C-93-1774 TEH, 1997 U.S. Dist. LEXIS 12208, at *16 (N.D. Cal. Aug. 14, 1997) (*unpublished*).

104. Griffin v. Gomez, No. C-92-1236 EFL, 1995 U.S. Dist. LEXIS 9263, at *19 (N.D. Cal. June 29, 1995) (*unpublished*).

105. CAL. CODE REGS. tit. 15, § 3378.5(b) (2019).

challenging the debriefing process, the regulations also provide that if an incarcerated person "makes a statement that tends to incriminate [himself] in a crime," he must waive his right against self-incrimination "prior to questioning . . . about the incriminating matter."[106] However, the prison official or gang investigator conducting the debriefing determines when a statement "tends to incriminate," and the debriefing incarcerated person has no attorney or representative present at the debriefing. If you are currently appealing your conviction or sentence and considering debriefing, you should talk to your appellate attorney about the possible implications debriefing may have on your appeal.

If you are not in California, it may be worth investigating whether or not the system in which you are incarcerated has a policy regarding the use of information gathered through gang debriefings in future criminal proceedings. If it does not have such a policy, then the debriefing requirement may present a valid Fifth Amendment issue.

5. Equal Protection and Free Exercise of Religion Claims

To win on an equal protection claim, an incarcerated person usually must prove: (1) that the government has intentionally treated similarly situated incarcerated people differently and (2) that there is no rational relationship between this dissimilar treatment and any legitimate penal interest.[107] This standard is frequently called "rational basis review." Rational basis review is the lowest level of scrutiny, or review, applied by courts. Challenges that incarcerated people make to classifications usually fail because officials only need to show that the action is "rationally related" to a "legitimate government interest." If, however, you are alleging that you were treated differently than other similarly situated incarcerated people because of your *race*, some courts, including California, will apply "strict scrutiny" to the government's policy. "Strict scrutiny" is a significantly higher standard than "rational basis review," and therefore more difficult for the government to meet (and more favorable to incarcerated people). To survive "strict scrutiny," the government must prove that the treatment you are challenging both: (1) promotes a compelling state interest; and (2) is narrowly or suitably tailored to that interest.[108]

An example of a policy that treated people differently based on race was found in *Johnson v. California*.[109] In *Johnson*, the court applied a strict scrutiny standard of review to the prison's policy of placing new or transferred incarcerated people with cellmates of the same race during the initial sixty-day evaluation period. In *Harbin-Bey v. Rutter*, however, the Sixth Circuit Court of Appeals held that a prison's decision to designate an incarcerated person as a member of a Security Threat Group without a hearing did not involve different treatment based on race.[110] Instead, the court in *Harbin-Bey* held that because incarcerated people are not a suspect class, the "rational basis" test applied, and the prison's classification decision was constitutional.[111] For more information on Equal Protection claims you should see Chapter 16 of the *JLM,* "Using 42 U.S.C. § 1983 and 28 U.S. § 1331 to Obtain Relief from Violations of Federal Law."

You may be able to argue that the debriefing policy makes it hard to practice your religion. However, these types of claims have failed because the policy does not "substantially burden" free

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106. CAL. CODE REGS. tit. 15, § 3378.5(e) (2019).

107. Harbin-Bey v. Rutter, 420 F.3d 571, 576 (6th Cir. 2005); *see* Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987) (establishing the "legitimate penological interests" test to validate prison regulations that may otherwise impinge an incarcerated person's constitutional rights); *see also* Ashelman v. Wawrzaszek, 111 F.3d 674, 676 (9th Cir. 1997) (noting that the *Turner* "legitimate penological interests" test may not apply to certain religious discrimination cases under the "compelling government interest" test required by the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1).

108. Johnson v. California, 543 U.S. 499, 505, 125 S. Ct. 1141, 1146, 160 L. Ed. 2d 949, 958 (2005); *see* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720, 127 S. Ct. 2746, 2752, 168 L. Ed. 2d 517, 523 (2007) (using the strict scrutiny standard in the context of race-conscious student assignment policies designed to eliminate racial imbalances in school enrollment); Jana-Rock Const., Inc. v. New York State Dept. of Econ. Dev., 438 F.3d 195, 205 (2d Cir. 2006) (clarifying that "extrinsic showing of discriminatory animus or effect is not necessary to trigger strict scrutiny").

109. Johnson v. California, 543 U.S. 499, 509, 125 S. Ct. 1141, 1148, 160 L. Ed. 2d 949, 960 (2005).

110. Harbin-Bey v. Rutter, 420 F.3d 571, 576 (6th Cir. 2005).

111. *See* Harbin-Bey v. Rutter, 420 F.3d 571, 576 (6th Cir. 2005).

exercise of religion.[112] Using the substantial burden test, a district court in California rejected a challenge where a religious Catholic incarcerated person argued that the debriefing policy was unconstitutional because it forced him to confess to a person other than a priest. The court held that the policy did not substantially burden the incarcerated person's religion because the incarcerated person was not forced to commit any act forbidden by his religion, but instead could refrain from debriefing.[113] For more information on your right to practice your religion see Chapter 27 of the *JLM,* "Religious Freedom in Prison."

6. Administrative Options

Given courts' general hostility toward gang validation claims, the most effective way to challenge classification is probably through administrative procedures within the prison. You should be granted periodic review of your status as an alleged gang member. When this happens, you should have the opportunity to express your views on your classification. This is your opportunity to ensure that officials are following the proper administrative procedures that the California courts have relied upon in dismissing incarcerated people's due process claims. For example, as discussed above, all anonymous testimony must be accompanied by an official statement that the identity of your accuser has been withheld for security reasons and that testimony should be as complete as it can possibly be without identifying the source. You should become familiar with the classification procedures so that you can monitor whether they are being followed. Deviations from the classification may provide grounds for challenging your classification.

Chapter 15 of the *JLM*, "Inmate Grievance Procedures," contains detailed instructions on how to pursue administrative remedies. The focus of Chapter 15 is on the state of New York's Internal Grievance Program ("IGP"), but you will also find information on locating the guidelines and procedures for filing grievances in other states. You may also find Chapter 18 of the *JLM*, "Your Rights at Prison Disciplinary Proceedings," helpful in challenging your classification. Many states separate their disciplinary and classification systems and there may be separate provisions for appealing your classification. It is important that you read the grievance rules carefully so that you can use the correct administrative remedy. Finally, if you have exhausted all of the administrative options and you are imprisoned in the state of New York, you can file an Article 78 proceeding. Article 78 provides a procedure for challenging administrative decisions in court. For instructions on how to bring an Article 78 proceeding, see Chapter 22 of the *JLM*, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules."

D. Conclusion

Your security classification is important because it influences where you are incarcerated and what sort of freedoms you will receive. If you have undergone gang validation and been designated a member of a Security Threat Group it may be possible to challenge this designation, although such challenges are difficult to win. While you may have some room to raise a challenge on equal protection grounds if the prison used a race-based policy to classify you in a certain group, you are probably more likely to be successful challenging your security classification through your prison's administrative procedures.

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112. Rojas v. Cambra, No. C 96-2990 VRW, 1997 U.S. Dist. LEXIS 7610, at *23 (N.D. Cal. May 20, 1997) (*unpublished*).

113. Rojas v. Cambra, No. C 96-2990 VRW, 1997 U.S. Dist. LEXIS 7610, at *22–23 (N.D. Cal. May 20, 1997) (*unpublished*).