

## CHAPTER 41

### SPECIAL ISSUES OF INCARCERATED WOMEN\*

#### A. Introduction

Men greatly outnumber women in American prisons and jails. However, women are incarcerated at a much greater rate. As of 2019, 231,000 women were incarcerated in the United States.<sup>1</sup> Since 1980, the number of women incarcerated in the United States has grown at two-times the rate of increase in the number of incarcerated men.<sup>2</sup> Rates of incarceration for women vary significantly by region. Idaho has the highest female imprisonment rate at 138 per 100,000 women. Massachusetts has the lowest at 10 per 100,000 women.<sup>3</sup>

There are some important differences between incarcerated men and women. Women are more likely than men to be in prison for drug and property offenses. Men are more likely to be in prison for violent crime. As of 2018, 26% of women in state prisons had been sentenced to drug related offenses, compared to just 13% of the state male prison population.<sup>4</sup> Furthermore, incarcerated women are three to four times more likely than incarcerated men to have experienced abuse, either as a child or as an adult.<sup>5</sup> And incarcerated women are more likely to suffer from mental illness than incarcerated men.<sup>6</sup>

For these and many other reasons, prison can be a very different experience for women than for men. This Chapter explains the unique concerns and legal rights of incarcerated women. It is important that women who are incarcerated are able to learn about issues that specifically affect them. If you are a woman who is incarcerated, you should not rely only on this Chapter for information about your legal rights in prison. Instead, you should read any other parts of the *JLM* that may apply to your situation, since many issues people face in prison are shared across gender-lines.

This Chapter is divided into five parts, B to F. Part B describes the issue of equal protection in programs and services provided to both incarcerated men and women. Part C supplements Chapter 23 of the *JLM*, “Your Right to Adequate Medical Care.” It focuses on medical care for incarcerated women. It also includes the right to basic gynecological care, abortions, treatment for HIV, and resources and treatment for pregnant women. Please see Chapter 33 of the *JLM*, “Rights of

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1. Aleks Kajstura, *Women’s Mass Incarceration: The Whole Pie 2019*, Prison Policy Initiative (29 Oct. 2019), available at <https://www.prisonpolicy.org/reports/pie2019women.html> (last visited Dec. 2, 2020).

2. The Sentencing Project, *Fact Sheet: Incarcerated Women and Girls* (Nov. 2020), available at <https://www.sentencingproject.org/wp-content/uploads/2020/11/Incarcerated-Women-and-Girls.pdf> (last visited Dec. 2, 2020) (“Though many more men are in prison than women, the rate of growth for female imprisonment has been twice as high as that of men since 1980.”); Aleks Kajstura, *Women’s Mass Incarceration: The Whole Pie 2019*, Prison Policy Initiative (29 Oct. 2019), available at <https://www.prisonpolicy.org/reports/pie2019women.html> (last visited Dec. 2, 2020) (“Women’s incarceration has grown at twice the pace of men’s incarceration in recent decades[.]”).

3. The Sentencing Project, *Fact Sheet: Incarcerated Women and Girls* (Nov. 2020), available at <https://www.sentencingproject.org/wp-content/uploads/2020/11/Incarcerated-Women-and-Girls.pdf> (last visited Dec. 2, 2020).

4. The Sentencing Project, *Fact Sheet: Incarcerated Women and Girls* (Nov. 2020), available at <https://www.sentencingproject.org/wp-content/uploads/2020/11/Incarcerated-Women-and-Girls.pdf> (last visited Dec. 2, 2020).

5. See American Civil Liberties Union, *Words From Prison – Did You Know...?*, available at <https://www.aclu.org/other/words-prison-did-you-know#1> (last visited Dec. 19, 2019) (citing American Civil Liberties Union, Brennan Center, & Break the Chains, *Caught in the Net: The Impact of Drug Policies on Women and Families* (Apr. 2005), available at <https://www.aclu.org/caught-net-impact-drug-policies-women-and-families> (last visited Dec. 2, 2020).

6. Aleks Kajstura, *Women’s Mass Incarceration: The Whole Pie 2019*, Prison Policy Initiative (29 Oct. 2019), available at <https://www.prisonpolicy.org/reports/pie2019women.html> (last visited Dec. 2, 2020).

Incarcerated Parents” for general information about the rights of imprisoned parents. Part D focuses on privacy concerns, searches, sexual harassment, and sexual assault and rape. Your right to be free from assaults and illegal body searches is also described in *JLM*, Chapter 24, “Your Right to be Free from Assault by Prison Guards and Other Incarcerated People,” and Chapter 25, “Your Right to Be Free from Illegal Body Searches.” Part E discusses the growing popularity of alternative sentencing options, such as drug treatment programs. It explains why programs designed for men may not be as effective for women. Finally, Part F defines a form of sentencing adjustment called “clemency.” It includes a description of clemency proceedings. It also explains how you can petition for clemency as a battered (abused) woman. While Part F focuses on clemency for battered women, any person petitioning for clemency can use these procedures. Other possibilities for release are discussed in *JLM*, Chapter 39, “Temporary Release Programs,” Chapter 35, “Getting out Early: Conditional & Early Release,” and Chapter 32, “Parole.”

## B. Equal Protection and Programming

Many prison programs fail to address issues that are specific to incarcerated women because the majority of the prison population is usually male. Nonetheless, being smaller in number is not a reason to be discriminated against. You should know that in many situations, incarcerated women have the right to seek programs and services substantially equivalent to the ones offered to males.

If you feel that you have been unfairly discriminated against, there are two different legal steps you can take. Which step you take depends on the type of discrimination you think you are experiencing. If the discrimination concerns vocational and educational programs in prison, you can bring a claim under a federal law called Title IX of the Education Amendments Act of 1972.<sup>7</sup> Otherwise, you can bring a challenge under the Equal Protection Clause of federal and state constitutions.<sup>8</sup> Each type of action will be explained below.

*The Equal Protection Clause:* The Equal Protection Clause guarantees that people must be treated equally if they are similarly situated. To win an equal protection challenge, you must demonstrate that:

- (1) groups of incarcerated men and women are “similarly situated,”<sup>9</sup>
- (2) the groups are treated differently on the basis of gender, and
- (3) the difference in treatment is not “substantially related” to a legitimate government objective.<sup>10</sup>

“Similarly situated” means that two groups share common features, or are the same in all major ways, except for their gender.<sup>11</sup> Courts have held that groups of incarcerated men and women *are*

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7. 20 U.S.C. § 1681.

8. *See, e.g.* *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1043–1044 (S.D.N.Y. 1995) (holding that providing a sensorially disabled unit for men but not women violated equal protection); *West v. Virginia Dept. of Corr.*, 847 F. Supp. 402, 407–409 (W.D. Va. 1994) (holding failure to provide boot camp programs for women as well as men violated equal protection); *Casey v. Lewis*, 834 F. Supp. 1477, 1550–1552 (D. Ariz. 1993) (holding inequalities in mental health treatment available to men and women violated equal protection); *McCoy v. Nevada Dept. of Prisons*, 776 F. Supp. 521, 523–524 (D. Nev. 1991) (plaintiffs showed enough evidence that their equal protection rights were violated where incarcerated men had access to a wider variety of recreational and educational programs than women, including training for larger a range of careers); *Canterino v. Wilson*, 546 F. Supp. 174, 210–212 (W.D. Ky. 1982), vacated and remanded on other grounds, 869 F.2d 948 (6th Cir. 1989) (failure to provide incarcerated women with parity in the offering of institutional jobs and vocational training programs violated equal protection).

9. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313, 320 (1985) (“The Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.”). This United States Supreme Court case involved zoning ordinances for a house for the mentally ill. The zoning ordinances were found to violate equal protection. The test from this case is used in cases involving equal protection challenges on the basis of gender in prisons. *See, e.g.*, *Betts v. McCaughy*, 827 F. Supp. 1400, 1405 (W.D. Wis. 1993); *McCoy v. Nev. Dept. of Prisons*, 776 F. Supp. 521, 523 (D. Nev. 1991).

10. *Roubideaux v. N.D. Dept. of Corr. & Rehab.*, 570 F.3d 966, 974–975 (8th Cir. 2009).

11. *Betts v. McCaughy*, 827 F. Supp. 1400, 1405 (W.D. Wis. 1993) *aff’d*, 19 F.3d 21 (7th Cir. 1994).

similarly situated in some circumstances.<sup>12</sup> In other cases, however, courts have decided that incarcerated men and women are not similarly situated. Some of the reasons why include the number of incarcerated people in their prison, the lengths of their sentences and differences in security classifications.<sup>13</sup> If you are able to show that your group is similarly situated to a group of incarcerated men, the next step is to look at the type of different treatment you receive. Incarcerated men and women do not need to be treated identically. The Constitution only requires that your treatment be “substantially equivalent” or that incarcerated men and women receive “parity” of treatment.<sup>14</sup> In other words, you need to show that the difference in treatment that you are challenging is meaningful. For example, one court held that small differences in the grooming accessories made available to incarcerated men and women were not significant enough to amount to a constitutional violation.<sup>15</sup>

The last step is to look at the reason for the different treatment. Prisons are actually allowed to discriminate between similarly situated incarcerated men and women. They can do this if the different treatment is “substantially related” to important prison goals. These goals may include safety and security.<sup>16</sup> For example, the Third Circuit found that a County jail’s policy of serving hot meals to incarcerated women in a restricted housing unit (RHU), while serving cold, bagged meals to incarcerated men in the RHU, was “rationally connected” to a legitimate and neutral government objective.<sup>17</sup> Before the policy, the jail gave hot meals to men in the RHU, but the men began to use the trays and utensils as weapons. The jail did not have the same problem with women in the RHU.<sup>18</sup> Based on those facts, the court held the jail’s decision to only serve hot meals to women was “rationally connected” to the legitimate government interest in safety and security. For more information on how to make a claim under the Equal Protection Clause, read *JLM*, Chapter 16(B)(2)(c), “Fourteenth Amendment Claims: The Equal Protection Clause.”

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12. See *Sassman v. Brown*, 99 F. Supp. 3d 1223, 1241 (E.D. Cal. 2015) (incarcerated men who otherwise met the criteria for California’s Alternative Custody Program were similarly situated to the incarcerated women who met the criteria); *Woods v. Horton*, 84 Cal. Rptr. 3d 332, 344 (Cal. Ct. App. 2008) (incarcerated men who had experienced significant levels of domestic violence as victims were similarly situated to women for the purpose of the need for domestic violence programs).

13. See *Klinger v. Dept. of Corr.*, 31 F.3d 727, 731–732 (8th Cir. 1994) (women incarcerated at an all-female prison were not similarly situated to men incarcerated at an all-male facility because of the differences in the sizes of the institutions, differences in the length of incarceration and differences in security classification); *Pargo v. Elliott*, 894 F. Supp. 1243, 1261 (S.D. Iowa 1995) (incarcerated men and women were not similarly situated for the purposes of security and programming where the men were housed in different facilities by security classification and the women were housed together, served shorter sentences, and had special characteristics).

14. *Betts v. McCaughtry*, 827 F. Supp. 1400, 1406 (W.D. Wis. 1993) *aff’d*, 19 F.3d 21 (7th Cir. 1994); *McCoy v. Nev. Dept. of Prisons*, 776 F. Supp. 521, 523 (D. Nev. 1991): “courts have required that female prisoners be treated ‘in parity’ with male prisoners.”

15. *Betts v. McCaughtry*, 827 F. Supp. 1400, 1406 (W.D. Wis. 1993) *aff’d*, 19 F.3d 21 (7th Cir. 1994).

16. *Roubideaux v. N.D. Dept. of Corr. & Rehab.*, 570 F.3d 966, 974–975 (8th Cir. 2009).

17. *Mathis v. Monza*, 530 F. App’x 124, 127–128 (3d Cir. 2013).

18. *Mathis v. Monza*, 530 F. App’x 124, 127–128 (3d Cir. 2013); see also *Roubideaux v. N.D. Dept. of Corr. & Rehab.*, 570 F.3d 966, 974–975 (8th Cir. 2009) (incarcerated women challenged a statute under which, when there was insufficient space in state prisons, women were placed in county jails with limited prison programming, but men were not placed in those jails. The Court held that the statute was substantially related to the important governmental interest in providing adequate segregated housing for incarcerated women); *Davie v. Wingard*, 958 F. Supp. 1244, 1253 (S.D. Ohio 1997) (Differences in regulations governing hair length and styles for incarcerated men and women in the state prison system were justified by the much lower incidence of contraband concealment, escape, gang participation, and violence by incarcerated women compared to male prison population. Therefore, the different treatment was substantially related to the goal of promoting prison safety, security and discipline.). But see *Sassman v. Brown*, 99 F. Supp. 3d 1223, 1243–1244 (E.D. Cal. 2015) (Excluding men from an early release program was *not* substantially related to the government interest of reducing recidivism for women because the state did not show why excluding men from the program was necessary to achieve this goal).

*Title IX:* If you feel that your institution does not provide the same vocational and educational programs as the men's prisons, you can also bring a discrimination claim under Title IX of the Education Amendments of 1972.<sup>19</sup> Title IX is a federal law that prohibits sex discrimination in federally funded educational programs and activities. The law states that “[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”<sup>20</sup> For example, if you know that the men's prison has a college program, and the women's prison does not, you might have a Title IX claim. Similarly, if you are aware that the men's prison has an athletics or sports program, and the women's prison does not, you might have a Title IX claim.

It may also be easier to win a Title IX claim than an Equal Protection claim. One reason for this is that in Title IX claims, you do not have to show that the two groups are “similarly situated.” Courts have found that federal law already assumes that male and female participants in federally funded educational programs are similarly situated.<sup>21</sup> Thus, they are entitled to the same opportunities and programs. Also, courts have held that Title IX holds prisons to a higher standard than the one required by the Equal Protection Clause. Under the Equal Protection Clause, prisons must treat similarly-situated incarcerated people with “parity” (discussed above), while Title IX requires “equality.”<sup>22</sup> For Title IX claims, courts consider multiple factors when deciding whether the discrimination is legal. Whether the discrimination is “reasonably related” to a legitimate prison interest is only one of the factors courts consider when deciding whether it is legal.<sup>23</sup> Other factors include: whether the prison has a legitimate security interest in providing very different educational opportunities to men than to women, and cost and management concerns.<sup>24</sup>

For example, in one case incarcerated women sued their prison because incarcerated women could only choose from two vocational classes while incarcerated men could choose from twelve. The prison officials said the difference in class numbers was due to a “legitimate penological interest” (a justifiable interest of the prison) because the male prison population was bigger. The court said that this by itself did not prevent the women's claim.<sup>25</sup> The court decided that the incarcerated women were entitled to equal opportunities to the incarcerated men. Equal opportunity was not defined as being entitled to the same number of classes. But, it was decided that women are entitled to the same diversity of classes as well as access to some of the male classes.<sup>26</sup>

### C. Adequate Medical Care

Both incarcerated men and women have the right to adequate medical care, as explained in Chapter 23 of the *JLM*, “Your Right to Adequate Medical Care.” This Part addresses medical needs specific to incarcerated women. Therefore, you should be sure to read Chapter 23 for any concerns you have regarding your right to medical care that may be relevant to both men and women. Research has shown that incarcerated women have different, and often more severe, health problems than incarcerated men.<sup>27</sup> Many incarcerated women suffer from chronic and complex health conditions

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19. 20 U.S.C. § 1681.

20. 20 U.S.C. § 1681(a).

21. *See* *Klinger v. Dept. of Corr.*, 107 F.3d 609, 614 (8th Cir. 1997).

22. *Jeldness v. Pearce*, 30 F.3d 1220, 1228 (9th Cir. 1984).

23. *Jeldness v. Pearce*, 30 F.3d 1220, 1230 (9th Cir. 1984).

24. *Jeldness v. Pearce*, 30 F.3d 1220, 1230 (9th Cir. 1984).

25. *Jeldness v. Pearce*, 30 F.3d 1220, 1224, 1230–1231 (9th Cir. 1984).

26. *Jeldness v. Pearce*, 30 F.3d 1220, 1229 (9th Cir. 1984).

27. According to the World Health Organization, “Women in prison often have more health problems than male prisoners. . . . Women's prisons require a gender specific framework for health care which pays special attention for reproductive health, mental illness, substance use problems and physical and sexual abuse. Timely access to all services available for women outside prison, should be available for women inside prison. As with all prisoners, confidentiality of medical records should always be guaranteed.” United Nations Office of Drugs and Crime & World Health Organization Europe, *Women's Health in Prison: Correcting Gender Inequities in Prison Health* (2009), available at <https://www.unodc.org/documents/hiv->

resulting from lives of poverty, drug use, family violence, sexual assault, adolescent pregnancy, malnutrition, and poor health care.<sup>28</sup> Incarcerated women also suffer from mental illness at higher rates than incarcerated men. As of January 2007, more than 42% of women in New York's prisons had been diagnosed with a serious mental illness, compared to nearly 12% of incarcerated men.<sup>29</sup> The prison environment does not always take into account women's specific health needs. For example, prisons often do not provide accessible hygiene products during menstruation, adequate nutrition for pregnant women, or specialized care for women who are infected with diseases like HIV/AIDS.<sup>30</sup>

If you are concerned about the level of medical care that is provided in your prison, there are five possible steps you can take:

- 1) The first thing you should do is consult your institution's administrative grievance procedure. You should attempt to resolve your concerns following your institution's procedure before taking your concerns to court (see Chapter 15 of the *JLM*, "Inmate Grievance Procedures").
- 2) Only if you have "exhausted" (used up) all of your administrative remedies without success should you consider filing a claim in court.
- 3) If you think that prison officials have been "deliberately indifferent" towards your medical needs, you may want to pursue a claim that your Eighth Amendment rights were violated (see *JLM*, Chapter 16, Using 42 U.S.C. 1983 and 28 U.S.C. 1331 to Obtain Relief From Violations of Federal Law).
- 4) If you think that officials were just negligent (careless) towards your medical treatment, you may want to file a tort action in a state court (or in the Court of Claims, if you are in New York).
- 5) If you are trying to get the prison to provide you with specific medical care, rather than monetary damages, you may want to file an Article 78 petition in state court (if you are in New York). An Article 78 petition asks for a special proceeding against body or officer.<sup>31</sup>

See Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care," and Chapter 5, "Choosing a Court & a Lawsuit: An Overview of the Options," for more information on choosing your claim and your court.

### 1. Eighth Amendment Claim for Adequate Medical Care

You have a federal right under the Eighth Amendment to receive adequate medical care for your serious medical needs.<sup>32</sup> For information on bringing a claim that your Eighth Amendment rights were violated, see *JLM*, Chapter 16, "Using 42 U.S.C. 1983 and 28 U.S.C. 1331 to Obtain Relief from Violations of Federal Law." Generally, to make an Eighth Amendment claim, you must show that:

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aids/WHO\_EURO\_UNODC\_2009\_Womens\_health\_in\_prison\_correcting\_gender\_inequity-EN.pdf (last visited Feb. 16, 2020).

28. United Nations Office of Drugs and Crime & World Health Organization Europe, *Women's Health in Prison: Correcting Gender Inequities in Prison Health* (2009), available at [https://www.unodc.org/documents/hiv-aids/WHO\\_EURO\\_UNODC\\_2009\\_Womens\\_health\\_in\\_prison\\_correcting\\_gender\\_inequity-EN.pdf](https://www.unodc.org/documents/hiv-aids/WHO_EURO_UNODC_2009_Womens_health_in_prison_correcting_gender_inequity-EN.pdf) (last visited Feb. 16, 2020).

29. Women in Prison Project, Correctional Association of New York, *Women in Prison Fact Sheet* (Apr. 2009), available at [http://www.ncdsv.org/images/WIPP\\_Wome\\_in\\_Prison\\_Fact\\_Sheet\\_4-2009.pdf](http://www.ncdsv.org/images/WIPP_Wome_in_Prison_Fact_Sheet_4-2009.pdf) (last visited Feb. 16, 2020).

30. United Nations Office of Drugs and Crime & World Health Organization Europe, *Women's Health in Prison: Correcting Gender Inequities in Prison Health* (2009), available at [https://www.unodc.org/documents/hiv-aids/WHO\\_EURO\\_UNODC\\_2009\\_Womens\\_health\\_in\\_prison\\_correcting\\_gender\\_inequity-EN.pdf](https://www.unodc.org/documents/hiv-aids/WHO_EURO_UNODC_2009_Womens_health_in_prison_correcting_gender_inequity-EN.pdf) (last visited Nov. 10, 2019).

31. N.Y. C.P.L.R. 7804 (McKinney 2008).

32. The main case in this area is *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976), in which the Supreme Court first held that deliberate indifference to the serious medical needs of an incarcerated person violates the Eighth Amendment. The Court in that case said that deliberate indifference to the serious medical needs of incarcerated people constitutes "the unnecessary and wanton infliction of pain," or cruel and unusual punishment, which is prohibited by the Eighth Amendment.

- (1) You were denied adequate medical care, and the denial was “sufficiently grave”;<sup>33</sup> and
- (2) The prison official knew about the seriousness of your condition and exhibited “deliberate indifference” to your medical needs.<sup>34</sup>

“Deliberate indifference” means that the prison official had some idea of the seriousness of your medical condition and still did not provide you with necessary care.<sup>35</sup> A court may find “deliberate indifference” where a prison has a “pattern or practice” of providing less than adequate medical services and facilities to people incarcerated at the prison over a long period of time.<sup>36</sup>

As an incarcerated woman, you have a right to adequate gynecological care and general physical examinations.<sup>37</sup> In 1977, incarcerated women at Bedford Hills Correctional Facility, New York’s maximum-security prison for women, brought a lawsuit against the facility. They claimed that there was an unconstitutionally defective medical care system.<sup>38</sup> They argued that the prison failed to provide gynecological and general physical examinations when the incarcerated people were first admitted, and did not provide proper follow-up care and recordkeeping.<sup>39</sup> The Second Circuit Court of Appeals found that extremely long delays and outright denial of medical care violated the incarcerated women’s constitutional rights.<sup>40</sup>

Incarcerated women who are HIV positive are entitled to additional gynecological care. In the lawsuit described in the previous paragraph, Bedford Hills was required to provide its incarcerated women with improved services. These services included access to physicians who were knowledgeable about the treatment of HIV/AIDS, and more frequent gynecological examinations for incarcerated people with HIV/AIDS.<sup>41</sup> In New York, the DOCCS has a written policy on Pap smears for women with HIV. It requires that HIV-positive women have Pap tests every six months, no matter what the results are.<sup>42</sup> In a recent report on reproductive justice in prisons, the Correctional Association of New

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33. *Helling v. McKinney*, 509 U.S. 25, 35, 113 S. Ct. 2475, 2481, 125 L. Ed. 2d 22, 32–33 (1993). “Sufficiently serious” means that your future health has been unreasonably endangered, and that it is contrary to current standards of decency for you to be kept under such conditions.

34. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823–824 (1994). This case involved a failure to protect an incarcerated person from harm, not a failure to provide adequate medical care. However, the case is relevant to claims involving medical care because it explains the meaning of “deliberate indifference.” The Court said that the official must act or fail to act while *actually aware* of a substantial risk that serious harm will be suffered by the incarcerated person. Prison officials only need to be aware of the *risk* of harm. They do not need to *intend* or want to cause harm. Deliberate indifference can sometimes be proven from the fact that the risk would be obvious. *See Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976).

35. *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976) (claim brought by an incarcerated person failed because he did not establish that prison officials had been deliberately indifferent to his medical needs. After he injured his back while working at the prison, medical personnel treated him on 17 occasions over three months. The Court held that the failure to properly diagnose and treat him might have amounted to medical malpractice, but that is not enough to constitute a constitutional violation); *see also Spavone v. N.Y. State Dept. of Corr. Services*, 719 F.3d 127, 138–139 (2d Cir. 2013).

36. *See, e.g., Todaro v. Ward*, 565 F.2d 48, 52–53 (2d Cir. 1977) (finding that a prison’s medical care violated the Eighth Amendment because of inadequate access to medical staff, the use of a “lobby clinic” for screening complaints, and record-keeping procedures that caused substantial delays).

37. *Todaro v. Ward*, 431 F. Supp. 1129, 1131–1133 (S.D.N.Y. 1977), *aff’d*, 565 F.2d 48 (2d Cir. 1977).

38. *Todaro v. Ward*, 431 F. Supp. 1129, 1131 (S.D.N.Y. 1977), *aff’d*, 565 F.2d 48 (2d Cir. 1977).

39. *Todaro v. Ward*, 431 F. Supp. 1129, 1137, 1145–1147 (S.D.N.Y. 1977).

40. *Todaro v. Ward*, 565 F.2d 48, 53 (2d Cir. 1977). The court appointed a monitor to make sure that the prison complied with the improvements ordered by the court. In August 2002, the court’s monitor found that after 20 years, Bedford Hills had finally complied with the court’s judgment, which included providing gynecological care and infectious disease care for women with HIV/AIDS. By agreement with the State of New York, the Prisoners’ Rights Project of the Legal Aid Society continued monitoring the Facility until August 2004 to ensure that reforms were institutionalized.

41. Kate Walsh, *Inadequate Access: Reforming Reproductive Health Care Policies for Women Incarcerated in New York State Correctional Facilities*, 50 COLUMBIA J. OF L. & SOC. PROBLEMS 45, 68 (2016).

42. Women in Prison Project, Correctional Association of New York, *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* 165, 219 (Feb. 2015), available at

York noted that the DOCCS policy on this issue differ from community standards.<sup>43</sup> According to the report, community standards require that HIV-positive women should have two Pap tests six months apart for the first year after their diagnosis. These tests should be followed by annual tests if the results are normal. They should be followed by tests at least every six months if they are not. DOCCS' written policy also does not specify that HIV-positive women with abnormal Pap smear results should be referred for a colposcopy (a cervical exam) to rule out more serious cervical disease.<sup>44</sup> For more information regarding your legal rights about HIV/AIDS in prison, see Chapter 26 of the *JLM*, "Infectious Diseases (AIDS, Hepatitis and Tuberculosis) in Prison."

Although the Eighth Amendment requires you to show "deliberate indifference," state tort law often only requires you to show that the doctor or prison official was *negligent*.<sup>45</sup> Negligent medical care means that the care is below the standard that a reasonable medical provider would give. To find out the specific requirement in your state, consult Chapter 2 of the *JLM*, "Introduction to Legal Research."

## 2. Abortion

### (a) Your Right to Choose: Access to Elective Abortions

An "elective abortion" is the voluntary termination of a pregnancy, where a woman personally chooses to have her pregnancy ended for non-emergency reasons. You do not lose your legal right to decide whether to continue a pregnancy or to have an elective abortion just because you are in prison.<sup>46</sup> However, states are allowed to place restrictions or limitations on a woman's right to an abortion, like requiring parental consent for pregnant minors. States can have these restrictions or limitations as long as they do not place an "undue burden" on a woman's right to choose.<sup>47</sup> An undue burden exists if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus is "viable" (able to live outside the womb).<sup>48</sup> A provision of a law is invalid if an undue burden exists. Courts decide what kind of obstacles might count as an "undue burden." Prisons and jails sometimes have regulations that make it difficult to obtain an abortion. So, if you think you could be pregnant and might want an abortion, you should get a pregnancy test as soon as possible. You can do this by contacting your prison's medical center.

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<https://static.prisonpolicy.org/scans/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf>  
(last visited Feb. 16, 2020).

43. Women in Prison Project, Correctional Association of New York, *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* 165 (Feb. 2015), available at <https://static.prisonpolicy.org/scans/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf> (last visited Feb. 16, 2020).

44. Women in Prison Project, Correctional Association of New York, *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* 165 (Feb. 2015), available at <https://static.prisonpolicy.org/scans/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf> (last visited Feb. 16, 2020).

45. *Knight v. State*, 127 A.D.3d 1435, 1435, 6 N.Y.S.3d 807, 808 (3d Dept. 2015) ("Where an inmate alleges that defendant has abdicated its duty to provide adequate medical care, he or she must present competent evidence demonstrating defendant's common-law negligence or that it departed from accepted standards of care and that such deviation was the proximate cause of the sustained injuries").

46. American Civil Liberties Union, *State Standards for Pregnancy-Related Health Care and Abortion for Women in Prison*, available at <https://www.aclu.org/state-standards-pregnancy-related-health-care-and-abortion-women-prison-0> (last visited Nov. 7, 2019); see *Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008); *Victoria W. v. Larpenter*, 369 F.3d 475 (5th Cir. 2004); *Monmouth County Corr. Inst'l Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987); *Doe v. Barron*, 92 F. Supp. 2d 694 (S.D. Ohio 1999); *Doe v. Arpaio*, 150 P.3d 1258 (Ariz. Ct. App. 2007).

47. See *Planned Parenthood v. Casey*, 505 U.S. 833, 876–877, 112 S. Ct. 2791, 2820–2821, 120 L. Ed. 2d 674, 714–715 (1992).

48. See *Planned Parenthood v. Casey*, 505 U.S. 833, 877, 112 S. Ct. 2791, 2820–2821, 120 L. Ed. 2d 674, 714–715 (1992).

There are two main types of prison abortion policies that have been challenged in the courts:<sup>49</sup>

- (1) Policies that say no incarcerated person can be transported off prison grounds to get an abortion (assuming the abortion is not medically necessary),<sup>50</sup> and
- (2) Court order provisions that require incarcerated women to get a court order before they can get an abortion.<sup>51</sup>

In both of these kinds of cases, courts have relied on the Supreme Court's "reasonableness" standard as set forth in *Turner v. Safley*, to decide whether the challenged policies violated a woman's right to an abortion under the Fourteenth Amendment.<sup>52</sup> *Turner* also stated that prison regulations that restrict the rights of incarcerated people must be substantially related to some legitimate (justified) concern of the prison. In *Turner*, the Supreme Court held that restrictions on the right of incarcerated people to marry non-incarcerated people were not reasonably related to any prison objective.<sup>53</sup>

When considering whether prison policies involving blanket prohibitions and court order provisions are unreasonable, courts consider a range of concerns. These concerns include the safety risk of transporting incarcerated people off prison grounds, and the need to allocate scarce resources and time.<sup>54</sup> To show that it is unreasonable to refuse to transport women to clinics or hospitals for an abortion, courts have cited the prison's ability to provide transportation for other kinds of medical examinations during pregnancy, including delivery.<sup>55</sup> Likewise, as the Third Circuit explained in *Monmouth*, prisons already have to provide all pregnant incarcerated people with proper pre-natal and post-natal care, so taking an incarcerated person to get an abortion does not require prisons to use more resources than they are already required to use.<sup>56</sup> The *Monmouth* court further found that prison officials must provide abortion services even if the incarcerated person cannot pay for them.<sup>57</sup>

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49. For summary and analysis of these cases, see Diana Kasdan, *Abortion Access for Incarcerated Women: Are Correctional Health Practices in Conflict with Constitutional Standards?* 41 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 59, 59 (Mar. 2009), available at <http://www.guttmacher.org/pubs/psrh/full/4105909.pdf> (last visited Feb. 16, 2020). See also 2007 (11) AELE Monthly Law Journal 301, 304–308 (Nov. 2007), available at <http://www.aele.org/law/2007JBNOV/2007-11MLJ301.pdf> (last visited Nov. 7, 2019).

50. See *Roe v. Crawford*, 514 F.3d 789, 800–801 (8th Cir. 2008).

51. See *Monmouth County Corr. Inst'l Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987), *Doe v. Arpaio*, 150 P.3d 1258 (Ariz. Ct. App. 2007).

52. *Turner v. Safley*, 482 U.S. 78, 89–91, 107, S. Ct. 2254, 2261–2262, 96 L. Ed. 2d 64, 79–80 (1987). The reasonableness test requires that courts consider "(1) the rational relationship between the regulation and the governmental interest put forward to justify it; (2) the existence of alternative means to exercise the asserted right; (3) the impact on prison resources of accommodating the asserted right; and (4) the existence of "ready alternatives" to accommodate the asserted right at "*de minimus*" cost to valid penological interests." when deciding whether or not to strike down a prison regulation. *Monmouth County Corr. Inst'l Inmates v. Lanzaro*, 834 F.2d 326, 332 (3d Cir. 1987) (citing *Turner v. Safley*, 482 U.S. 78, 91, 107, S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 80 (1987)).

53. *Turner v. Safley*, 482 U.S. 78, 91, 107, S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 80 (1987).

54. Diana Kasdan, *Abortion Access for Incarcerated Women: Are Correctional Health Practices in Conflict with Constitutional Standards?*, 41 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 59, 60 (Mar. 2009), available at <http://www.guttmacher.org/pubs/psrh/full/4105909.pdf> (last visited Feb. 16, 2020).

55. *Roe v. Crawford*, 514 F.3d 789, 795 (8th Cir. 2008); *Doe v. Arpaio*, 214 Ariz. 237, 242, 150 P.3d 1258, 1263 (Ct. App. 2007) (finding prison's court order policy unreasonable and noting that the prison already transports incarcerated people without a court order for other medical care and court dates).

56. *Monmouth County Corr. Inst'l Inmates v. Lanzaro*, 834 F.2d 326, 341 (3d Cir. 1987) (citing *Turner v. Safley*, 107 S. Ct. 2254, 2262 (1987)).

57. *Monmouth County Corr. Inst'l Inmates v. Lanzaro*, 834 F.2d 326, 351 (3d Cir. 1987); see also *Rust v. Sullivan*, 500 U.S. 173, 178, 203, 111 S. Ct. 1759, 1764, 1778, 114 L. Ed. 2d 233, 245–246, 262 (1991) (upholding federal regulation prohibiting federally funded medical clinics from counseling or referring women for abortion); *Webster v. Reproductive Health Serv.*, 492 U.S. 490, 511, 109 S. Ct. 3040, 3053, 106 L. Ed. 2d 410, 431 (1989) (upholding Missouri statute prohibiting the use of public facilities or personnel from performing non-therapeutic abortions); *Harris v. McRae*, 448 U.S. 297, 302, 100 S. Ct. 2671, 2680, 65 L. Ed. 2d 784, 795 (1980) (upholding congressional restriction of Medicaid funds for any abortion unnecessary to protect the life of the mother, or in



Your right to access an abortion varies depending on the kind of prison you are in and where it is located. In federal prison, federal regulations require incarcerated women to be offered medical, religious, and social counseling before having an abortion.<sup>58</sup> The incarcerated person must be allowed to make the final decision herself.<sup>59</sup> Federal prisons do not have to pay for non-medically necessary abortions.<sup>60</sup> However, if an incarcerated person requests an abortion, and is entitled to one under state law, then a prison official is required to transport her to a clinic.<sup>61</sup> In state prisons, the rights of incarcerated women to get abortions will depend on the state-specific abortion laws, which vary greatly.<sup>62</sup>

In New York, under a law passed in 2019, abortions are legal if they are performed in the first twenty-four weeks of the pregnancy.<sup>63</sup> They can also be legal after twenty-four weeks if the mother's life or health is at risk or if the fetus is nonviable.<sup>64</sup> This new law should still apply to incarcerated people, though DOCCS does not currently have any written guidelines regarding abortion access for incarcerated people. Delays can also be a problem. In the Second Circuit case of *Bryant v. Maffucci*, the prison took so long to schedule the incarcerated woman's abortion that the twenty-four-week deadline had passed. She was unable to get an abortion.<sup>65</sup> The court found that the prison officials had not violated the Eighth Amendment because they were "merely negligent," rather than "deliberately indifferent" to the incarcerated woman's need for an abortion (see above for definitions of these terms).<sup>66</sup>

Some states, like California, have codes that say incarcerated women have the same right to an abortion as any other woman in the state.<sup>67</sup> The Third Circuit, which covers Delaware, New Jersey, and Pennsylvania, has recognized that the denial of elective abortions is a serious medical need. It has also recognized that this denial will have "irreparable" physical and emotional consequences for incarcerated people who do not want to carry their pregnancy to term.<sup>68</sup> However, other courts have not ruled similarly to the Third Circuit. Many courts do not consider non-elective abortion to be a serious medical need.<sup>69</sup>

The Eighth Circuit rejected the Missouri Department of Corrections' claim that its ban on transporting incarcerated women for abortions was reasonable. The Department argued that the ban applied equally to all elective procedures. In doing so, they made it just a "specific application of a general policy." The court disagreed, finding that "abortion [was] treated differently" from other medical care at the prison, and that this different treatment was not reasonable.<sup>70</sup>

The Fifth Circuit upheld a restriction that required a court order before abortions. The court accepted the jail's insistence that the court-order requirement did not target abortion because it

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cases involving rape or incest). *But see* *Roe v. Crawford*, 514 F.3d 789, 800-801 (8th Cir. 2008) (finding that the Monmouth decision was "exceptionally broad" in requiring prisons to pay for elective abortions, and that "the Supreme Court has made it clear the state has no affirmative duty to provide, fund, or help procure an abortion for any member of the general population.").

58. 28 C.F.R. § 551.23(a)–(c) (2016).

59. 28 C.F.R. § 551.23(a) (2016).

60. *Harris v. McRae*, 448 U.S. 297, 326–327, 100 S. Ct. 2671, 2693, 65 L.Ed.2d 784, 811 (1980).

61. *See Harris v. McRae*, 448 U.S. 297, 326, 100 S. Ct. 2671, 2693, 65 L.Ed.2d 784, 811 (1980); *Monmouth County Corr. Inst'l Inmates v. Lanzaro*, 834 F.2d 326, 351–352 (3d Cir. 1987).

62. For more information on your state's laws governing access to abortions as well as pregnancy-related healthcare, see The American Civil Liberties Union, *State Standards for Pregnancy-Related Health Care and Abortion for Women in Prison*, available at <https://www.aclu.org/state-standards-pregnancy-related-health-care-abortion-women-prison-0> (last visited Feb. 16, 2020).

63. N.Y. PUB. HEALTH LAW § 2599-bb (Consol. 2019).

64. N.Y. PUB. HEALTH LAW § 2599-bb (Consol. 2019).

65. *Bryant v. Maffucci*, 923 F.2d 979, 979 (2d Cir. 1991).

66. *Bryant v. Maffucci*, 923 F.2d 979, 985 (2d Cir. 1991).

67. CAL. PENAL CODE § 4028 (West 2010).

68. *Monmouth County Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 349 (3d Cir. 1987).

69. *Roe v. Crawford*, 514 F.3d 789, 800–801 (8th Cir. 2008).

70. *Roe v. Crawford*, 514 F.3d 789, 797 n.6 (8th Cir. 2008).

applied equally to transportation for other non-emergency medical care.<sup>71</sup> This case applies throughout Mississippi, Louisiana, and Texas; if you live in any of these states, you might have to get a court order before an abortion. It may be difficult to challenge the prison's policy in court.

### (b) Medically Necessary Abortions: Your Right under the Eighth Amendment

At a minimum, courts agree that abortion is a serious medical need if it is necessary to preserve the incarcerated woman's health. For example, the Eighth Circuit said that a "medically necessary abortion certainly could qualify as a serious medical need."<sup>72</sup> The decision does not define "medically necessary" in the prison abortion context. But under long-standing Supreme Court precedent, medically necessary abortions include those that, in a physician's professional medical judgment, are necessary to prevent harm to the woman's physical or mental health.<sup>73</sup> Because prisons have to provide for incarcerated people's serious medical needs, the prison authorities must pay for your medically necessary abortion if you cannot afford to pay for it yourself.<sup>74</sup> If you believe that you will suffer serious physical or mental health problems if you do not have an abortion and your doctor has confirmed this with you, you could have an Eighth Amendment claim if your prison denies you the right to an abortion.

## 3. Pregnancy

Many women report being pregnant at the time of their incarceration, including 4% of women in state prisons, 3% of women in federal prisons, and about 5% of women in jails nationwide.<sup>75</sup> In New York State, DOCCS requires incarcerated women to take pregnancy tests when you first enter prison and when you are removed from a work release program. You can also ask for a pregnancy test at any other time during your incarceration.<sup>76</sup>

In New York state, a pregnant incarcerated person has the right to complete and thorough prenatal care, which includes medical examinations, HIV education, and advice about exercise, safety, and nutrition.<sup>77</sup> Pregnant incarcerated people in New York are housed at Taconic Correctional Facility and Bedford Hills Correctional Facility. A recent report found that both facilities generally provide pregnant incarcerated people with access to adequate pre-natal care, including pre-natal education and vitamins. However, the report also noted problems including long waiting times for appointments, insufficient food, and inadequate dental care for pregnant women.<sup>78</sup> In New York state prisons,

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71. *Victoria W. v. Larpenter*, 369 F.3d 475, 485 (5th Cir. 2004).

72. *Roe v. Crawford*, 514 F.3d 789, 799 (8th Cir. 2008) (finding that an elective abortion sought for non-medical reasons does not rise to the level of a "serious medical need" under the Eighth Amendment).

73. *Doe v. Bolton*, 410 U.S. 179, 192, 93 S. Ct. 739, 747, 35 L. Ed. 2d 201, 212–213 (1973).

74. *See, e.g., Monmouth Cty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 351–352 (3d Cir. 1987) (holding that prisons must pay for medically necessary abortions that incarcerated women cannot afford themselves); *Right to Choose v. Byrne*, 450 A.2d 925, 937, 91 N.J. 287, 310 (1982) (holding that the State may not jeopardize the health of poor women by excluding medically necessary abortions from a system providing them all other medically necessary care); *see also Harris v. McRae*, 448 U.S. 297, 322–323 100 S. Ct. 2671, 2691 65 L. Ed.2d 784, 808–809 (1980).

75. *Women in Prison Fact Sheet*, CORRECTIONAL ASSOCIATION OF NEW YORK WOMEN IN PRISON PROJECT (Apr. 2009), available at [http://www.ncdsv.org/images/WIPP\\_Wome\\_in\\_Prison\\_Fact\\_Sheet\\_4-2009.pdf](http://www.ncdsv.org/images/WIPP_Wome_in_Prison_Fact_Sheet_4-2009.pdf) (last visited Feb. 16, 2020).

76. Tamar Kraft-Stolar, *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons*, WOMEN IN PRISON PROJECT, CORRECTIONAL ASSOCIATION OF NEW YORK, 88 (Feb. 2015), available at <https://static.prisonpolicy.org/scans/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf> (last visited Feb. 16, 2020).

77. N.Y. COMP. CODE R. & REGS. tit. 9, § 7651.17(a).

78. Tamar Kraft-Stolar, *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons*, WOMEN IN PRISON PROJECT, CORRECTIONAL ASSOCIATION OF NEW YORK, 97 (Feb. 2015), available at <https://static.prisonpolicy.org/scans/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf> (last visited Feb. 16, 2020).

pregnant incarcerated people are not to be placed in Special Housing Units other than in exceptional circumstances.<sup>79</sup>

Shortly before she is about to give birth, an incarcerated woman should be moved from the prison to a hospital, institution, or clinic and provided with comfortable accommodations, maintenance, and medical care.<sup>80</sup> However, 11 out of 18 respondents to the Correctional Association of New York's recent survey reported that nurses initially dismissed their symptoms of labor. These dismissals resulted in delays in obtaining medical care during labor.<sup>81</sup> A pregnant incarcerated person will be returned to the prison or jail as soon after the birth of her child as the state of her health permits.<sup>82</sup> Bedford Hills is currently the only New York state prison with a nursery program. The program allows women who met certain criteria to live in a special unit with their babies for up to one year, or up to 18 months if the mother will be paroled within that period.<sup>83</sup>

Federal prisons and some state prisons ban the use of shackles or leg irons on pregnant women while being transported to the hospital or during labor. In fact, some courts have recognized this practice as a violation of the Eighth Amendment.<sup>84</sup> As of 2014, twenty-one states including New York, California, Connecticut, Illinois, Washington, and the District of Columbia have laws or policies that explicitly prevent this practice.<sup>85</sup> New York passed an anti-shackling law in 2009. This law covers all state prisons and local jails. It banned the use of any restraints on women during transportation to hospital, throughout labor, delivery and recovery after giving birth, other than in exceptional circumstances.<sup>86</sup> Despite these protections, however, news reports and other surveys have indicated that the rules are not being properly enforced. A recent report by the Correctional Association of New York found that 23 of the 27 women interviewed who had given birth between 2009 and 2013 had been shackled, in violation of the law.<sup>87</sup> A new law passed in December 2015 extends the protection to all transportation throughout a woman's pregnancy and for eight weeks after the woman gives birth,

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79. *NYCLU Lawsuit Secures Historic Reforms to Solitary Confinement*, NEW YORK CIVIL LIBERTIES UNION (Feb. 19, 2014), available at <http://www.nyclu.org/news/nyclu-lawsuit-secures-historic-reforms-solitary-confinement> (last visited Feb. 16, 2020).

80. N.Y. CORRECT. LAW § 611(1) (McKinney 2010).

81. Tamar Kraft-Stolar, *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons*, WOMEN IN PRISON PROJECT, CORRECTIONAL ASSOCIATION OF NEW YORK, 110 (Feb. 2015), available at <https://static.prisonpolicy.org/scans/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf> (last visited Feb. 16, 2020).

82. N.Y. CORRECT. LAW § 611(1) (McKinney 2014).

83. N.Y. CORRECT. LAW § 611(1)–(2) (McKinney 2014).

84. *Nelson v. Corr. Med. Services*, 583 F.3d 522, 534 (8th Cir. 2009) (en banc) (holding it is clearly established that a woman “in the final stages of labor cannot be shackled absent clear evidence that she is a security or flight risk”); *Women Prisoners v. Dist. of Columbia*, 877 F. Supp. 634, 668–669 (D.D.C. 1994), *vacated and modified in part on other grounds*.

85. For the full list of states, see Tamar Kraft-Stolar, *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons*, WOMEN IN PRISON PROJECT, CORRECTIONAL ASSOCIATION OF NEW YORK, 136 (Feb. 2015), available at <https://static.prisonpolicy.org/scans/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf> (last visited Feb. 16, 2020). See also *Shadow Report to the U.N. Committee Against Torture*, THE UNIVERSITY OF CHICAGO HUMAN RIGHTS CLINIC (Sept. 2014), available at [https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/INT\\_CAT\\_CSS\\_USA\\_18526\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/INT_CAT_CSS_USA_18526_E.pdf) (last visited June 19, 2020); Adam Liptak, *Prisons Often Shackle Inmates in Labor*, N.Y. TIMES (2 Mar. 2006), available at <http://www.nytimes.com/2006/03/02/national/02shackles.html?pagewanted=2&r=1> (last visited Feb. 16, 2020); Sadhbh Walshe, *Women are Born Free in the US but Everywhere Give Birth in Chains*, THE GUARDIAN (6 June 2012), available at <http://www.guardian.co.uk/commentisfree/2012/jun/06/women-born-free-give-birth-in-chains> (last visited Feb. 16, 2020).

86. N.Y. CORRECT. LAW § 611(1) (McKinney 2014).

87. Tamar Kraft-Stolar, *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons*, WOMEN IN PRISON PROJECT, CORRECTIONAL ASSOCIATION OF NEW YORK, 6 (Feb. 2015), available at <https://static.prisonpolicy.org/scans/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf> (last visited Feb. 16, 2020).

other than in exceptional circumstances.<sup>88</sup> The new law also prohibits a correctional officer from being present during the birth unless requested by medical staff or the mother.<sup>89</sup> If you are incarcerated in a state where it is against the law to use shackles on women while they are in labor, and if this happens to you, you can sue the prison in state or federal court.<sup>90</sup>

In other states, it is still common to shackle women while on the way to the hospital, or even while they are in labor.<sup>91</sup> If you live in a state that does not currently have anti-shackling laws, you may still try to challenge this practice in federal court as a violation of the Eighth Amendment.

You may also have an Eighth Amendment claim if the prison is deliberately indifferent to your serious medical needs during your pregnancy. In other words, if they show a real lack of care towards you. In a case in Wisconsin, an incarcerated woman charged prison nurses with violating her Eighth Amendment rights by failing to bring her to the hospital when she was in labor.<sup>92</sup> The woman gave birth in her prison cell.<sup>93</sup> The court held that a reasonable jury could conclude that the nurses showed deliberate indifference toward the woman because the nurses ignored her request to go to the hospital and they “only examined [her] through the small tray slot in the cell door, rather than conducting a more comprehensive exam.”<sup>94</sup>

Pregnant incarcerated people have also had some success using state tort law to claim that prisons were negligent (or careless) in treating their medical needs during pregnancy and delivery. (As discussed above, negligence is easier to prove than deliberate indifference, so tort law can be a better option than the Eighth Amendment in the context of medical treatment.) For example, in a Louisiana case, the court found a prison responsible for the wrongful death of a premature baby born to an incarcerated person because the prison was careless in their treatment of the incarcerated woman.<sup>95</sup> Prison officials did not follow the prison’s procedures. They failed to identify the problem despite complaints of bleeding and abdominal pain. They also did not bring the incarcerated person to a hospital until it was too late to prevent the premature birth.<sup>96</sup>

Prisons have a duty to care for you during your pregnancy. They also have a duty to provide you with safe conditions for labor and delivery. If these rights are violated, you may have a claim against the prison under the Eighth Amendment (requiring deliberate indifference) or state tort law (requiring negligence). For information on possible federal claims, see *JLM*, Chapter 14, “Prison Litigation Reform Act,” and Chapter 16, “Using 42 U.S.C. 1983 and 28 U.S.C. 1331 to Obtain Relief from Violations of Federal Laws.” For information on state tort claims, see *JLM*, Chapter 17, “The State’s Duty to Protect You and Your Property: Tort Actions.”

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88. N.Y. CORRECT. LAW § 611(1) (McKinney 2014); *Governor Cuomo Signs Legislation to Prohibit Shackling of Pregnant Inmates During Transportation*, OFFICER OF GOVERNOR ANDREW A. CUOMO (22 Dec. 2015), <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-prohibit-shackling-pregnant-inmates-during-transportation> (last visited Feb. 16, 2020).

89. N.Y. CORRECT. LAW § 611(1)(c) (McKinney 2014); Office of Governor Andrew A. Cuomo, *Governor Cuomo Signs Legislation to Prohibit Shackling of Pregnant Inmates During Transportation* (December 22, 2015), available at <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-prohibit-shackling-pregnant-inmates-during-transportation> (last visited Feb. 16, 2020).

90. In 2012, a lawsuit against Cook County Jail in Illinois settled for \$4.1 million dollars after a group of pregnant women who were incarcerated at the jail sued. The women alleged that they were shackled during labor despite state laws that prevented shackling. Amy Fettig, *\$4.1 Million Settlement Puts Jails on Notice: Shackling Pregnant Women is Unlawful*, ACLU (May 24, 2012), available at <https://www.aclu.org/blog/41-million-settlement-puts-jails-notice-shackling-pregnant-women-unlawful> (last visited Feb. 16, 2020).

91. Lori Teresa Yearwood, *Pregnant and Shackled: Why Inmates are Still Giving Birth Cuffed and Bound*, THE GUARDIAN (24 Jan. 2020), available at <https://www.theguardian.com/us-news/2020/jan/24/shackled-pregnant-women-prisoners-birth> (last visited June 19, 2020).

92. *Doe v. Gustavus*, 294 F. Supp. 2d 1003, 1007 (E.D. Wisc. 2003).

93. *Doe v. Gustavus*, 294 F. Supp. 2d 1003, 1007 (E.D. Wisc. 2003).

94. *Doe v. Gustavus*, 294 F. Supp. 2d 1003, 1009 (E.D. Wisc. 2003).

95. *Calloway v. City of New Orleans*, 524 So. 2d 182, 187 (La. Ct. App. 1988).

96. *Calloway v. City of New Orleans*, 524 So. 2d 182, 187 (La. Ct. App. 1988).

## D. Sexual Assault, Harassment, and Privacy Concerns

Chapter 24, “Your Right to be Free from Assault by Prison Guards and Other Incarcerated People,” and Chapter 25, “Your Right to Be Free From Illegal Body Searches,” address assault and illegal searches in general. This Part focuses on three issues—privacy, sexual harassment, and sexual assault and rape—as they affect incarcerated women specifically.

### 1. Privacy

This Section explains your right to be free from inappropriate pat-downs, involuntary exposure, and illegal body searches.

#### (a) Cross-gender Pat-downs

Under the Fourth Amendment of the Constitution, you are guaranteed the right to be free from unreasonable searches and seizures.<sup>97</sup> A seizure is a capture of your person or property by force or an interference with your person or property by force. However, the Supreme Court has found that this right is severely limited in prison. It is limited because of the security concerns of prison and incarceration.<sup>98</sup> Nonetheless, a few courts have recognized that random searches of incarcerated women by male guards may violate the Eighth Amendment. For example, incarcerated women sued the Washington Corrections Center for Women over the prison policy of random full-body pat-down searches by male guards.<sup>99</sup> Many of these women had been severely sexually and physically abused by men in the past, and experienced severe trauma during these searches. As a result, the Court of Appeals for the Ninth Circuit found that these searches were “cruel and unusual” punishment in violation of the Eighth Amendment.<sup>100</sup> However, following the lead of the Supreme Court, all courts recognize limitations on incarcerated women’s right to privacy when it involves an emergency or another important prison security issue.<sup>101</sup> In New York, the DOCCS policy prohibits male guards from pat frisking incarcerated women unless there are “exigent circumstances.”<sup>102</sup> “Exigent circumstances” are any set of temporary and unforeseen circumstances that require immediate action to combat a threat to the security or institutional order of a facility.<sup>103</sup>

In June 2012, as part of the Prison Rape Elimination Act (PREA), the Department of Justice issued National Standards to help prevent, reduce and punish prison rape, and sexual abuse between incarcerated people or between guards and incarcerated people. The National Standards include a ban on cross-gender pat-down searches of incarcerated women.<sup>104</sup> As of August 20, 2015 (or August 21, 2017 for a facility with fewer than 50 incarcerated people), the National Standards prohibit adult

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97. U.S. CONST. amend IV.

98. *See Hudson v. Palmer*, 468 U.S. 517, 524, 104 S. Ct. 3194, 3198, 82 L. Ed. 2d 393, 400 (1984).

99. *Jordan v. Gardner*, 986 F.2d 1521, 1525–1526 (9th Cir. 1993).

100. *Jordan v. Gardner*, 986 F.2d 1521, 1525–1526 (9th Cir. 1993).

101. *See, e.g., Forts v. Ward*, 621 F.2d 1210, 1215–1218 (2d Cir. 1980) (holding that the privacy interests of incarcerated women did not extend to a protection against being viewed while sleeping by male guards so long as suitable sleepwear was provided); *Carlin v. Manu*, 72 F. Supp. 2d 1177, 1179–1180 (D. Or. 1999) (finding it was acceptable during an emergency removal of incarcerated women to a men’s prison that male guards watched as female guards strip searched the women, since the male guards were not touching the women, and it was a one-time event, as opposed to an indefinite infliction of pain).

102. State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control and Search of Contraband § III(B)(3)(b) (2019), *available at* <http://www.doccs.ny.gov/Directives/4910.pdf> (last visited Feb. 16, 2020). Pat frisks are required when incarcerated people are entering the visiting room, when an entire area of the institution is being searched, when an officer has an articulable basis to suspect an incarcerated person possesses contraband, or as directed by supervisory staff. Pat frisks are also allowed when an incarcerated person is going or returning to housing, program, and recreation areas and outside work details.

103. State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control and Search of Contraband § III(B)(3)(b) (2019), *available at* <http://www.doccs.ny.gov/Directives/4910.pdf> (last visited Feb. 16, 2020).

104. 28 C.F.R. § 115.15 (2020).

prisons, jails, and community confinement facilities from permitting cross-gender pat-down searches of incarcerated women, absent exigent (urgent) circumstances.<sup>105</sup> Facilities are also banned from restricting incarcerated women's access to regularly available programming or other out-of-cell opportunities in order to follow this provision.<sup>106</sup> For more information, please read *JLM*, Chapter 25, "Your Right to Be Free from Illegal Body Searches."

(b) Involuntary Exposure

"Involuntary exposure" is when your naked or partly naked body is seen by guards of the opposite sex, such as when you are using showers or toilets. The Supreme Court in *Turner v. Safley* stated that prison regulations that restrict the rights of incarcerated people must be substantially related to some legitimate (justified) concern of the prison.<sup>107</sup> Thus, your privacy rights can be limited if the prison gives a reason that is substantially related to a legitimate prison policy.

One important prison policy is to treat male and female prison officials the same, as required by federal employment discrimination laws.<sup>108</sup> This can make it difficult to challenge involuntary exposure situations. Prisons cannot treat male and female employees differently. Prisons cannot be required to assign only female workers to a position unless there is a legally recognized need for the position to be filled by a woman.<sup>109</sup> Courts have occasionally upheld the designation of certain jobs as female-only jobs, usually where there is a strong privacy concern.<sup>110</sup> Courts have also upheld this designation where there has been a long, well-recorded history of abuse by male officers and other efforts to address the problem have failed.<sup>111</sup> Some courts have recognized that all incarcerated people

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105. 28 C.F.R. § 115.15(b) (2020).

106. 28 C.F.R. § 115.15(b) (2020).

107. *See, e.g.*, *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 566 U.S. 318, 322, 132 S. Ct. 1510, 1511, 182 L. Ed. 2d 566, 569 (2012) (detailing what constitutes a legitimate interest for search and seizures of a pre-trial detainee); *Turner v. Safley*, 482 U.S. 78, 87, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 78 (1987).

108. Title VII of the U.S. Code prohibits denying employment, promotions, or raises based on sex, and the hiring of only female employees for female correctional facilities has been seen as a violation of this law. 42 U.S.C. § 2000e-2(a)-(d) (2012). *See, e.g.*, *Breiner v. Nevada Dept. of Corr.*, 610 F.3d 1202, 1216 (9th Cir. 2010) (holding that policy of hiring only female correctional lieutenants at women's prison violated Title VII); *Forts v. Ward*, 621 F.2d 1210, 1216 (2d Cir. 1980) (finding that that male prison guards could not be excluded from night shifts in a women's prison because other measures to ensure women's privacy were available).

109. 42 U.S.C. § 2000e-2(a)-(d) (2012); *see, e.g.*, *Forts v. Ward*, 621 F.2d 1210, 1216 (2d Cir. 1980) (holding that male prison guards could not be excluded from night shifts in a women's prison because other measures to ensure women's privacy were available).

110. *See Teamsters Local Union No. 117 v. Washington Dept. of Corr.*, 789 F.3d 979, 990 (9th Cir. 2015) (concluding that policy rationales of protecting incarcerated women from sexual misconduct by male deputies, maintaining jail security, and protecting the privacy of incarcerated women were all reasonably necessary to the essence of prison administration justifying the designation of certain positions as female-only); *Mills v. City of Barbourville*, 389 F.3d 568, 579 (6th Cir. 2004) ("As to jail employees of the opposite gender viewing prison inmates or detainees, ... a prison policy forcing prisoners to be searched by members of the opposite sex or to be exposed to regular surveillance by officers of the opposite sex while naked...would provide the basis of a claim on which relief could be granted."); *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (recognizing the right of incarcerated people to bodily privacy "because most people have 'a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.") (quoting *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981)).

111. *Teamsters Local Union No. 117 v. Washington Dept. of Corr.*, 789 F.3d 979, 991 (9th Cir. 2015) (policy saying that certain jobs were female-only was adopted in the face of documented allegations of abuse); *Everson v. Mich. Dept. of Corr.*, 391 F.3d 737, 762 (6th Cir. 2004) (finding that officers in female prison housing units must be women because the prison adequately demonstrated that this policy would enhance security, decrease the likelihood of sexual abuse, protect the privacy rights of the women incarcerated at the prison, and that there were no reasonable alternatives to this plan); *Robino v. Iranon*, 145 F.3d 1109, 1111 (9th Cir. 1998) (finding that it was proper for male prison guards to be excluded in order to accommodate the privacy of incarcerated women and reduce risk of sexual conduct between guards and women incarcerated at the prison); *Jennings v. New York State Office of Mental Health*, 786 F. Supp. 376, 387 (S.D.N.Y. 1992) (holding that gender was a genuine requirement to be a "treatment assistant" in a female ward, and therefore, the requirement that at least one woman be assigned to a female prison ward was permissible under the Civil Rights Act).

have a right to be free from unnecessary viewing in the nude or while performing private bodily functions by guards of the opposite sex. A few courts have been particularly sensitive to the privacy interests of incarcerated women. These courts have required that they be able to cover their windows when undressing or using the toilet.<sup>112</sup> But if these factors are not present, courts may decide that the incarcerated person's interest in protecting bodily privacy is not as strong as the state's interest in offering equal employment opportunities for correctional officers.<sup>113</sup> For more information on your right to be free from involuntary exposure, see *JLM*, Chapter 25, "Your Right to Be Free From Illegal Body Searches."

### (c) Body Searches

In deciding whether a prison search violates your right to be free from unreasonable searches, courts weigh the need for prison security against the privacy interests of the incarcerated people.<sup>114</sup> Then they decide which of these interests is more important in the particular case.<sup>115</sup> For example, one court held that when an incarcerated person is being moved from one area of a prison to another, the prison's need for a visual body cavity search to make sure the incarcerated person is not carrying drugs or weapons is more important than the need for privacy.<sup>116</sup> A "visual body cavity search" is when a prison officer inspects an incarcerated person's ears, nose, mouth, anus, or vagina to see if there are drugs, weapons, or other contraband.

Courts usually find that the prison's security concerns outweigh the incarcerated person's privacy interests.<sup>117</sup> In some cases, courts have found that non-medical personnel (prison officers) are allowed to conduct clothed body frisks (searches of the outer clothing of an incarcerated person),<sup>118</sup> cell

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112. See, e.g., *Sepulveda v. Ramirez*, 967 F.2d 1413, 1415 (9th Cir. 1992) (denying qualified immunity to a male parole officer who walked in on a female parolee urinating as part of a required drug test); *Forts v. Ward*, 621 F.2d 1210, 1214–1216 (2d Cir. 1980) (allowing incarcerated women to cover the window of their cells for privacy for 15-minute intervals).

113. See, e.g., *Johnson v. Phelan*, 69 F.3d 144, 147–148 (7th Cir. 1995) (recognizing that "[a] warden must accommodate conflicting interests—the embarrassment of reticent prisoners and the entitlement of women to equal treatment in the workplace."), *overruled on other grounds by Henry v. Hulett*, 969 F.3d 769, 783 (7th Cir. 2020); *Grummett v. Rushen*, 779 F.2d 491, 495 (9th Cir. 1985) (finding that to restrict or disallow female guards from holding positions which involve occasional viewing of incarcerated men would require tremendous rearrangement of work schedules and possibly produce a risk to both internal security needs and equal employment opportunities for female guards).

114. *Timm v. Gunter*, 917 F.2d 1093, 1099 (8th Cir. 1990) (holding that when a court reviews whether a prison violated an incarcerated person's constitutional rights, the court must consider whether the prison has legitimate institutional concerns that justify the restrictions or actions the plaintiff challenges).

115. *Hudson v. Palmer*, 468 U.S. 517, 527, 104 S. Ct. 3194, 3200, 82 L. Ed. 2d 393, 403 (1984) ("[It would be] impossible to accomplish the prison objectives [of ensuring the safety of prisoners, staff, and visitors] if inmates retained a right of privacy in their cells."); *Padgett v. Donald*, 401 F.3d 1273, 1280 (11th Cir. 2005) (employing a balancing test, weighing the degree to which the search intrudes on an individual's privacy against the degree to which it promotes a legitimate governmental interest).

116. See *Story v. Foote*, 782 F.3d 968, 971 (8th Cir. 2015) (holding that Story's allegation of a body-cavity search by itself does not state a claim for the violation of a clearly established right given what the Supreme Court and the circuit court have said about the strong institutional interests in maintaining security, and about the reasonableness of visual body-cavity inspections when detainees enter a facility); *Goff v. Nix*, 803 F.2d 358, 366–371 (8th Cir. 1986).

117. See, e.g., *Calhoun v. Detella*, 319 F.3d 936, 939 (7th Cir. 2003) (stating that, while such strip searches may be unpleasant and humiliating, strip searches of incarcerated men by female officers would not violate the Eighth Amendment if done for a legitimate, penological purpose); *Timm v. Gunter*, 917 F.2d 1093, 1101 (8th Cir. 1990), *cert. denied*, 501 U.S. 1209, 111 S. Ct. 2807, 115 L. Ed. 2d 979 (holding that prisons are not required to provide same-gender pat-downs, and that prison administrators are entitled to find "the best balance among...competing concerns..."); *Sroka v. Welcher*, 2016 U.S. Dist. LEXIS 7835, \*15 (W.D.N.Y. Jan. 20, 2016) ("Although the privacy interests of an arrestee are generally greater than those of prison inmates, the practice of allowing a male officer to conduct a pat-down search of a female arrestee to insure that she is not armed is not, in and of itself, constitutionally unreasonable.").

118. See *Smith v. Fairman*, 678 F.2d 52, 54 (7th Cir. 1982) (holding female guards may conduct "pat down"

searches,<sup>119</sup> and visual body cavity or strip searches (searches where incarcerated people must take off their clothes and be visually inspected by a guard).<sup>120</sup> Particularly appalling circumstances may convince a court that the search was unconstitutional. For example, in one federal case, the court found that it was a violation of due process to force a female pretrial detainee who was seven months pregnant to squat uncomfortably for two visual body cavity searches by untrained officers.<sup>121</sup>

However, the test for a “digital body cavity search”—when a guard places his or her fingers into an incarcerated person’s nose, mouth, anus, or vagina—is stricter because it is more intrusive of your body than other types of searches.<sup>122</sup> To perform a digital body cavity search, prison officials must have a reasonable suspicion that is *specific* to the individual incarcerated person. A reasonable suspicion could be that an incarcerated person has a weapon.<sup>123</sup> Courts have found that digital body cavity searches are unreasonable unless medical personnel perform them both in a private area and in a hygienic (clean) manner.<sup>124</sup> The presence of male officers might make a digital body search unreasonable for women who are incarcerated.<sup>125</sup> Similarly, medical personnel (physicians, nurses, or their assistants), *not* correctional personnel, must conduct body cavity searches. These searches involve putting an instrument into a part of an incarcerated person’s body or taking something out of a body cavity.<sup>126</sup>

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searches without violating the privacy of incarcerated men); *Sroka v. Welcher*, 2016 U.S. Dist. LEXIS 7835, \*15, (W.D.N.Y. Jan. 20, 2016) (“Although the privacy interests of an arrestee are generally greater than those of prison inmates, the practice of allowing a male officer to conduct a pat-down search of a female arrestee to insure that she is not armed is not, in and of itself, constitutionally unreasonable”); *Talman Caldwell v. Rubbo*, 1993 U.S. App. LEXIS 20412, \*3 (4th Cir. 1993) (“Caldwell had no constitutional right to have the pat-down search performed by someone of her gender.”).

119. See *Hudson v. Palmer*, 468 U.S. 517, 525–526, 104 S. Ct. 3194, 3199, 82 L. Ed. 2d 393, 402–403 (holding that an incarcerated woman has no reasonable expectation of privacy in her cell); *Martin v. Lane*, 766 F. Supp. 641, 646 (applying *Hudson v. Palmer* to deny Fourth Amendment relief to an incarcerated person whose cell was searched during a lockdown); *Block v. Rutherford*, 468 U.S. 576, 589–591, 104 S. Ct. 3227, 3235, 82 L. Ed. 2d 438 (1984) (holding that security concerns justify regular “shakedown” searches of cells).

120. See *Bell v. Wolfish*, 441 U.S. 520, 558, 99 S. Ct. 1861, 1884, 60 L. Ed. 2d 447, 481 (holding that visual body cavity searches of people in a pre-trial detention facility did not violate the Fourth Amendment, as it did not punish them prior to trial, and served the legitimate purpose of insuring prison security) (the gender of the guards assigned to conduct the searches is not mentioned in the case); *Wood v. Hancock Cnty. Sheriff's Dept*, 354 F.3d 57, 68–69 (1st Cir. 2003) (holding that, due to the security threats posed by contact visits, a blanket policy of strip searching incarcerated people after contact visits is constitutional); *Michenfelder v. Sumner*, 860 F.2d 328, 332–333 (9th Cir. 1988) (citing many cases for the rule that incarcerated people may be subject to cavity searches when entering and leaving cells, even when such searches are very frequent).

121. *United States ex rel. Guy v. McCauley*, 385 F. Supp. 193, 198 (E.D. Wis. 1974) (finding that an incarcerated woman who was seven months pregnant was twice forced to bend over painfully by officers who were not medically trained, and that they did not conduct the search in a medical environment or use appropriate medical equipment).

122. 28 C.F.R. § 552.11(d) defines a “digital or simple instrument search” as “inspection for contraband or any other foreign item in a body cavity of an inmate by use of fingers or simple instruments, such as an otoscope, tongue blade, short nasal speculum, and simple forceps.” These searches may only be conducted by designated qualified health personnel, upon approval by Warden or Acting Warden, if there is reasonable belief by the Warden or Acting Warden that a person is concealing contraband.

123. See *Chapman v. Nichols*, 989 F.2d 393, 395–396 (10th Cir. 1993) (holding that blanket policy for strip searches of detainees was unconstitutional because strip searches should only be conducted on an individual basis, when necessary).

124. See *Foster v. City of Oakland*, 621 F. Supp. 2d 779, 789 (N.D. Cal. 2008) (quoting *Vaughan v. Ricketts*, 859 F.2d 736, 741 (9th Cir. 1988) which states that “body cavity searches of inmates to be unreasonable where they were performed by inadequately trained medical assistants”); see also *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 43 (1st Cir. 2009) (noting that physical rectal examinations of incarcerated people can be reasonable only when they are carried out by trained medical staff under sanitary conditions).

125. See *Bonitz v. Fair*, 804 F.2d 164, 172–173 (1st Cir. 1986), *overruled in part* by *Unwin v. Campbell*, 863 F.2d 124 (1st Cir. 1988) (pointing to the presence of male officers as one reason why the search of incarcerated women was unreasonable).

126. See *DaVee v. Mathis*, 812 S.W.2d 816, 825–826 (Mo. Ct. App. 1991) (concluding that searches involving



In conclusion, incarcerated women may be searched because of security concerns in prison. But, these searches must be conducted for a good reason and in a safe and respectful manner. For more information on illegal searches and potential legal remedies, see *JLM*, Chapter 25, “Your Right to Be Free from Illegal Body Searches.”

## 2. Sexual Harassment

Just because you are in prison does not mean you give up your right to be free from unwanted sexual activity. Any unwanted sexual attention that you experience, like leering, pinching, patting, verbal comments, or pressure to engage in sexual activity can be considered sexual assault or harassment.

Incarcerated women should never feel forced to engage in sexual activity with abusive staff who promise better treatment or threaten disciplinary action.<sup>127</sup> You have the right to be free from any unwanted sexual attention. If an officer acts inappropriately towards you in a sexual manner, it may be considered cruel and unusual punishment in violation of your Eighth Amendment rights.

To qualify as a violation of the Eighth Amendment, the behavior must be serious enough, and the officer must have been deliberately indifferent (ignored a risk to your health or safety that the officer either knows about or that is so obvious he should have known about it).<sup>128</sup> However, because sexually abusive officers are the ones creating the risk to your health or safety, they naturally know about it.<sup>129</sup> It is somewhat harder to prove that the behavior is serious enough. For some courts, the fewer times abuse has occurred, the more severe it must have been. Likewise, the less severe it was, the more times it must have occurred.<sup>130</sup>

If you cannot bring an Eighth Amendment claim against the prison official who harassed you, you may be able to bring an Eighth Amendment claim against supervisory officials for failing to protect you from unwanted sexual conduct. To do this, you have to show that supervisors were “deliberately indifferent” towards your abuse (meaning that they knew about the harassment, or it was so obvious they should have known about it, and did nothing).<sup>131</sup> You also have to show that the act violated “evolving standards of decency” (in other words, the act violated the level of physical contact that is acceptable in this day and age).<sup>132</sup> Some courts have found that certain extreme cases of sexual groping

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physical intrusion and removal of foreign objects must be conducted by medical personnel, but purely visual searches that do not involve physical contact do not require medical personnel).

127. HUMAN RIGHTS WATCH, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* (1996), available at [http://www.hrw.org/legacy/reports/1996/Us1.htm#N\\_880](http://www.hrw.org/legacy/reports/1996/Us1.htm#N_880) (last visited Nov. 7, 2019).

128. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811 (1994); *Wilson v. Seiter*, 501 U.S. 294, 298–299, 111 S. Ct. 2321, 2324, 115 L. Ed. 2d 271, 278 (1991).

129. *Boddie v. Schneider*, 105 F.3d 857, 861 (2d Cir. 1997) (“Because sexual abuse by a corrections officer may constitute serious harm inflicted by an officer with a sufficiently culpable state of mind, allegations of such abuse are cognizable as Eighth Amendment Claims.”); *Giron v. Corrections Corporation of America*, 191 F.3d 1281, 1290 (10th Cir. 1999).

130. *Crawford v. Cuomo*, 796 F.3d 252, 257 (2d Cir. 2015) (finding that “severe or repetitive sexual abuse” of an incarcerated person by a prison officer can be “objectively sufficiently serious’ enough to constitute an Eighth Amendment violation.”) (quoting *Boddie v. Schneider*, 105 F.3d 857, 861 (2d Cir. 1997)); *Boddie v. Schneider*, 105 F.3d 857, 861 (2d Cir. 1997) (requiring severe or repeated sexual abuse for Eighth Amendment violation). *But see Morrison v. Cortright*, 397 F. Supp. 2d 424, 425 (W.D.N.Y. 2005) (male correctional officer running finger between buttocks and pressing against male plaintiff during strip frisk was not sufficiently serious to be a violation of the Eighth Amendment); *Davis v. Castleberry*, 364 F. Supp. 2d 319, 321 (W.D.N.Y. 2005) (male correctional officer grabbing an incarcerated man’s penis during a pat frisk failed to state a claim under 18 U.S.C. § 1983); *Montero v. Crusie*, 153 F. Supp. 2d 368, 373, 375 (S.D.N.Y. 2001) (allegations that a male officer squeezed the male plaintiff’s genitalia and made sexual propositions during pat frisks and offered privileges in exchange for sexual favors was not sufficiently serious to be a violation of the Eighth Amendment).

131. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 824 (1994).

132. *Hudson v. McMillian*, 503 U.S. 1, 8, 117 L. Ed. 2d 156, 112 S. Ct. 995 (1992) (“The objective component of an Eighth Amendment claim is therefore contextual and responsive to ‘contemporary standards of decency.’”) (quoting *Estelle v. Gamble*, 429 U.S.C. 97, 101, 97 S. Ct. 285, 289, 50 L. Ed. 2d (1976)).

and touching do violate “evolving standards of decency.”<sup>133</sup> If your case is similar, you might be able to make an Eighth Amendment claim against the supervisors.

Generally, to bring an Eighth Amendment claim in federal court, you must have exhausted (used) your administrative remedies. However, under the Prison Rape Elimination Act’s National Standards, DOCCS has recently changed its requirements for exhaustion in relation to sexual abuse and made it easier to bring sexual abuse cases. If you want to bring a legal claim against the person who sexually abused or harassed you, you no longer need to file a grievance and appeal it to Central Office.<sup>134</sup> You can now satisfy the exhaustion requirement in a number of ways. You can report the incident to (1) facility staff; (2) Central Office staff in writing; (3) to an outside agency that has agreed to receive and forward reports of abuse; *or* (4) to the Office of Special Investigations.<sup>135</sup> You can also satisfy the exhaustion requirement if another person reports, if you confirm the report.<sup>136</sup> After taking any of these steps, you are able to submit your claim to court. You have to complete those steps and submit your claim within the statute of limitations. The statute of limitations for an Eighth Amendment claim is usually three years. For more information on how to make an Eighth Amendment claim, consult *JLM*, Chapter 16, “Using 42 U.S.C. 1983 and 28 U.S.C. 1331 to Obtain Relief from Violations of Federal Law.”

### 3. Sexual Assault and Rape

#### (a) Your Right to be Free from Sexual Assault and Rape

The rate of female sexual assault varies dramatically between prisons. The highest reported rate currently shows that one in four women are assaulted during their time in prison.<sup>137</sup> While a prison official is permitted to touch you for security reasons, for example in a legal search, he or she is never allowed to touch you in a sexual way. Under federal law, it is illegal for a prison official with “custodial, supervisory, or disciplinary authority” to engage in any type of sexual conduct with incarcerated people.<sup>138</sup> In federal prisons, it is also a felony for prison officers to obtain sex from an incarcerated person by using violence or the threat of violence, or to have sex with an incarcerated person after making her unconscious with drugs or alcohol.<sup>139</sup> Almost all states also have laws that make sex between incarcerated people and prison officers illegal.<sup>140</sup> Check your state’s laws to see what kind of protections you are offered.

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133. *See* Rodriguez v. McClenning, 399 F. Supp. 2d 228, 237–238 (S.D.N.Y. 2005) (concluding that an incarcerated man properly stated a claim for a violation of his Eighth Amendment rights where he alleged that a correctional officer groped him, relying on trend toward statutory prohibition of sexual contact between prison employees and incarcerated people); Schwenk v. Hartford, 204 F.3d 1187, 1197 (9th Cir. 2000) (“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, 824 (1994)).

134. State of New York, Department of Corrections and Community Supervision Directive 4040, Inmate Grievance Policy, at § 701.3 (2016).

135. State of New York, Department of Corrections and Community Supervision Directive 4040, Inmate Grievance Policy, at § 701.3 (2016).

136. State of New York, Department of Corrections and Community Supervision Directive 4040, Inmate Grievance Policy, at § 701.3 (2016).

137. JUST DETENTION INTERNATIONAL, *The Basics about Sexual Abuse in U.S. Detention*, 1 (Jan. 2009), available at <https://www.prearesourcecenter.org/sites/default/files/library/22-jdi-usdetentionbasics.pdf> (last visited Nov. 28, 2020) (quoting Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Reported by Women in Three Midwestern Prison*, 39 J. SEX RES. 217, 220 (2002)).

138. 18 U.S.C. § 2243(b)(2).

139. 18 U.S.C. § 2241.

140. *See, e.g.*, N.Y. PENAL LAW § 130.05(3)(e); ARIZ. REV. STAT. ANN. § 13–1419 (2011); CAL. PENAL CODE § 289.6 (Deering 2019); CONN. GEN. STAT. ANN. § 53a–73a (West 2019); MASS. GEN. LAWS ANN. ch. 268, § 21A (West 1999). For a full list of all states criminalizing corrections officers’ sexual contact with incarcerated people as of August 2015, see Crawford v. Cuomo, 796 F.3d 252, 259 n.6 (2d Cir. 2015) (only two states have not criminalized officers’ sexual contact with incarcerated people).

Even consensual sex between an incarcerated person and a prison official can be a violation of the Eighth Amendment or a crime under state law.<sup>141</sup> In New York, sexual intercourse between an employee of the New York State Department of Correctional Services and an incarcerated person—even with the incarcerated person’s consent—is considered rape.<sup>142</sup> The reason for this policy is that prison officials may attempt to abuse their position of authority to get sexual favors from incarcerated people.

Prison officials may also be liable for the acts of another incarcerated person under the Eighth Amendment. The officer will only be liable for sexual assault committed by another person incarcerated at your facility when the officer knew that you faced a substantial risk of serious harm, but did nothing to protect you.<sup>143</sup> For example, if prison officials knew that you were going to be sexually assaulted by another incarcerated person and did not try to prevent the assault, that could be a violation of your Eighth Amendment rights.

(b) What should you do if you have been raped or sexually assaulted?

If you have been raped or sexually assaulted, you should tell someone immediately and request to go to the hospital. Getting a medical exam (including a vaginal inspection and blood tests) at a hospital emergency room or other medical facility after you have been raped is important for several reasons:

- (1) Internal injuries can be assessed.
- (2) Some injuries that you can’t see or feel can only be detected by examination.
- (3) Pregnancy can be prevented. If you are not using birth control, “morning-after” emergency contraceptives greatly decrease the chance of pregnancy.
- (4) Evidence can be collected. Physical evidence that can identify and convict your rapist can be captured and stored in what is called a “rape kit.”

A rape kit is evidence that can be used in court if you choose to bring charges. Many hospitals have “Sexual Assault Rape Trauma” nurses (called “SART nurses”) who specialize in collecting evidence from rape victims. You should ask at your hospital if there is a SART nurse available to collect your rape kit. Many hospitals also provide rape trauma counselors to help assist you during the examination process. To complete the rape kit, medical professionals will:

- (1) Collect any semen, other body fluids, and hair;
- (2) Look for clothing fibers and evidence from the scene, such as grass or soil; and
- (3) Take clippings of your fingernails to examine any residue from your attacker.<sup>144</sup>

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141. See, e.g., *Carrigan v. Davis*, 70 F. Supp. 2d 448, 452–453 (D. Del. 1999) (“[A]s a matter of law, an act of vaginal intercourse and/or fellatio between a prison inmate and a prison guard, whether consensual or not, is a per se violation of the Eighth Amendment.”). Note that this holding was restricted to vaginal intercourse and/or fellatio. See also *Cash v. County of Erie*, Slip Op., 2009 WL 3199558, \*2 (W.D.N.Y. Sept. 30, 2009) (“even if [the corrections officer]’s defense was that the sexual intercourse with [the incarcerated person] was physically consensual, this may also constitute a constitutional violation”); *Perez v. State of N.Y.*, 33 Misc. 3d 667, 929 N.Y.S.2d 678 (N.Y. Ct. Cl. 2011) (Even where an incarcerated person and a corrections officer were involved in a romantic relationship, the court stated that their sexual encounters cannot be consensual); *Hammond v. Gordon County*, 316 F. Supp. 2d 1262, 1285 n.6 (N.D. Ga. 2002) (rejects the argument that the Court should rely on other cases where consent was considered a defense to sexual conduct in a correctional setting); *Paz v. Weir*, 137 F. Supp. 2d 782, 807 (S.D. Tex. 2001) (noting that Texas law deems sex non-consensual if engaged in by a public servant who exerts coercion on the other person or if the perpetrator takes advantage of their position as a member of the clergy).

142. N.Y. PENAL LAW § 130.05(3)(e)–(f) (Consol. 2018); N.Y. Penal Law § 130.25 (Consol. 2001).

143. *Farmer v. Brennan*, 511 U.S. 825, 847, 114 S. Ct. 1970, 1084, 128 L. Ed. 2d 811, 832 (1994) (holding that a prison official was liable under the Eighth Amendment because he had knowledge that a transgender person incarcerated at the prison faced a substantial risk of serious harm and subsequently disregarded the risk); see also *Winton v. Bd. of Comm’rs*, 88 F. Supp. 2d 1247, 1252–1253 (N.D. Okla. 2000) (denying a defendant institution’s motion for summary judgment because there was evidence that prison officials both knew there was substantial risk of serious harm from other people incarcerated at the prison, and did nothing to protect the plaintiff from it).

144. RAINN, *What is a Sexual Assault Forensic Exam?*, available at <https://www.rainn.org/articles/rape->

You should also ask the nurse or health professional to take pictures of any injuries that occurred during the attack (bruises, hand marks, cuts, burns, etc.). You have the right to skip any particular part of the exam because it makes you feel too uncomfortable. However, bear in mind that a rape kit increases the likelihood of prosecution.<sup>145</sup>

It is important to make a rape kit so that you can prosecute your rapist later if you choose to do so. You do not have to decide immediately whether to report the rape to the prison authorities. You can collect the evidence now and then decide later. But if you choose to report the person who raped you to prison authorities, your chances of convicting them depend heavily on the evidence in your rape kit. You only have one chance to get that evidence—immediately after the rape. Because of this, it is important that you do not bathe or shower, brush your hair, change your clothes or shoes, or douche until after you have gone to the hospital and had samples collected.

It is important to see a doctor again within a week or two to receive your blood test results and to treat any injuries. Emotional care is also very important. Many rape survivors will experience Rape Trauma Syndrome (RTS). RTS is a collection of emotional responses to the extreme stress of the sexual assault. Some survivors openly display their emotions. Others may appear calm and detached. Sleeping and eating patterns may change and nightmares are common.<sup>146</sup> It is important for you to seek and continue counseling and support groups for as long as you need them. Your prison should provide mental health services (like counseling) for rape and sexual assault.<sup>147</sup> You should also know that many mental health providers employed by corrections departments have an obligation to report any abuse revealed to them. So, if you want to discuss your abuse without reporting it, you should ask your counselor about his reporting obligations before sharing information.

If your facility does not provide counseling, the Rape, Abuse and Incest National Network (RAINN) offers counseling and other forms of assistance to rape and sexual assault victims. You can reach their hotline at 1-800-656-HOPE (1-800-656-4673), online at <https://ohl.rainn.org/online/>, or write to them at:

Rape, Abuse & Incest National Network  
1220 L Street NW, Suite 505  
Washington, DC 20005

### (c) What Are Your Legal Remedies if You Have Been Raped or Sexually Assaulted?

First, you should file a report through your prison's internal grievance procedures. If the prison administration does not remedy the situation, you may want to consider bringing civil charges.

If you decide to bring a lawsuit in a civil court, the Prison Litigation Reform Act (PLRA) will apply to you. This Act generally provides that incarcerated people cannot bring a civil lawsuit for any mental or emotional injury suffered in prison unless you can show some kind of physical injury as well.<sup>148</sup> This made the collection of physical evidence through a rape kit important. However, the Violence Against Women Act has changed this requirement. It does not require you to show evidence of physical injury.<sup>149</sup> Furthermore, the Second Circuit has held that sexual assaults alleged to arise from "intrusive body searches" meet the physical injury requirement of the PLRA.<sup>150</sup>

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kit (last visited June 20, 2020).

145. RAINN, *What is a Sexual Assault Forensic Exam?*, available at <https://www.rainn.org/articles/rape-kit> (last visited June 20, 2020).

146. KING COUNTY SEXUAL ASSAULT RESOURCE CENTER, *Rape Trauma Syndrome 1*, available at <https://www.kcsarc.org/sites/default/files/Resources%20-%20Rape%20Trauma%20Syndrome.pdf> (last visited June 21, 2020).

147. National Standards To Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37,106, 37,221 (June 20, 2012) (to be codified at 28 C.F.R. pt. 115).

148. Prison Litigation Reform Act of 1995, 110 Stat. 1321, § 802(e) (1996). See Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," for more information on the PLRA.

149. The Violence Against Women Act, 42 U.S.C. § 13981.

150. *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999) (holding that allegations of sexual assault, if true,

Courts have found that a prison official's sexual assault of an incarcerated person violates the Eighth Amendment. It is "cruel and unusual punishment[]"<sup>151</sup> and violates the "evolving standards of decency that mark the progress of a maturing society."<sup>152</sup> Here, "evolving standards of decency" refers to conduct that violates standards of conduct considered acceptable today.<sup>153</sup> The Supreme Court stated that, "being violently assaulted in prison is not 'part of the penalty that criminal offenders pay for their offenses against society.'"<sup>154</sup> In a recent decision, the Second Circuit held that intentional contact by a correctional officer with an incarcerated person's genitalia or other intimate area violates the Eighth Amendment if it serves no penological purpose and is undertaken with the intention to gratify the officer's sexual desire or humiliate the victim.<sup>155</sup> The Court referred to the national standards and the criminalization of sexual conduct by correctional officers. The Court said that, "sexual abuse of prisoners, once passively accepted by society, deeply offends today's standards of decency."<sup>156</sup>

As described in the "Sexual Harassment" Section above, there are two components to bringing an Eighth Amendment claim against prison supervisors. First, you have to show that there was a substantial risk of serious harm to your safety.<sup>157</sup> Second, you must show that the prison knew about the situation and yet did nothing about it. For more information on how to bring an Eighth Amendment claim, 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."

### E. Drug Treatment Programs

The crackdown on drugs has been a major cause of the female prison population growth. As of March 2020, nearly 20% of incarcerated people in the United States were incarcerated for a drug offense.<sup>158</sup> Furthermore, drug offenses accounted for 91% of the increase in the number of women sentenced to prison from 1986 to 1995. This trend is partially due to New York's harsh Rockefeller Drug Laws. These laws gave judges little discretion in sentencing for drug offenses. However, in 2004, New York reformed the state's old Rockefeller drug laws by adopting the Drug Law Reform Act (DLRA).<sup>159</sup> If you were sentenced under the old laws, you may be allowed to apply for re-sentencing.<sup>160</sup> For more information, read *JLM*, Chapter 10, "Applying for Re-Sentencing for Drug Offenses."

If you are in prison for a drug-related offense, you might have access to various alternative sentencing programs. You may have access even if you are already in prison. One of these options is the "drug court."<sup>161</sup> In this type of program, judges, prosecutors, and defense attorneys take part in the treatment and rehabilitation of the offenders.<sup>162</sup> Judges keep track of the treatment and progress

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"qualify as physical injuries"); *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000) ("A sexual assault on an inmate by a guard—regardless of the gender of the guard or of the prisoner—is deeply 'offensive to human dignity.'... 'Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society'"" (internal citations omitted)).

151. U.S. CONST. amend. VIII.

152. See, e.g., *Hudson v. McMillian*, 503 U.S. 1, 8, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992); *Ullery v. Bradley*, 949 F.3d 1282, 1290–1291 (10th Cir. 2020) (holding that a prison guard's sexual assault of an incarcerated person clearly offended society's standards of decency).

153. See *Crawford v. Cuomo*, 796 F.3d 252, 256 (2d Cir. 2015).

154. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 101 S. Ct. 2392, 69 L. Ed. 2d 59 (1981)).

155. *Crawford v. Cuomo*, 796 F.3d 252, 254 (2d Cir. 2015).

156. *Crawford v. Cuomo*, 796 F.3d 252, 254 (2d Cir. 2015).

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

158. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POLICY INITIATIVE, March 24, 2020, available at <https://www.prisonpolicy.org/reports/pie2020.html> (last visited June 21, 2020).

159. 2004 N.Y. Sess. Laws 1474 (A. 11895, S. 7802).

160. *Rivera v. New York*, No. 11-CV-6185 MAT, 2012 WL 1342988, at \*2 (W.D.N.Y. Apr. 18, 2012).

161. See Kara Stinson, *Letting Time Serve You: Boot Camps and Alternative Sentencing for Female Offenders*, 39 BRANDEIS L. J. 847, 857 (2001).

162. See Kara Stinson, *Letting Time Serve You: Boot Camps and Alternative Sentencing for Female*

of offenders and the offenders follow a plan that includes detoxification (coming off drugs), counseling, education, vocational courses, group meetings, and urine testing.<sup>163</sup> According to the U.S. General Accounting Office, as of June 2010, there were over 2,500 drug courts operating nationwide.<sup>164</sup>

Another alternative sentence that might be right for you is a “boot camp.” A boot camp is a military-style program that attempts to “instill discipline and self-respect in participants.”<sup>165</sup> However, due to budgetary constraints and doubts as to their ability to rehabilitate people who have been convicted of a crime, these programs are increasingly rare. Their availability to women is also rare.<sup>166</sup> Even if you are in a regular correctional facility, your institution should have drug treatment programs available for you. For example, the Federal Bureau of Prisons (BOP) offers drug treatment plans to all incarcerated people who qualify, prior to their release from custody.<sup>167</sup>

## F. Clemency

“Clemency” is a term used to describe the power of a public official to lessen the sentence of a criminal defendant. Clemency exists to protect incarcerated people from unjustifiably harsh sentences.

It is very hard to get clemency. But you should file a petition if you think have a good reason to receive it. In thirty-five states, including New York, the governor grants clemency.<sup>168</sup> In other states, either an advisory board or the governor and advisory board together makes the decision.<sup>169</sup> Non-violent offenders have the best chance of getting clemency. But women who are in jail for killing their abusive spouses or taking other actions to defend themselves may also have a chance. Note that if you are currently seeking clemency for a death sentence, you have a right to a lawyer.<sup>170</sup>

There are four types of clemency: amnesty, reprieve, pardon, and commutation:

- (1) **Amnesty** applies to a group of people who have committed political offenses.
- (2) **Reprieve** postpones a scheduled execution.
- (3) **Pardon** attempts to clear a person’s name of a crime entirely and restore their reputation.
- (4) **Commutation** does not attempt to clear the person’s name of the crime, but merely substitutes a milder sentence for the current sentence being served.

This Part focuses on clemency for battered (or abused) women. But, the procedures discussed below apply to any clemency petition. For more information on clemency in the state of New York, see “Guidelines for Review of Executive Clemency Applications,” which is on file in the law library of each

*Offenders*, 39 BRANDEIS L. J. 847, 857 (2001).

163. See Kara Stinson, *Letting Time Serve You: Boot Camps and Alternative Sentencing for Female Offenders*, 39 BRANDEIS L. J. 847, 857 (2001).

164. U.S. General Accounting Office, GAO-12-53, “Adult Drug Courts: Studies Show Courts Reduce Recidivism, but DOJ Could Enhance Future Performance Measure Revision Efforts” (Dec. 2011).

165. See Kara Stinson, *Letting Time Serve You: Boot Camps and Alternative Sentencing for Female Offenders*, 39 BRANDEIS L.J. 847, 853 (2001); *Practice Profile: Adult Bootcamps*, NATIONAL INSTITUTE OF JUSTICE, available at <https://www.crimesolutions.gov/PracticeDetails.aspx?ID=5> (last visited Nov. 10, 2019).

166. See Richard Willing, *U.S. Prisons to End Boot Camp Programs*, USA TODAY (Feb. 2005), available at [http://usatoday30.usatoday.com/news/nation/2005-02-03-boot-camps\\_x.htm](http://usatoday30.usatoday.com/news/nation/2005-02-03-boot-camps_x.htm) (last visited Feb. 18, 2020).

167. *Substance Abuse Treatment*, FEDERAL BUREAU OF PRISONS, available at [https://www.bop.gov/inmates/custody\\_and\\_care/substance\\_abuse\\_treatment.jsp](https://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp) (last visited Feb. 18, 2020).

168. See, e.g., *Apply for Clemency*, N.Y. STATE, available at <https://www.ny.gov/services/apply-clemency> (last visited Jun 22, 2020); *Clemency – Commutations & Pardons*, STATE OF CALIFORNIA, available at <https://www.gov.ca.gov/clemency/> (last visited June 22, 2020).

169. See, e.g., *Clemency Applications*, COMMONWEALTH OF PENNSYLVANIA, available at <https://www.bop.pa.gov/application-process/Pages/clemency.aspx> (last visited Jun 22, 2020); *Executive Clemency Overview*, COMMONWEALTH OF MASSACHUSETTS, available at <https://www.mass.gov/service-details/executive-clemency-overview> (last visited June 22, 2020). For a complete list of all states’ different types of clemency authority, see *50-State Comparison: Pardon Policy & Practice*, RESTORATION OF RIGHTS PROJECT, available at <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2/> (last visited Jun 22, 2020).

170. *Harbison v. Bell*, 556 U.S. 180, 188, 129 S. Ct. 1481, 173 L. Ed. 2d 347 (2009).

correctional facility in New York.<sup>171</sup> For more information on pardons, commutations, and other forms of early release, please see *JLM*, Chapter 35, “Getting Out Early: Conditional and Early Release.” If you are not in New York, you must look up your state’s rules on clemency.<sup>172</sup> For further information on clemency for battered women nationwide, contact the National Clearinghouse for the Defense of Battered Women, which accepts collect calls from incarcerated battered women (see Appendix A).

### 1. How to Request Clemency

To be considered for clemency in New York, send a written petition requesting clemency to either of the following addresses:

The Governor of the State of New York  
Executive Chamber  
State Capitol  
Albany, New York 12224

New York State  
Department of Corrections and Community Supervision  
Executive Clemency Bureau  
The Harriman State Campus – Building 2  
1220 Washington Ave  
Albany, NY 12226-2050

Alternatively, you can scan and email your application to: [PardonsAndCommutations@doccs.ny.gov](mailto:PardonsAndCommutations@doccs.ny.gov).

You should send all supporting materials within thirty days of sending the application. Applications are usually considered in the order that they are received. If your petition has not been granted, you can re-apply a year after you found out about the decision. You may re-apply a year later, unless you have been authorized to do so sooner in the letter informing you of the unfavorable decision.<sup>173</sup> In either case, you will be informed of the decision by letter from the Clemency Bureau of your state.

### 2. Writing Your Petition

#### (a) Tips for Organizing Your Petition

Try to make the petition as brief as you can. But, be sure not to leave out any information you think is important. Use headings to separate the points that you make. If you have evidence of past incidents of abuse, it may be helpful to make a table that includes the date of each incident, the details of the abuse, and the evidence of the incident.

For example:<sup>174</sup>

DATE	NATURE OF THE ABUSE	DOCUMENT
7/1/15	Dan found on top of Paula with his hands around her neck.	Smith Affidavit, Exhibit 1

171. State of New York, Department of Corrections and Community Supervision, *Community Supervision Handbook: Questions and Answers Concerning Parole Release and Community Supervision* (July 2017), available at [https://doccs.ny.gov/system/files/documents/2019/05/Community\\_Supervision\\_Handbook.pdf](https://doccs.ny.gov/system/files/documents/2019/05/Community_Supervision_Handbook.pdf) (last visited Feb. 18, 2020). For instructions on how to apply for clemency in New York, you can also visit <https://www.ny.gov/services/apply-clemency> (last visited Dec. 2, 2020).

172. To find your state’s requirements for commutation, go to the Criminal Justice Policy Foundation website (<http://www.cjpf.org/state-clemency/>) and click “Select your State.”

173. Criminal Justice Policy Foundation, *New York Applicable Form of Executive Clemency* (June 2014), available at <http://www.cjpf.org/clemency-ny> (last visited Feb. 18, 2020).

174. Michigan Women’s Justice and Clemency Project, *Clemency Manual, Chapter VII*, UMich (2008), available at [http://www.umich.edu/~clemency/clemency\\_mnl/ch7.html](http://www.umich.edu/~clemency/clemency_mnl/ch7.html) (last visited Feb. 18, 2020).

11/23/15	Dan beats Paula so badly that she has contusions all over her body.	Cook County Hospital Records, Exhibit 2
10/3/16	Crisis Center overhears abuse and calls police.	Support Service Records, Exhibit 4
4/4/17	Dan violates restraining order. He is arrested for punching hand through window.	Police Report, Exhibit 6

An affidavit is a statement taken under oath or affirmed by a notary public or commissioner of oaths. An exhibit is a document or another object presented as evidence in court. You should describe the strongest part of your petition at the beginning of the document in the first paragraph. You may wish to include any special circumstances that affect your case, or significant achievements you have accomplished in prison. For example, one woman who recently submitted a petition for clemency graduated summa cum laude from Western Michigan University while in prison.<sup>175</sup> Another woman's sentencing judge specifically stated that he hoped the Parole Board would commute her sentence.<sup>176</sup> Put such facts at the beginning. Do not hide facts like these in the middle of the petition.

#### (b) What to Include in Your Petition

Your clemency petition should include a thorough description of your life before you were convicted. This description should:

- (1) Let the Board know what kind of person you were;
- (2) Discuss your childhood, your family, your hobbies, and your ambitions;
- (3) Record your educational background, the names of any organizations to which you belonged, and every job you have held, including responsibilities and length of employment; and
- (4) Briefly discuss your criminal history and any type of domestic violence (sexual, physical, and/or emotional) you may have experienced throughout your life.

You should also describe the event causing your conviction. You should note any differences between the evidence that was entered at your trial and what is known now. If you want to give a different version of what happened from what you said before trial or from the facts as found to be true at trial, you should explain these differences.

Next, you should describe why you think you should get clemency (your "theory of the case"). Your theory should set out the facts, law, and any policy reasons supporting your petition for clemency. If your criminal case went to trial, you may want to base your theory for clemency on the defense presented at trial.

Finally, describe why the Governor should grant you a special exception (the "plea for justice or mercy"). Clemency is extraordinary relief and you should remind the Governor that only he or she has the power to grant it.

You want to show the Governor that you are a model incarcerated person making the most of the rehabilitative services available to you in prison. If you have taken or completed any courses in prison, include copies of your transcripts, grades, diplomas, and degrees. You should include any skills programs or counseling programs you have completed. You should also include any certificates from the programs. If you are in a privileged housing area or have been moved to a lower security level, explain this and list the privileges that you have received. If you have a clean disciplinary record, list any housing honors and explain how you were able to avoid disciplinary problems. Also include any jobs that you have held at the facility, your length of employment at each job, and your duties and responsibilities. If you know a prison official, including a counselor, who will support your clemency petition, ask them to write a letter on your behalf. Finally, list the people that you have stayed in contact with through visits, phone calls, and letters.

175. Michigan Women's Justice and Clemency Project, *Clemency Manual, Chapter VII*, UMICH (2008), available at [http://www.umich.edu/~clemency/clemency\\_mnl/ch7.html](http://www.umich.edu/~clemency/clemency_mnl/ch7.html) (last visited Feb. 18, 2020).

176. Michigan Women's Justice and Clemency Project, *Clemency Manual, Chapter VII*, UMICH (2008), available at [http://www.umich.edu/~clemency/clemency\\_mnl/ch7.html](http://www.umich.edu/~clemency/clemency_mnl/ch7.html) (last visited Feb. 18, 2020).



It is very important to show the Governor that you will be a productive and law-abiding member of society after your release. Write down your plans for the future. For example, include where you will live, support groups and/or therapy in which you will participate, and family and friends who will help support you financially and emotionally. Also include plans to seek help for a drug or alcohol addiction, employment plans (including marketable skills that will help you find a job), and family plans.

You should also provide evidence to help give the Governor a sense of who you are as a person. Try to get letters from family members discussing their relationship with you, particularly if you have any children or grandchildren who are dependent on you. Include if a family member is able to offer you a place to live or a job upon release. Consider getting letters from religious or community leaders describing your involvement in their organization. Also consider including letters from people who knew you as a child, especially if you suffered abuse, neglect, or other hardships growing up. Finally, you may be able to get members of the victim's family to write a letter stating that they are not opposed to your clemency petition. Keep in mind that this is a very sensitive issue, so do not press for such a letter if you have reason to think that the victim's family may oppose your request.

### (c) Using Evidence to Support Your Petition

You should include evidence to support all of the aspects of your claim. This evidence includes letters of support, police records, and affidavits from family and friends.<sup>177</sup> You should label them as "exhibits" at the back of your petition. When using affidavits or letters, state whether the authors of those affidavits or letters testified at your criminal trial. Because you may have difficulty getting all of these documents while in prison, try to have a close friend or family member assist you in gathering this information and developing your petition. Here are some basic types of evidence to consider:

- (1) Affidavits. Affidavits are where a person writes out facts that they know to be true in the form of a statement. The person signs the affidavit in front of a notary to make it authoritative. For example, if someone was with you during the events that led to your incarceration, you might want them to write an affidavit stating what happened.
- (2) Records, including hospital records, police records, and sentencing materials.
- (3) Letters, e-mail printouts, photographs, and anything that shows your story to be true.
- (4) Letters of support written by people who believe you should receive a commutation. You can ask for letters of support from family, clergy, prison staff, and possibly the victim's family. More information on letters of support is below.

To show that you were abused or battered, think about the following types of evidence:

- (1) Medical records of injuries from abuse;
- (2) Mental health records showing your diminished capacity at the time of the crime and/or the stress, fear and anxiety caused by living in a violent relationship;
- (3) Orders of protection;
- (4) Police reports related to the abuse;
- (5) Photographs showing physical injury;
- (6) Records from battered women's shelters;
- (7) Any testimony referring to battered women's syndrome at your trial. Include the abuser's criminal history if he had a violent criminal past.

To get police records, you should call or write to the county where the incident happened. Different police departments have different policies and you may have to fill out a Freedom of Information Law ("FOIL") request, a formal request to a government agency to release documents. To learn more about how to make a FOIL request, see *JLM*, Chapter 7, "Freedom of Information." To get hospital records, call or write to the patient records office at the hospital where you went for treatment. A written

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177. Michigan Women's Justice and Clemency Project, *Clemency Manual, Chapter VII*, UMICH (2008), available at [http://www.umich.edu/~clemency/clemency\\_mnl/ch7.html](http://www.umich.edu/~clemency/clemency_mnl/ch7.html) (last visited Feb. 18, 2020).

request should include your name, date of birth, social security number, and the specific information you are requesting.

You should also try to get letters of support from the following people:

- (1) Anyone who can say that they knew or suspected that you were battered;
- (2) Co-workers who witnessed bruises, health problems, or work absences resulting from battering, or heard stories about battering episodes;
- (3) Neighbors who heard or saw violent episodes or called the police in response to them;
- (4) Medical professionals who witnessed the results of battering, such as bruises or fear and anxiety;
- (5) Social workers who witnessed the effects of your battering;
- (6) Lawyers (in your criminal case or elsewhere) if they were aware of the battering and attempted to document its effects;
- (7) Experts consulted for trial regarding battered women's syndrome and battering and its effects;
- (8) Witnesses who testified to the battering at trial;
- (9) Private investigators if one was hired for your case;
- (10) Women's groups and community organizations. You can seek letters from groups that would support your clemency petition, such as battered women's groups, women's rights groups, groups that support incarcerated people, or any community group of which you are a member.

In addition to the documents described previously, you will want to obtain your DOCCS records (records concerning the time you have spent in prison), your parole file, and your case file. Your DOCCS records include:

- (1) All misbehavior reports and supplemental (additional) sheets;
- (2) Physical force and unusual incident sheets;
- (3) Adjustment committee reports and dispositions;
- (4) Copy of legal dates;
- (5) Crimes of commitment;
- (6) Personal history record;
- (7) Disciplinary record;
- (8) Correctional supervision history;
- (9) Certificates of program completion; and
- (10) Recognition letters.

(d) Obtaining your DOCCS file, case record, parole file, case file and rap sheet

In order to obtain your DOCCS file, write to the inmate records coordinator of your facility. Include your name, DOCCS number, where you would like the records sent, and a list of the documents you want to receive. If the documents are being sent to someone other than you, you must authorize their release.

The case record is the most complete set of records maintained by the Board of Parole. It can be obtained by writing to the senior parole officer of your facility. In your request, include your name, ID number, and release interview date (or revocation hearing date or appeal pending date, whichever applies). State that you want to review all the information in the file that will be considered by the Board of Parole to prepare for the upcoming date.

The parole file is a less complete record in the central office. It can be obtained by writing to the Chairman of the Board of Parole, 97 Central Avenue, Albany, NY 12206. State that you are requesting these records under FOIL and the New York Personal Privacy Protection Law (PPPL).

You should also obtain a copy of your case file. Your case file includes police reports, hearing transcripts, and other useful information from your trial. Ask your attorney for copies of these

documents and transcripts. You may need to call the criminal courthouse to get copies if your attorney does not have complete transcripts.

For your rap sheet, send a written request to:  
Record Review Unit  
New York State Division of Criminal Justice Services  
Alfred E. Smith Building  
80 South Swan Street  
Albany, NY 12210.

You should include your name, date of birth, social security number, and department identification number, and send the request in a facility envelope, if possible. You can also ask them to *RUSH* processing of your file if you need the information quickly. Otherwise, it can take eight weeks or longer to receive your rap sheet. You also have a right to obtain pre-sentencing reports.<sup>178</sup> To get them, send a written request to the above address, addressed “To Whom It May Concern”, with your name, birth date, indictment/information/complaint number, sentencing court, the address to which you would like the information sent, and a signed release authorizing another person to receive the information, if necessary.

### G. Conclusion

This Chapter outlines some of the unique problems that women frequently face in prison. It identifies different ways that incarcerated women can advocate for themselves in prison. In particular, this Chapter explains incarcerated women’s right to receive the same programming as incarcerated men, right to adequate medical care, and right to be free from sexual harassment or assault. It also discusses rights regarding searches and privacy, as well as how to file for clemency. This Chapter is meant to supplement the rest of the *JLM*, which discusses the rights of all incarcerated people, and describes how to file grievances and bring lawsuits. If you need additional support, the organizations listed in Appendix A of this Chapter may be helpful to you.

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178. N.Y. CRIM. PROC. LAW § 390.50(2)(a) (McKinney’s 2018).

## Appendix A

### Contacts for Further Assistance

#### **Resources in New York**

##### **Battered Women:**

STEPS to End Family Violence (Rising Ground)  
<https://www.risingground.org/program/steps/>  
STEPShelpline@RisingGround.org  
(877) 783-7794

The Domestic Violence Prosecution Hybrid Clinic at Albany Law School  
80 New Scotland Avenue  
Albany, NY 12208-3494  
(518) 445-2328

##### **Discharge Planning & Work Release:**

Women's Prison Association  
110 Second Avenue  
New York, NY 10003  
(646) 292-7740

##### **Health Care:**

The Legal Aid Society, Prisoners' Rights Project  
199 Water Street, 6<sup>th</sup> Floor  
New York, NY 10038  
(212) 577-3300

##### **Sexual Harassment:**

Prisoner's Legal Services  
ITHACA  
114 Prospect St.  
Ithaca, NY 14850  
(607) 273-2283

Prisoner's Legal Services  
ALBANY  
41 State Street, Suite M112  
Albany, NY 12207

##### **Women's Program Services:**

Women's Advocate Ministry, Inc.  
211 West 129th Street  
New York NY 10027  
(212) 280-7320

**General Questions:**

Women in Prison Project  
The Correctional Association of New York  
2090 Adam Clayton Powell Blvd  
Suite 200  
New York, NY 10027  
(212) 254-5700

**National Resources Outside of New York:****Battered Women:**

National Clearinghouse for the Defense of Battered Women  
125 S. 9th Street, Suite 302  
Philadelphia, PA 19107  
(215) 351-0010 or 1-800-903-0111 ext. 3  
(Accepts collect calls from incarcerated battered women)

National Coalition Against Domestic Violence  
One Broadway, Suite B210  
Denver, CO 80203  
(303) 839-1852 or 1-800-799-SAFE (1-800-799-7233)

**Health:**

Cancer Hotline:  
1-800-4CANCER (1-800-422-6237)

**Sexual Assault and Rape:**

Rape, Abuse, and Incest National Network  
National Sexual Assault Hotline  
1-800-656-HOPE (1-800-656-4673)  
(Free and confidential, 24 hours a day)

**General Information:**

National Women's Law Center  
Women in Prison Project  
11 Dupont Circle, NW  
Suite 800  
Washington, DC 20036  
(202) 588-5180