CHAPTER 24

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

A. Introduction

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

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

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

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

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

Regardless of where you are imprisoned, you must bring a *civil* law claim. You cannot bring *criminal* charges against your attacker, since only the government can bring charges under criminal law.[2] Note, however, that you do not have to wait for the government to bring a criminal charge against your attacker. If you have been assaulted and you want to sue your attacker in court, you can bring a civil suit even before the

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

2. *See* Lewis v. Gallivan, 315 F. Supp. 2d 313, 316–17 (W.D.N.Y. 2004) ("[T]he law is well settled that no private citizen has a constitutional right to bring a criminal complaint against another individual.").

government charges your attacker with a crime, and even if the government never charges your attacker at all.

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

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

(1) bring an action under Section 1983 of Title 42 of the United States Code (42 U.S.C. § 1983)[5] in state or federal court,
(2) file a tort action in state court (in the New York Court of Claims[6] if you are in New York), or
(3) file an Article 78[7] petition in state court if you are in New York.

More information on all of these types of claims can be found in other chapters of the *JLM*, including Chapter 5, "Choosing a Court and a Lawsuit"; Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law"; Chapter 17, "The State's Duty to Protect You and Your Property: Tort Actions"; and Chapter 22, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules." If you decide to file a federal court claim, you ***must first*** read *JLM* Chapter 14 on the Prison Litigation Reform Act ("PLRA"). If you do not follow the steps required by the PLRA, you might lose your right to sue (and possibly your good-time credit also).

B. Your Right to be Free from Assault

This Part of the Chapter is organized into five different sections. Part B(1) explains the legal definition of assault and which prison assaults are considered unlawful. Part B(2) discusses how the Eighth Amendment,

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3. Note that if you are a prisoner in a *federal* institution, you will need to sue for simple tort violations using the Federal Tort Claims Act ("FTCA"). The FTCA is a law that allows you to sue the federal government for negligent or harmful actions by its employees. Without the FTCA, you could not sue the federal government in tort because the federal government would be "immune" from this kind of suit (unable to be sued). It is important to note that "[u]nder the FTCA, courts apply the law of the state where the accident occurred." Robinson v. U.S. Bureau of Prisons, 244 F. Supp. 2d 57, 64 (N.D.N.Y. 2003). *See also* 28 U.S.C. § 1346(b)(1) (2012) (stating that government officials can be sued "in accordance with the law of the place where the act or omission occurred"); Part E(4) of Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law.".

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

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

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

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

which forbids cruel and unusual punishment, protects you against assaults by both prison guards and other prisoners. Part B(3) outlines your rights against harassment. Part B(4) explains why you should not use force to resist, even if you think an order, assault, or search by prison officials is illegal. Finally, Part B(5) explains how state laws and state constitutions protect you from assault.

1. The Legal Concept of Assault

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

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

Constitutional law is similar to tort law in this respect. Verbal threats by prison staff generally do not violate the Constitution.[10] But if a staff member says words or takes some action that makes you believe that the person will seriously hurt you, courts might find a constitutional violation.[11] Even then, under the Prison Litigation Reform Act ("PLRA"), you cannot sue for compensatory damages[12] (and, in some circuits, punitive

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

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

10. *See* Cole v. Fisher, 379 Fed. Appx. 40, 43 (2d Cir. 2010) ("[V]erbal harassment, standing alone, does not amount to a constitutional deprivation") (citing Purcell v. Coughlin, 790 F. 2d 263, 265 (2d Cir. 1986) (internal citations omitted); McBride v. Deer, 240 F. 3d 1287, 1291, n.3 (10th Cir. 2001) (stating that threatening to spray with mace did not violate a constitutional right: "[A]cts or omissions resulting in an inmate being subjected to nothing more than threats and verbal taunts do not violate the Eight Amendment"); Adkins v. Rodriguez, 59 F.3d 1034, 1037 (10th Cir. 1995) (holding that verbal sexual harassment by a prison guard did not violate a constitutional right); Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987) (holding that prison official's use of vulgarity [bad language] did not violate a constitutional right); Mateo v. Fisher, 682 F. Supp. 2d 423, 432 (S.D.N.Y. 2010) (finding that calling a prisoner "paranoid" and referring him to a mental health evaluation could be harassment but not serious enough to violate a constitutional right); Govan v. Campbell, 289 F. Supp. 2d 289, 299 (N.D.N.Y. 2003) ("A claim under 42 U.S.C. § 1983 is not designed to rectify harassment or verbal abuse." (quoting Gill v. Hoadley, 261 F.Supp.2d 113, 129 (N.D.N.Y. 2003))); Johnson v. Dellatifa, 357 F.3d 539, 546 (6th Cir. 2004) ("[H]arassment and verbal abuse . . . do not constitute the type of infliction of pain that the Eighth Amendment prohibits."); Graves v. N.D. State Penitentiary, 325 F. Supp. 2d 1009, 1011–12 (D.N.D. 2004) (finding that even though a guard's racially derogatory language was "offensive, degrading, and reprehensible," "the use of racially derogatory language will not, by itself, violate the 14th Amendment 'unless it is pervasive or severe enough to amount to racial harassment'" (quoting Blades v. Schuetzle, 302 F.3d 801, 805 (8th Cir. 2002))).

11. *See* Irving v. Dormire, 519 F.3d 441, 448–49 (8th Cir. 2008) (finding that prison officer's multiple death threats partially in response to the prisoner starting a lawsuit against officers were serious enough to implicate the 8th Amendment); Northington v. Jackson, 973 F.2d 1518, 1524 (10th Cir. 1992) (finding prisoner stated a § 1983 8th Amendment excessive force claim for psychological injuries when plain-clothed corrections officers surprised plaintiff on the street while he was out on work release and, without identifying themselves, threatened at gunpoint to kill him before taking him back to jail; the court held that although plaintiff was not physically injured, his alleged psychological injury was not *de minimis* because "convicted prisoners have a constitutional 'right to be free from the terror of instant and unexpected death' at the hands of their keepers" (citations omitted)); *see also* Hudson v. McMillian, 503 U.S. 1, 16–17, 112 S. Ct. 995, 1004, 117 L. Ed. 2d 156, 172 (1992) (Blackmun, J., concurring) (stating a "guard placing a revolver in an inmate's mouth and threatening to blow [the] prisoner's head off" would be an unnecessary and wanton infliction of pain—although psychological, not physical pain—amounting to an 8th Amendment excessive force violation).

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

damages[13]) in federal court for mental or emotional injury unless you were also physically injured.[14] See *JLM* Chapter 14, "The Prison Litigation Reform Act," for information on the PLRA's physical injury requirement.

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

(i) State Torts and Intent

Assault and battery are state law torts. State courts use a variety of different tests to decide whether someone's use of force against you was wrongful (whether that person has committed the torts of assault and battery against you).[15] All states require you to show that the defendant meant to act against you in some way. They take different approaches to the other requirements. In some states, you will have to show that the defendant either acted unlawfully or meant to harm you.[16] In others, you must show that the defendant deliberately ignored your rights.[17] In a few states, you will only need to add that the defendant touched you without your permission.[18] In New York, courts use the "intentional touching" standard.[19]

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

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

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

14. The PLRA prohibits all federal civil actions (constitutional and tort claims) brought in federal court by prisoners (convicted felons, misdemeanants, and pretrial detainees) for mental or emotional injury suffered while in custody where there was no related physical injury. 42 U.S.C. § 1997e(e) (2012). The Federal Tort Claims Act has a similar limitation for convicted felons (but not pretrial detainees or misdemeanants): no convicted felon can "bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act." 28 U.S.C. § 1346(b)(2) (2012). See Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," for more information.

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

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

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

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

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

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

(ii) Constitutional Torts and Intent

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

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

(i) State Tort of Negligence

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

Winning a negligence claim against prison officials for an assault by another prisoner is difficult.[27] Courts have found negligence in only a few situations: when the attacker is a prisoner whom officials knew or should

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

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

23. Negligence is "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregardful of others' rights . . . [a] tort grounded in this failure, usually expressed in terms of the following elements: duty, breach of duty, causation, and damages." BLACK'S LAW DICTIONARY 1133–34 (10th ed. 2014).

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

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

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

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

have known was violent;[28] when officials placed the plaintiff (the prisoner bringing the suit) near a mentally ill prisoner;[29] when officials placed the plaintiff near an armed prisoner;[30] when the plaintiff was exposed to a disturbed prisoner overseer or "trustee";[31] when the plaintiff was exposed to a prisoner who had a grudge against him or who had threatened him;[32] or occasionally when the prison did not have enough supervisory staff on duty.[33]

(ii) Constitutional "Tort" of Deliberate Indifference

If another prisoner assaulted you, you may be able to make a federal constitutional claim of deliberate indifference as well as a state tort claim of negligence. But, remember that constitutional violations are harder to prove than state tort claims. Deliberate indifference means that the prison officials' actions or inactions were worse than negligence (carelessness) and were so bad that they violate the Eighth Amendment's ban on cruel and unusual punishment. You will have to prove that the prison officials actually knew that you were going to be attacked but did nothing or too little to stop the attack (were "deliberately indifferent" to the

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upon a showing that it failed to exercise adequate care to prevent that which was reasonably foreseeable.").

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

29. *See*, *e.g.*, Bartlett v. Commonwealth, 418 S.W.2d 225, 227–228 (Ky. 1967) (finding that the trial court erred in refusing to admit evidence showing that two prisoners who murdered a 15-year-old prisoner in a state juvenile facility had records of violence and mental and emotional disability; noting the general rule that the keeper of a prison must exercise ordinary care for the protection of his prisoner if there is reasonable grounds to foresee danger to the prisoner). *But see* Luttrell v. Nickel, 129 F.3d 933, 936 (7th Cir. 1997) (finding no negligence on the part of an official who did not separate plaintiff from a mentally disturbed prisoner who was taking medication). For examples of courts finding "deliberate indifference" to be a constitutional violation in similar situations, see Haley v. Gross, 86 F.3d 630, 642–43 (7th Cir. 1996) (affirming liability for officials who failed to act during a heated argument between plaintiff and a mentally ill prisoner); Glass v. Fields, No. 04-71014, 2007 U.S. Dist. Lexis 37089, at 24 (E.D. Mich. 2007) (finding that the objective component—how serious the risk of harm was—of the deliberate indifference test was met when plaintiff was put in the same cell as a detainee who claimed to be insane and was noted as prone to be violent). *But see* Hann v. State, 137 Misc. 2d 605, 611, 521 N.Y.S.2d 973, 977 (N.Y. Ct. Cl. 1987) (finding that it was not foreseeable that prisoner with history of assaultive behavior and who was recently released from psychiatric hospital would attack fellow prisoner).

30. *See*, *e.g.*, Huertas v. State, 84 A.D.2d 650, 650–51, 444 N.Y.S.2d 307, 308–309 (3d Dept. 1981) (finding negligence where, immediately before fatal assault, assailant left his work area with iron bar visible under his clothes, in plain view of five corrections officers); Jackson v. Hollowell, 714 F.2d 1372, 1373–74 (5th Cir. 1983) (finding prison officials liable when prisoner was struck by a pellet that was fired by an armed prison trustee using a sawed-off shotgun). Prison trustees are "inmates . . . armed with loaded shotguns and . . . entrusted with the responsibility of guarding other inmates." Jackson v. Hollowell, 714 F.2d 1372, 1373 n.2 (5th Cir. 1983).

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

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

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

danger). It is not enough to prove that the officials were negligent and "should have known" you were in danger. Part B(2)(a)(ii) below explains more about how to show prison officials' deliberate indifference.[34]

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

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

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

(d) When is Assault Prohibited by the Law?

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

Also, because corrections officers are part of the government, they can use the defense of qualified immunity[40] when sued under Section 1983. This means even if you can prove you were assaulted, the officials may not be liable because of qualified immunity. For a detailed discussion of qualified immunity and Section 1983, see Part (C)(3)(c) ("Qualified Immunity") and Part B ("Section 1983") of Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law."

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

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

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

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

38. *See* Whitman v. Nesic, 368 F.3d 931, 935–36 (7th Cir. 2004) (finding no violation because while nudity during drug tests might be uncomfortable, the evidence did not show that the official had acted for any other purpose besides a legitimate interest in providing for the safety of prisoners and the community).

39. N.Y. Correct. Law § 137(5) (McKinney 2003 & Supp. 2009) ("When any inmate, or group of inmates, shall offer violence to any person, or do or attempt to do any injury to property, or attempt to escape, or resist or disobey any lawful direction, the officers and employees *shall use all suitable means* to defend themselves, to maintain order, to enforce observation of discipline, to secure the persons of the offenders and to prevent any such attempt or escape." (emphasis added)).

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

2. Protection from Assault Under the Eighth Amendment

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

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

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

(1) A subjective part—prison officials must have acted with a state of mind that is guilty enough;[45] and
(2) An objective part— you must have been injured[46] or you must have had a big risk of serious injury.[47]

(a) Subjective Part—Culpable State of Mind

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

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41. This Chapter explains how the 8th Amendment can protect you from assaults and body searches. But the 8th Amendment right to be free from cruel and unusual punishment can protect prisoners in other ways too, like from general prison conditions such as overcrowding and uncleanliness (*see* Part B(2)(d) of Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law"), and lack of proper medical care (*see* Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care").

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

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

44. *See* Farmer v. Brennan, 511 U.S. 825, 833–34, 114 S. Ct. 1970, 1976–77, 128 L. Ed. 2d 811, 822–23 (1994) (holding that prison officials are obligated to protect prisoners from violent attacks by other prisoners); *see, e.g.*, Bistrian v. Levi, 696 F.3d 352, 370–71 (3d Cir. 2012) (finding that plaintiff stated a constitutional claim against officials who had placed him in a recreational yard with other prisoners whom officials knew were likely to retaliate against plaintiff).

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

46. *See* Hudson v. McMillian, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992) ("[T]he extent of injury suffered by a prisoner is one factor that may suggest 'whether the use of force could plausibly have been thought necessary' in a particular situation." (quoting Whitley v. Albers, 475 U.S. 312, 321, 106 S. Ct. 1078, 1085, 89 L. Ed. 2d 251, 261–62 (1986))).

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

48. Note that if a prison official injured you in the presence of, or with the knowledge of, other officials, you could sue both the official who harmed you and also the officials and/or supervisors who knew about it and did nothing. The prison officials who knew about your assault but did nothing would be liable under the *Farmer* standard—not the *Hudson* "malicious and sadistic" standard. *See, e.g.*, Blyden v. Mancusi, 186 F.3d 252, 264 (2d Cir. 1999) (finding the deliberate indifference standard applied to prison supervisors if "after learning of the violation through a report or appeal, . . . [the supervisor] failed to remedy the wrong . . . created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue . . . [or] was grossly negligent in managing subordinates who caused the unlawful condition or event." (citations omitted)); Buckner v. Hollins, 983 F.2d 119, 122 (8th Cir. 1993) (applying the

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

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

If officials are using force for valid reasons, they are not acting against the Eighth Amendment.[51] Prison officials are generally allowed to use force during a riot or other major prison disturbance,[52] and during smaller events when prisoners behave violently or disruptively.[53] But, if the force has no purpose and is simply meant to harm the prisoner for no valid reason, then the official may be found to have used too much force.[54] In other words, if the official uses force for the purpose of harming you and not for returning order to the prison, then the official may be found to have used too much force.

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

(1) the seriousness of your injuries,[55]
(2) if the force was necessary under the circumstances (why the official used force),
(3) the relationship between the need to use force and the amount of force that was actually used,
(4) the size of the threat as a prison official would reasonably see it, and
(5) efforts made by prison guards to decrease the amount of force used.[56]

You should think about each of these factors when you try to prove that prison officials meant to hurt you when they used violence. You need to remember that "not every push or shove, even if it may later seem

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deliberate indifference, or *Farmer*, standard, to a claim based on prison official's failure to act); Meriwether v. Coughlin, 879 F.2d 1037, 1048 (2d Cir. 1989) ("[S]upervisory liability may be imposed when an official has actual or constructive notice of unconstitutional practices and demonstrates 'gross negligence' or 'deliberate indifference' by failing to act."); Vaughan v. Ricketts, 859 F.2d 736, 741 (9th Cir. 1988) ("[P]rison administrators' indifference to brutal behavior by guards toward inmates [is] sufficient to state an Eighth Amendment claim.") (citations omitted); Pizzuto v. Nassau, 239 F. Supp. 2d 301, 311 (E.D.N.Y. 2003) (finding that prison supervisor was liable for standing by and watching while subordinates beat the prisoner).

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

50. Hudson v. McMillian, 503 U.S. 1, 6–7, 112 S. Ct. 995, 998–99, 117 L. Ed. 2d 156, 165–66 (1992).

51. *See* Hudson v. McMillian, 503 U.S. 1, 6, 112 S. Ct. 995, 998, 117 L. Ed. 2d 156, 165 (1992) ("[T]he question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." (quoting Whitley v. Albers, 475 U.S. 312, 320–21, 106 S. Ct. 1078, 1085, 89 L. Ed. 2d 251, 261 (1986)); *see also* Skinner v. Cunningham, 430 F.3d 483, 489 (1st Cir. 2005) (finding that prison officials used reasonable force in forcibly extricating the prisoner from his cell after he refused to be handcuffed during a cell search).

52. Whitley v. Albers, 475 U.S. 312, 318–26, 106 S. Ct. 1078, 1083–88, 89 L. Ed. 2d 251, 259–66 (1986) (finding no 8th Amendment violation where prisoner was shot as part of a good-faith effort to restore prison security); *see also* Wright v. Goord, 554 F.3d 255, 269–270 (2d Cir. 2009) (finding that although guard had placed one hand on prisoner's abdomen at the site of his colon surgery, there was no evidence that that placement was sadistic or malicious because prisoner did not testify that guard knew or had reason to know that his abdomen was unusually tender, nor did the record reveal any basis for inferring that guard would have been aware that it was a surgical site).

53. *See* Hudson v. McMillian, 503 U.S. 1, 6, 112 S. Ct. 995, 998–99, 117 L. Ed. 2d 156, 165 (1992) (finding that during a riot or a lesser disruption, "corrections officers must balance the need to maintain or restore discipline through force against the risk of injury to inmates"); *see also* Bellotto v. County of Orange, 248 Fed. Appx. 232, 235 (2d Cir. 2007) (finding that guards did not use excessive force in forcibly restraining and handcuffing female prisoner who was violently banging her head against the wall of her cell and refusing to stop).

54. *See, e.g.*, Estate of Davis by Ostenfeld v. Delo, 115 F.3d 1388, 1394–95 (8th Cir. 1997) (finding an 8th Amendment excessive force violation when a corrections officer struck a non-resisting prisoner in the head and face 20 to 25 times while four other officers restrained his limbs, resulting in serious injury); Locicero v. O'Connell, 419 F. Supp. 2d 521, 428–29 (S.D.N.Y. 2006) (finding that a prisoner adequately stated a claim that his 8th amendment rights were violated when he was seriously assaulted by a prison officer, the prisoner did not provoke the assault, and the prison facility had prior notice of, but failed to act about, the officer's previous use of excessive force).

55. Courts will examine the extent of your injury to help determine whether an official's decision to use force in a particular situation was reasonable. Hudson v. McMillian, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992). Courts also look at the seriousness of your injuries in deciding the objective component of an 8th Amendment violation.

56. *See* Hudson v. McMillian, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992).

unnecessary," violates your constitutional rights.[57] Even if an official used force, you may not be able to win in court. Nevertheless, some uses of force may be so extreme that they are unconstitutional, even in an emergency.[58]

The Ninth Circuit has said that you do not need to show that the officer meant to hurt or punish a specific individual.[59] This means even if the officer meant to hit someone else, he can still be found liable if he hit you instead. For instance, in Robins v. Meecham, a prisoner was injured by a birdshot a correction officer had fired at another prisoner.[60] The court held that even though the officer did not mean to harm or punish Robins, the officer did mean to harm a different prisoner.[61] The court said that this was enough to meet the intent requirement.[62]

Still, it is important to note that if a prison official means to harm a prisoner, but in the end does not hurt the prisoner, the prisoner will not have a claim.[63] For example, in Warren v. Humphrey, a prison official tried to kick a prisoner in the head but missed.[64] Because he missed, there was no harm and therefore, no case.[65] Remember that the Prison Litigation Reform Act would probably also prevent you from making a similar claim because it requires a physical injury, not just a mental injury.[66]

(ii) Assault by Another Prisoner—The *Farmer* Standard

If you are suing a prison official who did not stop or act to prevent another prisoner from attacking you, the court will use the "deliberate indifference"[67] standard from Farmer v. Brennan.[68] Prison officials may be found liable under the deliberate indifference standard if they:

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

(2) ignored the risk and did not act or do enough to avoid the harm.[69]

Because prisoners often cannot protect themselves, courts have decided that the government must take reasonable steps to protect prisoners against violence by other prisoners.[70] The Eighth Amendment creates a

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

58. *See* Jones v. Huff, 789 F. Supp. 526, 535–36 (N.D.N.Y. 1992) (finding violations of prisoner's 8th Amendment rights when corrections officers slapped, punched, and kicked a handcuffed and naked prisoner).

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

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

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

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

63. Warren v. Humphrey, 875 F. Supp. 378, 382 (E.D. Tex. 1995) ("[P]laintiff must allege some injury in order to sustain a claim of being subject to excessive force."); Jackson v. Culbertson, 984 F.2d 699, 700 (5th Cir. 1993) (finding trivial amounts of force not repugnant to the conscience of mankind do not violate the 8th Amendment's Cruel and Unusual Punishment Clause).

64. Warren v. Humphrey, 875 F. Supp. 378, 380 (E.D. Tex. 1995).

65. Warren v. Humphrey, 875 F. Supp. 378, 382 (E.D. Tex. 1995).

66. 42 U.S.C. § 1997e(e) (2012). See Part F of Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," for more information on the PLRA's limitations on actions for mental or emotional injury.

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

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

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

70. *See* Bistrian v. Levi, 696 F.3d 352, 366 (3d Cir. 2012) (stating that prisoner officials have a duty to protect prisoners from violent actions of fellow prisoners) (quoting Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994)); *see also* Berry v. City of Muskogee, 900 F.2d 1489, 1496–99 (10th Cir. 1990) (finding where prisoner was strangled to death in prison by two men whom he had identified as helping him commit the crime for which he was serving time, officials could have known of the danger based on the prior relationship); Cortes-Quinones v. Jiminez-Nettleship, 842 F.2d 556, 562–63 (1st Cir. 1988) (finding officials were deliberately indifferent to the safety needs of a psychiatrically-disturbed prisoner who was killed in an overcrowded prison); Gangloff v. Poccia, 888 F. Supp. 1549, 1555 (M.D. Fla. 1995) (finding that prison officials have a duty to protect prisoners from one another); Fisher v. Koehler, 692 F. Supp. 1519, 1559 (S.D.N.Y. 1988) ("Although the state is not obliged to insure an assault-free environment, a prisoner has a constitutional right to be protected from the unreasonable threat of violence from his fellow inmates.").

constitutional right for prisoners to be protected from harm by fellow prisoners.[71] Courts have mainly used the "deliberate indifference" standard for cases where a prison official does not prevent a prisoner from assaulting another prisoner, but courts have also used the standard for when a prison official does not prevent another official from attacking a prisoner.[72] These types of lawsuits are also known as "failure-to-protect" claims.[73] You can go to court to claim prison officials are ignoring unsafe conditions or a serious threat against you, even if you have not yet been assaulted.[74]

In Farmer v. Brennan, the U.S. Supreme Court held that prison staff showed deliberate indifference when they did not do anything, even though they knew about a big risk[75] to a prisoner's safety.[76] If you were assaulted by another prisoner (or prison guard) and believe prison officials' deliberate indifference allowed the assault to happen, you will have to prove to the court that:

(1) There was a big risk to your safety, and
(2) The prison officials knew of this risk to your safety.

In addition to proving both of the above, you must also prove one of the following:

(1) The prison officials did not try to prevent the assault; or
(2) The prison officials did nothing to stop the assault; or
(3) The prison officials tried to prevent or stop the assault, but they did not try as hard as they should have (in other words, their attempts to prevent the assault were not reasonably enough).

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

(1) Proving a Substantial Risk to Your Safety

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

(2) Proving the Prison Officials Knew About This Risk

You must also provide evidence that the official knew of the big risk to your safety.[78] You do not have to prove that the official definitely knew you were going to be attacked. You only have to show that the official

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

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

73. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 831, 114 S. Ct. 1970, 1975, 128 L. Ed. 2d 811, 821 (1994) (describing the alleged 8th Amendment claim as a failure to prevent harm).

74. *See* Helling v. McKinney, 509 U.S. 25, 34, 113 S Ct. 2475, 2481, L. Ed. 2d 22, 32 (1993) ("[A] prisoner need not wait until he is actually assaulted before obtaining relief . . . . [T]he Eighth Amendment protects against sufficiently imminent dangers as well as current unnecessary and wanton infliction of pain and suffering.").

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

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

77. *See, e.g.*, Blyden v. Mancusi, 186 F.3d 252, 265 (2d Cir. 1999) (holding correctional officers to a deliberate indifference standard); Madrid v. Gomez, 889 F. Supp. 1146, 1248, n.196 (N.D. Cal. 1995) ("Municipalities can be found liable where the failure to train or supervise subordinates evinces deliberate indifference that leads to constitutional deprivations.").

78. *See* Lewis v. Richards, 107 F.3d 549, 553–54 (7th Cir. 1997) (finding no 8th Amendment violation where prisoner failed to present sufficient evidence that officials knew of risk to his safety and consciously disregarded that risk after the prisoner was subjected to three separate sexual assaults); Davis v. Scott, 94 F.3d 444, 446–47 (8th Cir. 1996) (finding no 8th Amendment violation where prison informant was attacked after his return to the general population, because there was no "solid evidence" that anyone in the general population posed an "identifiable serious risk" to his safety).

knew there was a big chance that you could get hurt.[79] You do not have to show that the officials knew you were personally at risk or that the risk came from a particular prisoner.[80]

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

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

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79. *See* Whitston v. Stone County Jail, 602 F.3d 920, 924–25 (8th Cir. 2010) (finding that prison officials could be liable for sexual assault by one prisoner against the other even if they did not know about the risk of that specific prisoner committing the assault, as long as they knew about the general risk).

80. *See* Farmer v. Brennan, 511 U.S. 825, 843, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811, 829 (1994); *see also* Brown v. Budz, 398 F.3d 904, 914–15 (7th Cir. 2005) (holding deliberate indifference can be established by knowledge either of a victim's vulnerability or of an assailant's predatory nature; both are not required); Pierson v. Hartley, 391 F.3d 898, 902–03 (7th Cir. 2004) (holding that a prisoner could recover for assault by a violent prisoner assigned to an open-air dormitory (which allowed unrestricted movement) in violation of prison policy, regardless of whether prison staff knew of the risk to the particular prisoner who was injured); Greene v. Bowles, 361 F.3d 290, 294 (6th Cir. 2004) (holding that a transsexual prisoner could recover for assault by a known "predatory inmate" either because leaving her in a unit containing high-security prisoners threatened her safety, or because placing the attacker in protective custody created a risk for the other occupants); Marsh v. Butler County, Ala., 268 F.3d 1014, 1027–30 (11th Cir. 2001) (*en banc*) (finding that prisoners who were assaulted in a county jail stated a claim where the jail was generally overcrowded, understaffed, disorderly, and run-down, lacking locks on cells), *overruled in unrelated part as stated by* Hollywood E. Artful Designs, Inc. v. Gutentag, 2007 U.S. Dist. LEXIS 52948, at 3 (S.D. Fla. 2007); Hayes v. N.Y. City Dept. of Corr., 84 F.3d 614, 621 (2d Cir. 1996) (prisoner's refusal to name his enemies to prison staff does not by itself determine if staff knew of risk to him); Jensen v. Clarke, 94 F.3d 1191, 1198–1201 (8th Cir. 1996) (affirming injunction based on generalized increase in violence attributed to random assignment of cellmates); LaMarca v. Turner, 995 F.2d 1526, 1535–36 (11th Cir. 1993) (liability can be based on "general danger arising from a prison environment that both stimulated and condoned violence"); Coleman v. Wilson, 912 F. Supp. 1282, 1316 (E.D. Cal. 1995) (risk of harm from systemic medical care deficiencies is obvious); Abrams v. Hunter, 910 F. Supp. 620, 624–25 (M.D. Fla. 1995) (acknowledging potential liability based on awareness of generalized, substantial risk of serious harm from prisoner violence), *aff'd*, 100 F.3d 971 (11th Cir. 1996); Knowles v. N.Y. City Dept. of Corr., 904 F. Supp. 217, 221 (S.D.N.Y. 1995) (finding a valid claim where prison officials knew of an ethnic "war" among prisoners, that a Hispanic prisoner who had been cut had been transferred to plaintiff's jail, and that plaintiff was part of a group at risk because of his accent and appearance).

81. *See* Riccardo v. Rausch, 375 F.3d 521, 526 (7th Cir. 2004) ("'Deliberate indifference' means subjective awareness. It is not enough, the Court held in *Farmer*, that the guard *ought* to have recognized the risk. Instead, 'the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'" (citations omitted)); Knowles v. N.Y. City Dept. of Corr., 904 F. Supp. 217, 222 (S.D.N.Y. 1995) ("Mere negligence, however, on the part of a prison official will not give rise to a claim under § 1983.") (citations omitted).

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

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

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

85. *See* Farmer v. Brennan, 511 U.S. 825, 842–43, 114 S. Ct. 1970, 1981–82, 128 L. Ed. 2d 811, 829 (1994).

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

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

(3) Prison Officials Did Not Act Reasonably to Prevent or Stop Assault

Finally, you must prove that the official acted unreasonably or failed to act in a situation where the official knew that you were at a substantial risk of harm.[88] It is important to understand that if a prison official does take reasonable steps to help you, but you are assaulted anyway, then you will likely lose in court because courts will not find the official acted with deliberate indifference.[89] For example, in the First Circuit case Burrell v. Hampshire County, the court found that the prison guards did not act unreasonably when they did not transfer a prisoner who was good at martial arts and who did not have any previous fights with his attacker.[90]

(4) Examples of *Farmer* Deliberate Indifference Cases

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

New York courts have also dealt with claims that guards failed to protect a prisoner from other prisoners. In Knowles v. New York City Department of Corrections, another prisoner slashed Knowles in the face while they were in the recreation area.[95] Knowles sued prison officials stating that they had known of the risk to him and were deliberately indifferent to it.[96] The guards had only patted down the prisoners when they had entered the recreation area, instead of going through the normal strip search procedures.[97] Furthermore, evidence existed that the prison officials knew about a "war" going on between Spanish-speaking and Jamaican prisoners and that Knowles was one of the prisoners at risk because of the way that he looked and talked.[98] The court held that this was enough evidence to create uncertainty about whether or not the guards were deliberately indifferent to Knowles' safety.[99]

In sum, prison officials may be found liable under the *Farmer* deliberate indifference standard if they (1) know the prisoner is facing a substantial risk of serious harm, and (2) disregard the risk by failing to take

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

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

88. *See* Farmer v. Brennan, 511 U.S. 825, 841–42, 114 S. Ct. 1970, 1981, 128 L. Ed. 2d 811, 828 (1994) (holding that under the 8th Amendment, prison officials could not be liable for inhumane conditions of confinement unless the official had knowledge of the risk to the prisoner); *see also* Leibach v. State, 215 A.D.2d 978, 627 N.Y.S.2d 463 (3d Dept. 1995) (stating that where an attack was planned in secret, and correction staff was not aware of it, staff was not culpable).

89. *See* Farmer v. Brennan, 511 U.S. 825, 844, 114 S. Ct. 1970, 1982–83, 128 L. Ed. 2d 811, 830 (1994) (emphasizing that there is no 8th Amendment violation if the official "responded reasonably to the risk, even if the harm ultimately was not averted"); *see also* Short v. Smoot, 436 F.3d 422, 428 (4th Cir. 2006) (finding that officials who put a potentially suicidal prisoner under video surveillance had acted reasonably and could not be liable under the 8th Amendment).

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

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

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

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

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

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

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

97. Knowles v. N.Y. City Dept. of Corr., 904 F. Supp. 217, 218–19 (S.D.N.Y. 1995).

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

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

reasonable measures to avoid it. If they meet these requirements, officials may be liable if they do not act to stop another prisoner or prison official from attacking you. Prison officials may also be liable if there is a policy allowing a pattern of too much force.[100]

(b) Objective Part

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

(c) Seriousness of Harm in Assaults by Prison Officials

To win a lawsuit against a prison official who assaulted you, you have to show that the attack was "cruel and unusual punishment" under the Eighth Amendment.[102] You can show that a prison official violated your Eight Amendment rights whether your injury was big or small.[103] What matters most is whether the official used force against you in order to try to keep order in the prison or whether the purpose was to hurt you.[104] However, a court will still look into how severe your injury was.[105] This is because the kind of injury you have can help a court figure out the strength of the force the official was using. The injury can also help a court figure out whether officials could have thought that the force was necessary to do their job in a particular situation.

Courts look to society's standards of good behavior to decide whether the official's actions were bad enough.[106] In general, society's standards are violated whenever prison officials maliciously, evilly, or cruelly use force to cause harm "whether or not significant injury is evident."[107] But "not . . . every malevolent [cruel] touch by a prison guard gives rise to a federal cause of action."[108]

The Supreme Court has said that "cruel and unusual punishment" does not include uses of very minor amounts of force. Courts have used the latin phrase "*de minimis*" to describe this small amount of force. But remember that a small amount of force is not the same thing as a small injury.[109] "*De minimis*" refers to the idea that a fact or thing is "so insignificant that a court may overlook it in deciding an issue or case."[110] Some examples of injuries courts have thought were *de minimis* are bumping, discomfort, sore wrists,[111] cuts and

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100. *See* Matthews v. Crosby, 480 F.3d 1265, 1270–75 (11th Cir. 2007) (holding that a prison warden's knowledge of the violent propensities of some of his prison guards and his failure to act to prevent them from assaulting prisoners could count as deliberate indifference); Ruiz v. Estelle, 503 F. Supp. 1265, 1302 (S.D. Tex. 1980) (finding 8th Amendment violations where prison officials encouraged staff to indulge in excessive physical violence by rarely investigating reports of violence and failing to take corrective disciplinary action against officers whom they knew to have brutalized prisoners), *aff'd in part, rev'd in part*, 688 F.2d 266 (5th Cir. 1982), *and* 679 F.2d 1115 (5th Cir. 1982).

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

102. U.S. Const. amend. VIII.

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

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

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

106. Hudson v. McMillian, 503 U.S. 1, 2, 112 S. Ct. 995, 996, 112 L. Ed. 2d 156, 157 (1992); Estelle v. Gamble, 429 U.S. 97, 102–103, 97 S. Ct. 285, 290, 50 L. Ed. 2d 251, 259 (1976); *see also* Wright v. Goord, 554 F.3d 255, 268–69 (2d Cir. 2009).

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

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

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

110. BLACK'S LAW DICTIONARY 496 (10th ed. 2014).

111. Fillmore v. Page, 358 F.3d 496, 504–05 (7th Cir. 2004) (holding that incidental bumping, discomfort, and sore wrists were *de minimis* and do not meet the constitutional threshold).

swelling to the wrists,[112] being slammed against a wall,[113] and being hit by swinging keys.[114] Some examples of force courts have called *de minimis* are hitting a prisoner once on the head,[115] spraying a prisoner with water,[116] pressing a fist against a prisoner's neck,[117] and bruising a prisoner's ear during a routine search.[118]

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

In *Hudson*, the prisoner suffered blows that caused "bruises, swelling, loosened teeth, and a cracked dental palate."[119] The Supreme Court found that the violence against Hudson and his injuries were serious enough to satisfy the "objective part" of the Eighth Amendment. This provided the basis for a constitutional claim. But you should notice that the *Hudson* Court, in finding a constitutional violation, also thought that it was important that the officers meant to embarrass the prisoner.

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

In a Third Circuit case, Giles v. Kearney, officers hit and kicked a prisoner while he was restrained on the ground.[123] Giles had claimed that the officers continued to do this even after he had stopped resisting them.[124]

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112. Watson v. Riggle, 315 F. Supp. 2d 963, 969–70 (N.D. Ind. 2004) (holding injuries to prisoner's wrists, including a cut and some swelling, caused when guards removed his handcuffs were *de minimis*); *cf.* Liiv v. City of Coeur D'Arlene, 130 Fed. Appx. 848, 852 (9th Cir. 2005) (clarifying that while past cases, such as Wall v. County. of Orange, 364 F.3d 1107, 1112 (9th Cir. 2004), have "recognized that excessively tight handcuffing can constitute a Fourth Amendment violation," a finding of such violation requires either actual injury to the wrists or a complaint to the officers involved that the handcuffs were too tight).

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

114. Norman v. Taylor, 25 F.3d 1259, 1263–64 (4th Cir. 1994) (requiring prisoner to establish more than *de minimis* injury by deputy's swinging of keys at the prisoner to maintain claim of excessive force); White v. Holmes, 21 F.3d 277, 281 (8th Cir. 1994) (requiring prisoner to establish more than *de minimis* injury caused by prison librarian throwing keys at prisoner and flailing her arms at prisoner's head). *But see* United States. v. LaVallee, 439 F.3d 670, 687–88 (10th Cir. 2006) (rejecting the view that *de minimis* injury is conclusive evidence that *de minimus* force was used).

115. Olson v. Coleman, 804 F. Supp. 148, 150–51 (D. Kan. 1992) (holding that single blow that struck prisoner on the head while he was handcuffed was not excessive use of force), *vacated on other grounds*, No. 92-3281, 1993 U.S. App. LEXIS 10086, at * 3 (D. Kan. April 28, 1993) (*unpublished*).

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

117. Candelaria v. Coughlin, 787 F. Supp. 368, 374–75 (S.D.N.Y. 1992) (finding that guard pressing his fist against prisoner's neck, resulting in no physical injury, was *de minimis* force for 8th Amendment purposes), *aff'd*, 979 F.2d 845 (2d Cir. 1992).

118. Siglar v. Hightower, 112 F.3d 191, 193–94 (5th Cir. 1997) (finding no 8th Amendment violation where plaintiff suffered bruised ear during routine search; court deemed this a *de minimis* use of force).

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

120. Jones v. Huff, 789 F. Supp. 526, 535–36 (N.D.N.Y. 1992).

121. Jones v. Huff, 789 F. Supp. 526, 535–36 (N.D.N.Y. 1992) (finding that kicks and punches were not part of a good-faith effort to restore discipline and could not have been thought necessary since the prisoner was already pinned down by two other officers, and that stripping the prisoner "was done maliciously with the intent to humiliate him").

122. Jones v. Huff, 789 F. Supp. 526, 532, 536–37 (N.D.N.Y. 1992).

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

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

The Third Circuit stated that if Giles' claim were true, the officers' actions would be an Eighth Amendment violation.[125]

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

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

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

(i) Substantial Risk of Serious Harm from Other Prisoners

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

It is important that you understand that prison officials will not be responsible anytime another prisoner hurts you.[134] In other words, if you never faced a big risk (or cannot prove you did), then you cannot prove prison officials were deliberately indifferent to that risk. For example, in Berry v. Sherman,[135] the Eighth Circuit decided that the plaintiff, a prisoner who was assaulted by his cellmate, did not have an Eighth Amendment failure-to-protect claim because no one, including the victim, had thought the cellmate was dangerous. Therefore, the court rejected the prisoner's lawsuit because he had failed to show a "substantial risk of serious harm."[136]

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

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

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

128. Williams v. Benjamin, 77 F.3d 756, 764–65 (4th Cir. 1996).

129. Flowers v. Phelps, 956 F.2d 488, 489–90 (5th Cir. 1992), *vacated in part on other grounds*, 964 F.2d 400 (5th Cir. 1992).

130. Flowers v. Phelps, 956 F.2d 488, 491 (5th Cir. 1992).

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

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

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

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

135. Berry v. Sherman, 365 F.3d 631, 634 (8th Cir. 2004).

136. Berry v. Sherman, 365 F.3d 631, 634–35 (8th Cir. 2004); *see also* Riccardo v. Rausch, 375 F.3d 521, 526–27 (7th Cir. 2004) (holding that the prisoner plaintiff had not faced a substantial risk from his cellmate, who later assaulted him, because while the prisoner was at risk of attack from the Latin Kings, his cellmate attacked him not for that reason but out of a personal fantasy: "The risk from which [the prisoner plaintiff] Riccardo sought protection was not realized; for all this record shows, the (objectively evaluated) risk to Riccardo of sharing a cell with Garcia was no greater than the risk of sharing a cell with any other prisoner.").

In *Farmer*, the Court did not explain how serious the risk must be in order to be "substantial."[137] Generally, courts assess whether society considers the risk that the prisoner complains of to be so bad that it is against our society's standards to make anyone take such a chance.[138] In other words, the prisoner must show that today's society does not accept the risk he faced.[139] Courts do not consider the general, everyday risk of assault from other prisoners to be a "substantial risk" by itself.[140]

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

3. Harassment by Prison Officials

This Section explains when different types of harassment violate the Eighth Amendment. Harassment can be verbal, physical, or sexual. Harassment may be about race, sex, disability, language, national origin, sexual orientation, or other characteristics. New York State defines harassment as "[e]mployee misconduct meant to annoy, intimidate, or harm an inmate."[141] Generally, verbal harassment alone does not violate the Eighth Amendment unless you are also physically threatened at the same time. Sexual harassment is any unwanted sexual attention. Generally, sexual comments by themselves are not enough for an Eighth Amendment violation.[142] If you are being harassed, you should first try to file a grievance through the inmate grievance system, discussed in *JLM* Chapter 15.

(a) Verbal Harassment Alone

You cannot have an Eighth Amendment claim for verbal assault only.[143] Courts do not think verbal abuse, including racial and sexual comments, is unconstitutional. For example, the Ninth Circuit held in *Austin v. Terhune* that a prisoner did not have an Eighth Amendment claim where a guard verbally harassed the

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

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

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

140. Jones v. Marshall, 459 F. Supp. 2d 1002, 1008 (E.D. Cal. 2006) ("[T]he legal standard must not be applied to an idealized vision of prison life, but to the prison as it exists." (quoting Berg v. Kincheloe, 794 F.2d 457, 462 (9th Cir. 1986))).

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

142. *See* Adkins v. Rodriguez, 59 F.3d 1034, 1037–38 (10th Cir. 1995) (finding prison official's alleged verbal sexual harassment of prisoner did not violate the 8th Amendment because it was not objectively sufficiently serious and the prison official did not act with deliberate indifference to the prisoner's health or safety). When other forms of harassment are combined with comments of a sexual nature, they may constitute cruel and unusual punishment in violation of the 8th Amendment. *See, e.g.*, Berry v. Oswalt, 143 F.3d 1127, 1133 (8th Cir. 1998) (holding that allegations of attempted non-routine pat-downs combined with sexual comments and propositions that caused fear and frustration met the objective prong of the 8th Amendment claim). See Parts B(3)(a) and (c) of this Chapter for more information on verbal and sexual harassment.

143. Webster v. City of New York, 333 F. Supp. 2d 184, 201 (S.D.N.Y. 2004) ("Being subjected to verbally abusive language does not rise to the level of a constitutional claim in an Eighth Amendment context."); Minifield v. Butikofer, 298 F. Supp. 2d 900, 904–05 (N.D. Cal. 2004) (holding prisoner did not state a constitutional claim for sexual harassment, where a prison official twice unzipped his pants and told prisoner to grab his penis, because the Ninth Circuit has "specifically differentiated between sexual harassment that involves verbal abuse and that which involves allegations of physical assault, finding the latter [sic] to be in violation of the constitution"; also noting the prisoner had not alleged any physical injury, and under the Prison Litigation Reform Act, "[f]ailure to allege and establish an appropriate physical injury is ground for dismissal" (citations omitted)); Jones v. Brown, 300 F. Supp. 2d 674, 681 (N.D. Ind. 2003) (holding pretrial detainee had no constitutional claim, where guard incorrectly told him criminal charges had been dismissed, when in fact they had been referred to the prosecutor and eventually became part of a plea bargain, because verbal abuse and harassment are not sufficient).

prisoner in a sexual and racial manner and briefly exposed the guard's genitals.[144] Similarly, the Sixth Circuit in *Johnson v. Dellatifa* decided that a prisoner had no constitutional claim against a guard who banged his cell door, threw food trays, made aggravating and insulting comments, and behaved in a racially prejudicial manner because harassment and verbal abuse are not Eighth Amendment violations.[145]

(b) Verbal Harassment With Physical Threats

While simple verbal harassment does not violate the Eighth Amendment, courts have held that when these assaults come along with very serious physical threats (such as believable death threats), you may have a claim for psychological injury.[146] However, the PLRA states that prisoners may not bring a federal civil action for mental or emotional injury suffered while in custody "without a prior showing of physical injury."[147] The courts have said that this means that if you can only show a psychological injury, you will not be able to get money damages. The court can still grant you injunctive relief (a court order to prevent officials or prisoners from harassing you) if you can show that this conduct is likely to happen again in the future.[148] For more information on injunctive relief, see Part L of Chapter 14 of the *JLM*, "The Prison Litigation Reform Act."

(c) Sexual Harassment

There is no single definition of sexual harassment in the prison context. However, the Bureau of Justice Statistics defines nonconsensual sexual acts as "[u]nwanted contacts with another inmate or any contacts with staff that involve oral, anal, or vaginal penetration, handjobs, and other sexual acts."[149] Both men and women can be sexually harassed.[150] Because prison officials have so much power over prisoners, a corrections officer may try to force a prisoner into sexual conduct by threatening him with disciplinary action or some other punishment. This can be considered cruel and unusual punishment that goes against the Eighth Amendment.

To decide if an act of sexual harassment or assault violated a prisoner's Eighth Amendment rights, courts look to see if the act is against "evolving standards of decency."[151] In other words, a court will look at what society believes is acceptable and good behavior to decide whether an attacker's behavior went against that standard. Sexual assault is a clear violation, but comments of a sexual nature by themselves are usually not enough to violate the Eighth Amendment.[152] When other forms of harassment are combined with comments of a sexual nature, they may constitute cruel and unusual punishment in violation of the 8th Amendment.[153]

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144. Austin v. Terhune, 367 F.3d 1167, 1171–72 (9th Cir. 2004) ("Although prisoners have a right to be free from sexual abuse, whether at the hands of fellow inmates or prison guards, the Eighth Amendment's protections do not necessarily extend to mere verbal sexual harassment." (citations omitted)).

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

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

147. 42 U.S.C. § 1997(e) (2012).

148. *See* Hutchins v. McDaniels, 512 F.3d 193, 196–98 (5th Cir. 2007) (noting that "the physical injury requirement does not bar declaratory or injunctive relief for violations of a prisoner's Constitutional rights"); Zehner v. Trigg, 133 F.3d 459, 461–63 (7th Cir. 1997) (finding that in a suit for mental and emotional injuries because of exposure to asbestos, a prisoner cannot sue for monetary damages but can sue for other kinds of relief).

149. NPREC, Report and Standards, *available at* https://www.ncjrs.gov/pdffiles1/226680.pdf (last visited Feb. 12, 2017).

150. *See* Boddie v. Schnieder, 105 F.3d 857, 861 (2d Cir. 1997) (finding that, in principle, sexual abuse of a male prisoner by a female corrections officer could potentially violate the 8th Amendment); Liner v. Goord, 196 F.3d 132, 135–36 (2d Cir. 1999) (remanding case to consider an 8th Amendment sexual assault claim on this basis).

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

152. *See* Adkins v. Rodriguez, 59 F.3d 1034, 1037–38 (10th Cir. 1995) (finding that a prison official's alleged verbal harassment of a prisoner did not violate the 8th Amendment because it was not objectively sufficiently serious and the prison official did not act with deliberate indifference to the prisoner's health or safety).

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

If a prison official sexually harassed you, you can file a lawsuit both against that official and the prison. But you should know that it is difficult to make an Eighth Amendment claim for sexual harassment against a correctional institution because you must prove that the administrators showed "deliberate indifference" toward the harassment.[154] In other words, you must show that the prison administrators knew or should have known of the risk of harassment, but ignored it. Showing this knowledge is difficult unless you have evidence that you told the administrators about the problem or asked for help.

(d) Reporting Harassment in New York

New York law defines harassment as "employee misconduct meant to annoy, intimidate or harm an inmate"[155] and creates a special procedure for reporting harassment.[156] The procedure says that if you think you are the victim of prison employee misconduct or harassment, you should tell the prison employee's direct supervisor (but be aware that this is not a requirement for filing a formal grievance).[157] You should also file a formal grievance with the clerk of the Inmate Grievance Resolution Committee ("IGRC").[158] The Committee will give this grievance to the prison superintendent for review.[159] After receiving the grievance, the superintendent will decide within twenty-five calendar days if the employee's conduct was harassment.[160] If you do not get an answer from the superintendent within this time, you can appeal the grievance to the Central Office Review Committee ("CORC").[161]

If you are a victim of sexual harassment, you should use the confidential procedure your prison has in place to bring a formal complaint.[162] You should keep copies of these complaints so that you can later prove that administrators knew about the problem and were deliberately indifferent to your complaint.

4. Force Used to Carry Out an Illegal Order

If you refuse to follow an order from a prison official, even if that order is illegal, prison officials can use force to make you obey. Courts have held that prisoners must follow orders so that prisons can be run in a safe and orderly way.[163] Even if you believe an order violates your constitutional rights, courts say you do not have the right to resist the order.[164]

In Jackson v. Allen, a prisoner resisted prison guards because he thought they were going to use cruel and unusual punishment against him in violation of the Eighth Amendment.[165] The guards used force on him to overcome his resistance. The prisoner won his case against the guards, but only because they used too much force. The court said that the prisoner did not have a strong enough reason to resist the guards because guards have a legal right to make prisoners obey their orders and use force if necessary. The court stated that a prisoner in this situation can later try to get damages in court for the unconstitutional punishment but should

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

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

156. N.Y. Correct. Law § 701.8 (McKinney 2003).

157. N.Y. Correct. Law § 701.8(a) (McKinney 2003).

158. N.Y. Correct. Law § 701.5(a) (McKinney 2003). Chapter 15 of the *JLM* includes information on how to file a grievance complaint.

159. N.Y. Correct. Law § 701.8(b) (McKinney 2003).

160. N.Y. Correct. Law § 701.8(f) (McKinney 2003).

161. N.Y. Correct. Law § 701.8(g) (McKinney 2003).

162. Every facility should have a confidential and formal process for filing these complaints in order to prevent retaliation. N.Y. Correct. Law § 701.6(k) (McKinney 2003). However, be aware that complaints are not always kept "confidential" in reality.

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

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

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

not resist the order itself. Again, this is only if the officials used a reasonable and necessary amount of force for that situation.[166] But, the court did say there was one exception to the general rule that prisoners may never resist orders: a prisoner may resist an illegal order to protect himself from "immediate, irreparable and permanent physical or mental damage or death."[167] The court did not give specific examples of when a prisoner could legally refuse an order and just said that there would be exceptions only for extreme situations.

5. Protection Under State Constitutions and Statutes and Federal Statutes

You have already read how state tort law and federal constitutional law protect your rights against assault. But do not forget that state constitutions and statutes also protect your right to be free from assault. For example, the New York State Constitution, like the federal Eighth Amendment, prohibits cruel and unusual punishment.[168] Like the federal Fifth and Fourteenth Amendments, the New York Constitution does not allow you to lose your liberty without due process of law.[169]

New York State laws give prisoners more protections. New York statutes say that prison officials cannot hit prisoners except under emergency circumstances: "[N]o officer or other employee of the department shall inflict any blows whatever upon any inmate, unless in self-defense, or to suppress a revolt or insurrection."[170] See Chapter 2 of the *JLM*, "Introduction to Legal Research," for information on how to find similar laws in your state.

In addition, federal statutes can also protect the rights of federal prisoners to be free from assault. The Federal Bureau of Prisons owes a duty of care to persons in federal custody, which can be the basis for a suit against prison officials if you are attacked by other prisoners.[171] But, a court will look at state tort law to decide if the officials have failed their duties, so researching the laws of the state in which the prison sits is still necessary.[172]

C. Sexual Assault and Rape

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

If you were attacked by a prison official, you can make an Eighth Amendment claim and a state tort law claim for assault and battery. Remember that even though prison officials have the right to use lawful force to maintain order and security within the prison, they do not have the right to sexually abuse you.[173] Any bodily contact between you and a prison official must be (1) lawful force necessary to maintain security and (2) must somehow connect to helping the official run the prison. A guard cannot claim that he is maintaining

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

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

168. N.Y. Const. art. I, § 5.

169. N.Y. Const. art. I, § 6.

170. N.Y. Correct. Law § 137(5) (McKinney 2003 & Supp. 2013). *See* Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," for information on how to bring tort actions against state employees.

171. 18 U.S.C. § 4042(a)(2) (2012). *See* United States v. Muniz, 374 U.S. 150, 164–65, 83 S. Ct. 1850, 1859, 10 L. Ed. 2d 805, 816 (1963) (holding that the duty of care owed to federal prisoners is fixed by 18 U.S.C. § 4042, regardless of any conflicting state rules).

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

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

order or disciplining you for breaking a rule in order to force you to have sexual relations with him or to touch him in a sexual way.[174] If a prison official does this, you can seek the protection of the law.[175]

Even consensual sex (sex that both people agree to) between a prisoner and a prison official is not allowed. Such consensual sex will still violate the Eighth Amendment.[176] Federal law specifically criminalizes all sexual contact between corrections officers and prisoners in federal prisons, as Part C(2) explains below. Many states, including New York, have similar state laws,[177] as Part C(3) explains.

If another prisoner sexually assaulted you, you can claim that prison officials violated the Eighth Amendment if they knew that you were at risk of harm but did nothing about it.[178] You could also make a state law negligence claim against prison officials.

1. What to Do If You Are Sexually Assaulted

If you are raped or sexually assaulted, you should tell someone immediately and ask to go to the hospital. There, you should be tested for sexually transmitted infections, and women should also be tested for pregnancy. The health professional should collect your clothing, fingernail scrapings, pubic hair samples, blood samples, hair strands, and swab samples from the back of your throat and your rectum and/or vagina.[179] If you would like to speak with someone after the sexual assault or rape, the prison may provide counseling.

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

If you bring a civil suit, it is important to know that the court allows claims based on physical abuse but does not recognize claims based only on emotional damage.[180] You could claim, however, that you experienced both physical and emotional damage. This makes the collection of physical evidence of sexual assault even more important. See Chapter 14 of the *JLM* for more information on the PLRA.

2. Eighth Amendment Claims for Sexual Assault

Courts use the Eighth Amendment deliberate indifference standard to determine if a prison official is liable for failing to prevent sexual assaults.[181]

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174. *See* Women Prisoners v. District of Columbia, 877 F. Supp. 634, 665 (D.C. Cir. 1994) (noting that although security concerns sometimes trump privacy interests, the evidence did not show any justification for the invasion of prisoners' privacy or for vulgar sexual remarks).

175. *See* Women Prisoners v. District of Columbia, 877 F. Supp. 634, 665–66 (D.C. Cir. 1994) (holding that the District of Columbia was liable under U.S.C. 42 § 1983 for 8th Amendment violations); *see also* Hovater v. Robinson, 1 F.3d 1063, 1068 (10th Cir. 1993) ("[A]n inmate has a constitutional right to be secure in her bodily integrity and free from attack by prison guards") (citing Alberti v. Klevenhagan, 790 F.2d 1220, 1224 (5th Cir. 1986)).

176. *See*, *e.g.*, Carrigan v. Davis, 70 F. Supp. 2d 448, 452–53 (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 the holding in *Carrigan* was limited to vaginal intercourse and/or fellatio (oral sex); it did not necessarily include other sexual activities.

177. Just Detention International's website has useful resources, including information on laws, organizations, and practitioners who can help you in each state. Visit https://justdetention.org/service/ (last visited Feb. 12, 2017) to find local resources.

178. Farmer v. Brennan, 511 U.S. 825, 847, 114 S. Ct. 1970, 1984, 128 L. Ed. 2d. 811, 832 (1994) ("[A] prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.").

179. *See* Linda M. Petter & David L. Whitehill, *Management of Female Sexual Assault*, 58 Am. Family Physician 920 (1998) (providing medical recommendations for rape and sexual assault victims), *available at* http://www.aafp.org/afp/980915ap/petter.html (last visited Feb. 12, 2017).

180. Prison Litigation Reform Act of 1995, 42 U.S.C. §1997(e) (2012) ("[N]o Federal civil action may be brought by a prisoner confined in a jail, prison or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.").

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

If you were assaulted by a prison official, you can claim that the assault was "cruel and unusual punishment" violating your Eighth Amendment rights. Conduct violates the Eighth Amendment if it is against the "evolving standards of decency that mark the progress of a maturing society."[182] Courts have found that sexual assaults violate the Eighth Amendment because "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.'"[183]

In making your Eighth Amendment claim, you must show the same two parts as for any assault by a prison official: (1) the subjective part that the prison official has a state of mind that is guilty enough, and (2) the objective part that the harm is serious enough.[184] Showing these two parts is usually easier with sexual assault than with physical assault. Courts have said that sexual assaults are usually both malicious and harmful. As the Second Circuit explained in *Boddie v. Schnieder*, a claim of sexual abuse may meet both the subjective and objective parts of the Eighth Amendment because sexual abuse can cause severe physical and mental harm.[185]

3. Sexual Abuse of Women Prisoners

While both men and women prisoners have been sexually assaulted and/or raped, women prisoners are particularly vulnerable.[186] Although all prisoners' rights to privacy are very limited because of the nature of prison and incarceration,[187] courts are sometimes more sympathetic to female prisoners because of the greater chance of sexual abuses by prison guards. For example, some courts have found searches of women prisoners by male guards to be unconstitutional, even if searches of male prisoners by female guards would be allowed under the same circumstances.[188] To help prevent sexual abuse of women prisoners, some prisons have tried to hire only female corrections officers for women's prisons.[189]

4. Federal Law

While a prison official is allowed to touch a prisoner for security reasons (for example, while performing a legal search), he is never allowed to have sexual contact with a prisoner. Federal law criminalizes sexual intercourse or any type of sexual contact between persons with "custodial, supervisory or disciplinary" authority (like guards and wardens) and prisoners in federal correctional facilities.[190] It is a *felony* to use or

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the 8th Amendment, a prison official must have a "sufficiently culpable state of mind" which means one of "deliberate indifference" to prisoner health or safety) (citing Wilson v. Seiter, 501 U.S. 294, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991)).

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

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

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

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

186. Human Rights Watch, All Too Familiar: Sexual Abuse of Women in U.S. State Prisons (1996), *available at* https://www.hrw.org/report/1996/12/01/all-too-familiar/sexual-abuse-women-us-state-prisons (last visited Feb. 12, 2017) ("[The female prisoner population is] a population largely unaccustomed to having recourse against abuse; all the more necessary, then, for the state to present the available means of recourse clearly and in an accessible fashion.").

187. *See* Hudson v. Palmer, 468 U.S. 517, 527–28, 104 S. Ct. 3194, 3200–01, 82 L. Ed. 2d 393, 403–04 (1983) (finding that the interest in ensuring institutional security necessitates a limited right of privacy for prisoners).

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

189. *See*, *e.g.*, Ind. Code Ann. §§ 36-8-3-19, 36-8-10-5 (LexisNexis 2009). California protects all prisoners from being searched by officers of the opposite sex. Cal. Penal Code § 4021(b) (West 2008). Michigan provides that if prisoners are subject to body cavity searches by officers of the opposite sex, an officer of the same sex must also be present. Mich. Comp. Laws Ann. § 764.25b(5) (West 2000).

190. 18 U.S.C. § 2243 (2012). For an example of criminal prosecution of a federal prison guard for violating this statute,

threaten force to engage in sexual intercourse in a federal prison.[191] This means it is always illegal in a federal prison for prison officials to have sexual contact with prisoners, and it is a felony if the officials use or threaten force to engage in sexual contact. These laws only protect federal prisoners. Laws protecting state prisoners are discussed in the next Subsection.

In 2003, the federal government passed the Prison Rape Elimination Act, the first federal law about sexual assault in prisons. The Act calls for the collection of national statistics about sexual assault in federal, state, and local prisons. It also develops guidelines for states on addressing prisoner rape, creates a review panel to hold annual hearings, and provides grants to states to fight the problem.[192] With this Act, the federal government recognized that sexual assault in prisons is a major problem.[193]

5. State Law

In many states, including New York and California, any sexual conduct between a prison employee and a prisoner—even with the prisoner's consent—is a form of rape.[194] A New York State statute makes any sexual relations between prisoners and prison employees illegal. Specifically, the law says prisoners cannot legally "consent" to sexual relations with prison employees.[195] Thus, by state statute, New York State prison employees are criminally liable for rape, sodomy, sexual misconduct, or sexual abuse if they have sexual contact with or commit a sexual act with prisoners. In other words, courts will consider any sexual contact between a prison employee and a prisoner a crime, even if the prisoner believed he or she agreed to such contact. Consent is not a valid defense for the prison official's acts.

Other states that criminalize sexual contact between prison employees and prisoners include Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Virginia, Washington, West Virginia, and Wisconsin.[196] States that have laws that do not refer specifically to prison employees but may

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see United States v. Vasquez, 389 F.3d 65, 77 (2d Cir. 2004) (affirming the conviction of a defendant prison guard for five counts of sexual abuse of prisoners and one count of misdemeanor abusive sexual contact, and sentencing of defendant to 21 months imprisonment).

191. 18 U.S.C. § 2241 (2012).

192. Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601–15609 (2012). The National Prison Rape Elimination Commission ("NPREC") released an official report and guidelines in mid-2009. NPREC, Report and Standards, *available at* https://www.ncjrs.gov/pdffiles1/226680.pdf (last visited Feb. 12, 2017).

193. The U.S. Department of Justice ("DOJ") also released a report examining the DOJ's efforts to deter sexual abuse of federal prisoners by federal corrections officers, and made recommendations to help the DOJ prevent this sexual abuse (including better staff training and increased medical and psychological help for victims of abuse). Dept. of Justice, Office of the Inspector General, The Department of Justice's Efforts to Prevent Staff Sexual Abuse of Federal Inmates (2009), *available at* http://www.justice.gov/oig/reports/plus/e0904.pdf (last visited Feb. 12, 2017).

194. Cal. Penal Code § 289.6 (West 2008); N.Y. Penal Law § 130.05(3)(e)–(f) (McKinney 2004).

195. N.Y. Penal Law §§ 130.05(3) (e)–(f) (McKinney 2004).

196. Alaska Stat. §§ 11.41.425.2, 11.41.427.1 (2008); Ariz. Rev. Stat. Ann. § 13-1419 (2001 & Supp. 2008); Ark. Code Ann. § 5-14-126(a)(1)(A) (2006 & Supp. 2009); Cal. Penal Code § 289.6 (West 2008); Colo. Rev. Stat. § 18-3-404(f) (2004 & Supp. 2009); Conn. Gen. Stat. Ann. §§ 53a-71(a)(5), 53a-73a(a)(1)(F) (West 2007); Del. Code Ann. tit. 11, § 1259 (2007); D.C. Code §§ 22-3013, 22-3014, and 22-3017 (2001 & Supp. 2009); Fla. Stat. Ann. § 944.35(3) (West 2006); Ga. Code Ann. § 16-6-5.1 (2007); Haw. Rev. Stat. Ann. §§ 707-731(1)(c), 707-732(1)(e) (LexisNexis 2009); Idaho Code Ann. § 18-6110 (2004 & Supp. 2008); 720 Ill. Comp. Stat. Ann. 5/11-9.2 (West 2002); Iowa Code Ann. § 709.16(1) (West 2003); Kan. Stat. Ann. § 21-3520 (2007); Ky. Rev. Stat. Ann. § 510.120 (LexisNexis 2008); La. Rev. Stat. Ann. § 14:134.1 (2004); Me. Rev. Stat. Ann. tit. 17-a, § 253(2)(E) (2006 & Supp. 2008); Md. Code Ann., [Crim. Law] § 3-314 (LexisNexis 2002); Mich. Comp. Laws Ann. §§ 750.520c (1)(i–k) (West 2004 & Supp. 2009); Minn. Stat. Ann. § 609.344(1)(m), 609.345(1)(m) (West 2009); Miss. Code Ann. § 97-3-104 (West 2008); Mo. Ann. Stat. § 566.145 (West 1999 & Supp. 2009); Mont. Code Ann. § 45-5-502(5)(a) (2008); Nev. Rev. Stat. Ann. § 212.187 (LexisNexis 2005); N.H. Rev. Stat. Ann. § 632-A:4(III) (2007 & Supp. 2008); N.J. Stat. Ann. § 2C:14-2(c)(2) (West 2005); N.M. Stat. Ann. § 30-9-11(E)(2) (2004 & Supp. 2009); N.D. Cent. Code § 12.1-20-06 (1997 & Supp. 2009); Ohio Rev. Code Ann. § 2907.03(A)(6,11) (West 2006 & Supp. 2009); Or. Rev. Stat. §§ 163.452, 454 (2009); 18 Pa. Cons. Stat. Ann. § 3124.2 (West 2000); R.I. Gen. Laws § 11-25-24 (2002); S.C. Code Ann. § 44-23-1150 (2002 & Supp. 2008); S.D. Codified Laws § 24-1-26.1 (2004); Utah Code Ann. § 76-5-412 (2008); Va. Code Ann. § 18.2-64.2 (2009); Wash. Rev. Code Ann. §§ 9A.44.160, 170, 180 (West 2009); W. Va. Code Ann. § 61-8B-10 (LexisNexis 2005 & Supp. 2009); and Wis. Stat. Ann. § 940.225 (West 2005). These laws vary significantly in detail, and you should consult the law of the state in which you are imprisoned. *See* Human Rights Watch, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* 39–40 (1996), *available at*

also criminalize prison employees' sexual contact with prisoners include Nebraska, North Carolina, Oklahoma, Texas, and Wyoming.[197]

Some states have also taken steps to protect prisoners from retaliation for reporting sexual misconduct by prison staff. For example, California has made it illegal for prison guards to retaliate against prisoners who report them for sexual assault.[198] Of course, even with such laws, retaliation still occurs and is a real concern. But, if your state law does not allow retaliation, the fact that the law forbids this behavior only serves to strengthen your legal claim.

D. Assault on LGBT or Effeminate Prisoners

This Part of the Chapter discusses special issues for gay, homosexual, lesbian, transsexual and/or effeminate prisoners (prisoners with feminine characteristics). Chapter 30 of the *JLM*, "Special Information for Lesbian, Gay, Bisexual, and Transgender Prisoners," explains these issues in more detail. But, you should remember you do not have to wait to be attacked before bringing suit; you can sue before you are assaulted if you feel officials are ignoring a large risk that you will be seriously harmed.

Most LGBT prisoners who have been assaulted by other prisoners make Eighth Amendment deliberate indifference claims under *Farmer*,[199] although in one recent case, a court recognized a Fourteenth Amendment Equal Protection claim as well.[200] To make a claim that you are vulnerable to attack (in order to satisfy a deliberate indifference claim), you have to present evidence that you may be a target of assault.[201] If you are gay or effeminate, it may be easier for you to prove that there is or was a great risk to your safety and that prison officials knew of that risk. In other words, your status as gay or effeminate may make it easier to prove that you are a vulnerable prisoner. As long as prison officials know of your status, they know there is a higher risk you will be assaulted.

Even if it might be easier for you to prove you are/were in danger of being assaulted, it is still important to report any threats against you so that prison officials know about specific problems. For example, if you seem vulnerable because you are gay, or because you look young or effeminate, then you should report to prison officials any harassment or threats of rape by other prisoners. When you report harassment or threats to prison officials, you need to have some specific evidence or examples (for example, that a prisoner who has raped other prisoners is threatening you) because suspicions alone are not enough.[202] With such evidence, prisoners who fall into the gay or effeminate categories may be able to make a deliberate indifference Eighth Amendment claim that prison officials should have considered the previous threats and tried to prevent an attack. Of course, you will still have to prove that prison officials did not act reasonably to try to prevent the assault.

You should also note that you may be able to get special protection even if you are not gay but are still more vulnerable to physical and sexual assaults by other prisoners because of how you look.[203] If you fear you will be assaulted, you may request to be placed in special housing or protective custody, which unfortunately

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https://www.hrw.org/report/1996/12/01/all-too-familiar/sexual-abuse-women-us-state-prisons (last visited Feb. 12, 2017).

197. Neb. Rev. Stat. § 28-322.03 (2008); N.C. Gen. Stat. § 14-27.7 (2005); Okla. Stat. Ann. tit. 21 § 1114 (2005); Tex. Penal Code Ann. § 22.011 (2004); Wyo. Stat. Ann. § 6-2-303 (2005). *See* Human Rights Watch, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* 40 (1996), *available at* https://www.hrw.org/report/1996/12/01/all-too-familiar/sexual-abuse-women-us-state-prisons (last visited Feb. 12, 2017).

198. Cal. Code Reg. Tit. 15, § 3401.5(f) (2003).

199. Farmer v. Brennan, 511 U.S. 825, 828–29, 114 S. Ct. 1970, 1975, 128 L. Ed. 2d 811, 820 (1994) (recognizing as actionable an 8th Amendment claim for a prison's "deliberate indifference" to a prominent risk of assault).

200. Johnson v. Johnson, 385 F.3d 503, 532–33 (5th Cir. 2004) (holding that prisoner's sexual-orientation-based equal protection claims were properly pleaded and actionable).

201. *See* Purvis v. Ponte, 929 F.2d 822, 825–27 (1st Cir. 1991) (per curiam) (finding that the 8th Amendment is not violated when a prisoner alleged general fear of "gay bashing" and suspicions that homophobic cellmates threatened his safety, because the prisoner presented no evidence of the likelihood that violence would occur and officials had tried placing him with 6 different cellmates).

202. Riccardo v. Rausch, 375 F.3d 521, 527–28 (7th Cir. 2004) ("The Constitution does not oblige guards to believe whatever inmates say . . . [A] prisoner's bare assertion is not enough to make the guard subjectively aware of a risk, if the objective indicators do not substantiate the inmate's assertion.").

203. *See, e.g.*, United States v. Gonzalez, 945 F.2d 525, 526–27 (2d Cir. 1991) (ruling in favor of decreasing prisoner's sentence because of his feminine appearance).

usually also means you will lose certain privileges. Prison officials may also put you, without your consent, in protective custody or even solitary confinement because they believe that is the only way to protect you.[204]

1. Special Protection for Gay or Effeminate Prisoners

In general, courts have recognized that gay or effeminate men are often assaulted in prison, especially when placed in the general population,[205] and may need special consideration either at sentencing or after incarceration.[206] Courts are still creating the law in this area, but the Supreme Court has expressly said that a sentencing court may consider "susceptibility to abuse" in prison as a factor for a downward departure (a decrease from what the sentence would otherwise be) in extraordinary or unusual circumstances.[207] Where the judge believes there is a serious risk you could be assaulted in prison or where prison officials say that they can protect you only by putting you in protective custody or solitary confinement, you can request better protective custody conditions or a shorter sentence. For example, several courts have ordered reduced sentences for prisoners at risk of assault because of their sexual orientation or appearance.[208]

Special treatment for effeminate or gay prisoners was considered by the Second Circuit in *United States v. Lara*.[209] In this case, the prisoner had a youthful appearance and bisexual orientation that made him extremely vulnerable to physical attack. Prison officials were able to protect him only by putting him in solitary confinement, so the court reduced his sentence.[210] A year after *Lara*, the Second Circuit also decided *United States v. Gonzalez*.[211] In *Gonzalez*, the court similarly reduced the sentence of a nineteen-year-old prisoner who was young, effeminate, and likely to be victimized by his fellow prisoners.[212] Unlike in *Lara*, however, the prisoner in *Gonzalez* was not gay or bisexual but still vulnerable to homophobic attacks since the way he looked did not fit traditional views of masculinity.[213] In other words, as long as a prisoner looks like he might be gay, he is at a greater risk of attack, even if he is not actually gay. The *Gonzalez* court also found

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204. *See, e.g.*, City of New York Department of Corrections, Directive 6007R-A: Protective Custody (May 24, 2010), *available at* http://www.nyc.gov/html/doc/downloads/pdf/6007R-A.pdf (last visited Feb. 12, 2017); New York Department of Corrections and Community Supervision, Directive 4948: Protective Custody Status (Mar. 13, 2015) *available at* http://www.doccs.ny.gov/Directives/4948.pdf (last visited Feb. 12, 2017).

205. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 848, 114 S. Ct. 1970, 1984, 128 L. Ed. 2d 811, 832 (1994) (noting that placing a young effeminate man into general population could threaten his safety); Johnson v. Johnson, 385 F.3d 503, 517–19 (5th Cir. 2004) (holding that officials must use all possible administrative means to protect prisoners from sexual abuse); Taylor v. Mich. Dept. of Corr., 69 F.3d 76, 77, 83–84 (6th Cir. 1995) (holding a warden liable for providing inadequate protection against physical and sexual abuse of a vulnerable prisoner).

206. United States v. Gonzalez, 945 F.2d 525, 526–27 (2d Cir. 1991) (holding that shortening the prison sentence for a prisoner was possible by balancing the government's interest in incarcerating criminals with the goal of diminishing the likelihood that the prisoner would be assaulted).

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

208. *See, e.g.*, United States v. Lara, 905 F.2d 599, 605 (2d Cir. 1990) (reducing a sentence for a bisexual prisoner after prison officials put him in solitary confinement because solitary confinement was the only way the officials could protect him from assault); United States v. Gonzalez, 945 F.2d 525, 526–27 (2d Cir. 1991) (approving the trial court's grant of a downward sentencing departure to a nineteen-year-old effeminate looking heterosexual prisoner based on the likelihood of assault by other prisoners, even though no such attack had yet occurred); *cf.* United States v. Parish, 308 F.3d 1025, 1032–33 (9th Cir. 2002) (upholding downward departure because prisoner was particularly susceptible to abuse). Note, however, that the Federal Sentencing Commission has discouraged, but not prohibited, the use of physical appearance in determining a prisoner's potential for victimization and thus reduction in sentence. *See* Koon v. United States, 518 U.S. 81, 107, 116 S. Ct. 2035, 2050, 135 L. Ed. 2d 392, 418 (1996).

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

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

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

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

213. United States v. Gonzalez, 945 F.2d 525, 526–27 (2d Cir. 1991) ("[E]ven if Gonzalez is not gay or bisexual, his physical appearance, insofar as it departs from traditional notions of an acceptable masculine demeanor, may make him as susceptible to homophobic attacks as was the bisexual defendant before us in *Lara*.").

that the prisoner could get a shorter sentence even though he had not been attacked; oppressive conditions without an actual attack may be enough to get a shorter sentence.[214]

2. Examples of Legal Claims Brought by LGBT Prisoners.

In *Farmer v. Brennan*, a transsexual[215] prisoner with feminine characteristics was placed in the general male prison population and was later beaten and raped by another prisoner.[216] The Supreme Court held that the prisoner may have had an Eighth Amendment claim and sent the case back to the lower court to determine if prison officials acted with deliberate indifference by failing to protect him.[217]

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

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

> (1) by proving the officials knew of the plaintiff's vulnerable status and of the general risk to the plaintiff's safety from other prisoners, even if the officials did not know of any specific danger; or
> (2) by proving that the officials knew that a predatory prisoner, without separation or other protective measures, could be dangerous to others, including the plaintiff.[224]

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

In another important case, *Johnson v. Johnson*, an African-American homosexual prisoner sued prison officials after prison gangs sexually assaulted him and bought and sold him as a sexual slave for over eighteen

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

215. A transsexual is someone whose anatomical (physical) sex does not match his or her gender identity.

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

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

218. Young v. Quinlan, 960 F.2d 351, 362–63 (3d Cir. 1992).

219. Young v. Quinlan, 960 F.2d 351, 362–63 (3d Cir. 1992).

220. Taylor v. Mich. Dept. of Corr., 69 F.3d 76, 77, 84 (6th Cir. 1995).

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

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

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

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

225. Greene v. Bowles, 361 F.3d 290, 294 (6th Cir. 2004) ("[A] prison official cannot 'escape liability . . . by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault.'") (quoting Farmer v. Brennan, 511 U.S. 825, 844, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811, 829 (1994)); *see also* Curry v. Scott, 249 F.3d 493, 507–08 (6th Cir. 2001) (finding that where a particular prison guard had a history of racially motivated harassment of African American prisoners, deliberate indifference could be demonstrated by a factual record, without threat to a particular prisoner), *overruled in part on other grounds by* Jones v. Bock, 549 U.S. 199, 216, 127 S. Ct. 910, 921, 166 L. Ed. 2d 798, 813 (2007).

months, even though the plaintiff had asked for protection.[226] The Fifth Circuit said the plaintiff had a deliberate indifference claim because the officials continued to house him with the general population even though he repeatedly asked for protection: the prison officials' response—that Johnson must "learn to f*** or fight"—"was not a reasonable response and . . . contravene[d] clearly established law."[227] The Court further held that "[a]lthough it is not clear exactly what type of action an official is legally required to take under *Farmer* . . . an official may not simply send the inmate into the general population to fight off attackers."[228]

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

E. Legal Remedies Available for Victims of Unlawful Assault

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

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

1. Inmate Grievance Program

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

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

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

228. Johnson v. Johnson, 385 F.3d 503, 527 (5th Cir. 2004); *see also* Farmer v. Brennan, 511 U.S. 825, 832–33, 114 S. Ct. 1970, 1976–77, 128 L. Ed. 2d 811, 822–23 (1994) (explaining that jailers must "take reasonable measures to guarantee the safety of the inmates" and "are not free to let the state of nature take its course" (internal quotation and citation omitted)); James v. Hertzog, 415 Fed. Appx. 530, 532 (5th Cir. 2011) (unpublished) (Noting that "The Supreme Court has not recognized sexual orientation as a suspect class; however, if the State violates the Equal Protection Clause by creating a disadvantage for homosexuals, the State's conduct must have a rational relationship to legitimate governmental aims.") (internal quotation marks removed).

229. U.S. Const. amend. XIV, Section 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."). See Chapter 30 of the *JLM*, "Special Information for Lesbian, Gay, Bisexual, and Transgender Prisoners" for more information on the Equal Protection Clause.

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

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

232. *See, e.g.*, Johnson v. Johnson, 385 F.3d 503, 515–23 (5th Cir. 2004) (dismissing a prisoner's claims that prison officials had failed to protect him from repeated sexual assaults due to his failure to exhaust administrative remedies).

2. 42 U.S.C. § 1983

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

You can also use Section 1983 to sue local officials as long as you can show that they too acted under "color of state law." You may be able to sue local officials under state tort law as well. But note that you can only sue municipalities (towns, cities, or counties) under Section 1983 if your injury was the result of an official municipal policy or custom.[235] This means that to sue a city or a county, you will have to show that the "execution of [the] government's policy or custom . . . inflict[ed] the injury."[236] In other words, a local government will be held liable only if an injury can be shown to be a direct result of the local government's official policy, either express or implied.[237] Therefore, a local government is not liable under Section 1983 "for an injury inflicted solely by its employees or agents" who were not following official local policy or custom,[238] even though the local officials may be individually liable under Section 1983.

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

3. Tort Actions

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

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

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233. 42 U.S.C. § 1983 (2012).

234. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

235. *See, e.g.*, Williams v. Kaufman County., 352 F.3d 994, 1013–14 (5th Cir. 2003) (holding that a county could be held liable for unlawful searches of detainees when the relevant policymaker, in this case the sheriff, authorized the policy).

236. Irwin v. City of Hemet, 22 Cal. App. 4th 507, 525, 27 Cal. Rptr. 2d 433, 442 (Cal. Ct. App. 1994) (quoting Monell v. Dept. of Soc. Servs., 436 U.S. 658, 694, 98 S. Ct. 2018, 2037–2038, 56 L. Ed. 2d 611, 638 (1978)). In *Irwin*, a California court found that a complaint alleging that the City of Hemet's adoption of a policy or custom not to train its jailers in suicide screening and prevention was the proximate cause of a prisoner's suicide, may not be summarily dismissed without determination as to whether or not the city adopted a policy or custom to inadequately train jailers. For an example of such a municipal policy or custom, *see* Blihovde v. St. Croix County., 219 F.R.D. 607, 613 (W.D. Wis. 2003) (involving claims arising from a policy of strip searches for arrestees entering a jail).

237. Blihovde v. St. Croix County., 219 F.R.D. 607, 618 (W.D. Wis. 2003) ("Even when there is no express policy, a municipality may be liable when there is a 'custom' of unconstitutional conduct." (citing Monell v. Dept. of Soc. Servs., 436 U.S. 658, 691, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611, 635 (1978))); *see also* Walker v. Sheahan, 526 F.3d 973, 977 (7th Cir. 2008) (dismissing a § 1983 claim for lack of evidence of a practice of using excessive force and following a "code of silence"); Amnesty Am. v. Town of West Hartford, 361 F.3d 113, 125–27 (2d Cir. 2004) (reviewing the law of municipal liability in a damage suit for excessive force).

238. Irwin v. City of Hemet, 22 Cal. App. 4th 507, 525, 27 Cal. Rptr. 2d 433, 442 (Cal. Ct. App. 1994) (quoting Monell v. Dept. of Soc. Servs., 436 U.S. 658, 694, 98 S. Ct. 2018, 2037–38, 56 L. Ed. 2d 611, 638 (1978)).

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

4. Class Action Suits

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

(1) there are too many plaintiffs for the court to try each case individually,
(2) each plaintiff's case is similar in fact and law,
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class,
(4) the representative parties will fairly and adequately protect the interests of the class,[241] and
(5) most of the claims would not be brought otherwise because each plaintiff's individual damages are too small.[242]

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

F. Conclusion

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

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

241. *See* Fed. R. Civ. P. 23.

242. *See, e.g.*, Tardiff v. Knox County, 365 F.3d 1, 7 (1st Cir. 2004) (holding that class action status probably is the only feasible means for arrestees to pursue strip search claims); Amchem Prods., Inc., v. Windsor, 521 U.S. 591, 617, 117 S. Ct. 2231, 2246, 138 L. Ed. 2d 689, 709 (1997) (noting that the policy underlying class actions is to make it possible for individuals with small claims to aggregate those claims in order to vindicate their rights).

243. *See*, *e.g.*, Ingles v. Toro, 438 F. Supp. 2d 203, 208–09, 216 (S.D.N.Y. 2006) (approving settlement of a class action over excessive use of force by New York City prison guards; the city agreed to pay injured prisoners $2.2 million and revise its use-of-force directive and investigatory procedures, install new video cameras to watch guards and prisoners, and train guards in appropriate defensive techniques); Madrid v. Gomez, 889 F. Supp. 1146, 1254–60 (N.D. Cal. 1995) (granting injunction in class action on behalf of all inmates at a facility where a pattern of unnecessary and wanton infliction of pain and constitutionally inadequate medical and mental health care was shown as cruel and unusual conditions of confinement for mentally ill prisoners in a security housing unit); *see also* Mark Mooney, *Inmates Win 1.5M in Rikers Abuse Settlement*, Daily News, Feb. 14, 1996, at 12 (discussing a class action suit by 15 prisoners that involved allegations of abuse by corrections officers and that was settled by New York City for $1.5 million).

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

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