CHAPTER 7: YOUR RIGHT TO BE FREE FROM ASSAULT BY PRISON GUARDS AND OTHER PRISONERS*

A. INTRODUCTION

If a guard or another prisoner attacked, raped, or assaulted you in some other way, this Chapter can help you figure out whether you can sue and how to do it. If you decide to sue, you must bring a *civil* law claim. You cannot bring *criminal* charges against your attacker because only the government can do that. You can bring a civil suit before the government criminally charges your attacker and even if the government never charges your attacker.

Two types of law protect you from assault while you are in prison: (1) Louisiana state law and (2) the U.S. Constitution. You can make a state law claim (saying that an assault violated state law) or a federal constitutional claim (saying that an assault violated your constitutional rights). This Chapter explains when you may use these laws. For more information about your constitutional rights, please read Chapter 24 of the main *JLM*, "Your Right to Be Free from Assault by Prison Guards and Other Prisoners."

B. YOUR RIGHT TO BE FREE FROM ASSAULT

This Part of the Chapter explains what law you can use to sue if someone attacked or threatened you. Section One explains how you can use Louisiana law to sue another prisoner or a prison official for assault or battery. Section Two explains how you can use Louisiana law to sue a prison official, a prison, or the state of Louisiana for negligence if another prisoner harms you. Finally, Section Three explains how you can sue prison officials under the Eighth Amendment of the Constitution if a prison official or another prisoner harms you.

1. Assault and Battery under Louisiana State Law

Louisiana state law protects you from two types of assaults: (1) "battery" (a physical attack)[1] and (2) "assault" (an act that makes you afraid that you will be physically attacked, such as a threat, verbal abuse, or harassment).[2] Both are "intentional torts."[3]

You can sue for battery only if someone touched you on purpose in a way that harmed you.[4] To make a battery claim, you must prove three things: (1) "act," (2) "intent," and (3) "contact." "Act" means your attacker did something—for example, he used his own hand to hit you or he pulled a trigger. "Intent" means your attacker *wanted* to touch you in a harmful or offensive way or *believed* that his act was going to cause you to be touched in a harmful or offensive way.[5] Your attacker's intent does not have to be

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* This Supplement Chapter was written by Michelle Luo.

[1] Battery is "[t]he nonconsensual touching of, or use of force against, the body of another with the intent to cause harmful or offensive contact." Black's Law Dictionary (10th ed., 2014).

[2] 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 or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery." Black's Law Dictionary (10th ed., 2014).

[3] A tort is "[a] breach of a duty that the law imposes on persons who stand in a particular relation to one another." An intentional tort is "[a] tort committed by someone acting with general or specific intent." Black's Law Dictionary (10th ed., 2014).

[4] LA. REV. STAT. ANN. § 14:33 (2017) ("Battery is the intentional use of force or violence upon the person of another; or the intentional administration of a poison or other noxious liquid or substance to another."); Landry v. Bellanger, 2002-1443, p. 6 (La. 5/20/03); 851 So. 2d 943, 949 ("[B]attery is '[a] harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff to suffer such a contact . . . .'") (quoting Caudle v. Betts, 512 So. 2d 389, 391 (La. 1987)).

[5] Caudle v. Betts, 512 So. 2d 389, 391 (La. 1987) ("The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm . . . . Rather it is an intent to bring about a result which will invade the interests of another in a way that the law forbids."); Bazley v. Tortorich, 397 So. 2d 475, 481 (La. 1981) ("The meaning

malicious (evil). He must have wanted to *touch* you but it is not necessary that he wanted to *hurt* you.[6] "Contact" means your attacker touched you in a harmful or offensive way. You can prove contact even if your attacker did not cause you physical harm[7] and even if he did not touch you directly—for example, if he stabbed you or threw something at you.[8] Thus, battery means that your attacker *wanted* to and *did* touch you in a harmful or offensive way.

If your attacker did not touch you but instead made you *afraid* that you were going to be touched in a harmful or offensive way, you can sue him for assault.[9] To make an assault claim, you must prove three things: (1) "act," (2) "intent," and (3) that your attacker made you reasonably afraid that you were going to be touched in a harmful or offensive way.[10] For assault, "intent" means that your attacker wanted to make you afraid that you were going to be touched in a harmful or offensive way.[11] A verbal threat alone is not enough to be assault. But it may be assault if your attacker threatens to harm you *and* is able to harm you and makes you afraid that he will harm you.[12]

There are two important differences between assault and battery. First, for assault, you must prove that you were *afraid* that someone might touch you.[13] This is not a requirement for a battery claim.[14] For example, it is not assault if someone intentionally hit you while you were sleeping because

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of 'intent' is that the person who acts either (1) consciously desires the physical result of his act . . . or (2) knows that that result is substantially certain to follow from his conduct . . . .").

[6] Caudle v. Betts, 512 So. 2d 389, 391 (La. 1987) (finding defendant committed battery even though he gave plaintiff an electrical shock "as a practical joke"); Brungardt v. Summitt, 2008-0577, p. 11 (La. App. 4 Cir. 04/08/09); 7 So. 3d 879, 887 ("The defendant's intention need not be malicious nor need it be an intention to inflict actual damage . . . . It is sufficient if the defendant intends to inflict either a harmful or offensive contact without the other's consent.") (internal citations omitted).

[7] Caudle v. Betts, 512 So. 2d 389, 391 (La. 1987) (stating that both "contacts that do actual physical harm" and "relatively trivial [contacts] which are merely offensive and insulting" meet the contact requirement).

[8] FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., LOUISIANA TORT LAW §§ 2–6(A) (2016) ("The contact may be with an inanimate object controlled or precipitated by the actor, such as the surgeon's scalpel, a bullet, a car in which a person is sitting or even a thrown hamburger."); Fricke v. Owens-Corning Fiberglas Corp., 571 So. 2d 130, 132 (La. 1990) (suggesting that exposure to harmful gases counts as a "contact" in battery); Saucier v. Belgard, 445 So. 2d 191, 194 (La. App. 3 Cir. 1984) (finding battery where defendant shot plaintiff three times).

[9] LA. REV. STAT. ANN. § 14:36 (2017) ("Assault is an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery.").

[10] *See* RESTATEMENT (SECOND) OF TORTS § 19 (1965) ("In order that a contact be offensive to a reasonable sense of personal dignity, it must be one which would offend the ordinary person and as such one not unduly sensitive as to his personal dignity. It must, therefore, be a contact which is unwarranted by the social usages prevalent at the time and pace at which it is inflicted."); *see, e.g.*, Groff v. Sw. Beverage Co., 08-625, p. 6 (La. App. 3 Cir. 11/05/08); 997 So. 2d 782, 787–788 (finding that defendant did not make plaintiff reasonably afraid by yelling and cursing at him because defendant did not have a weapon or move toward him in a threatening way, they were separated by a desk, and three other people were in the room at the time); McVay v. Delchamps, Inc., 97-860, p. 5 (La. App. 5 Cir. 01/14/98); 707 So. 2d 90, 93 (finding that defendant made plaintiff reasonably afraid defendant was going to hurt her when he pointed a gun at her and her friend walking next to her, shot her friend, and made eye contact with her right after he shot her friend); Castiglione v. Galpin, 325 So. 2d 725, 726 (La. App. 4 Cir. 1976) (finding that plaintiff was reasonably afraid when defendant said to plaintiff, "I'll get a gun and shoot you if you dare to close that water," went inside, got a gun, and returned to his front porch, where he either pointed the gun at the plaintiff or sat with the gun on his lap).

[11] RESTATEMENT (SECOND) OF TORTS § 21 cmt. a (1965) (suggesting that for assault, "intent" means that your attacker wanted to cause "apprehension" of an imminent "harmful or offensive contact").

[12] Groff v. Sw. Beverage Co., 08-625, p. 6 (La. App. 3 Cir. 11/05/08); 997 So. 2d 782, 787 ("Mere words do not constitute an assault . . . . Yet, a combination of threats, present ability to carry out the threats, and reasonable apprehension of harmful or offensive contact may suffice."); Martin v. Bigner, 27694, p. 3 (La. App. 2 Cir. 12/06/95); 665 So. 2d 709, 712 ("Although words alone may not be sufficient to constitute an assault, threats coupled with the present ability to carry them out is sufficient when the victim is placed in reasonable apprehension of receiving an injury."); Castiglione v. Galpin, 325 So. 2d 725, 726 (La. App. 4 Cir. 1976) ("Words alone may not be sufficient to constitute an assault; however, threats coupled with the present ability to carry out the threats are sufficient when one is placed in reasonable apprehension of receiving an injury.").

[13] RESTATEMENT (SECOND) OF TORTS § 22 (1965) ("In tort, the plaintiff must be aware of the imminence of a harmful or offensive contact.").

[14] FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., LOUISIANA TORT LAW 28 (2016) ("The victim need not be aware of the contact when it occurs.").

you did not know that someone might touch you, but it is battery. Second, battery requires "contact" but assault does not. For example, if someone tried to hit you but missed, it is assault if you were afraid he was going to touch you, but it is not battery.

Sometimes, you can sue for *both* assault and battery. For example, if you watched as someone hit you, it is assault and battery because you were afraid that he was going to hit you (assault) and he did hit you (battery).

It is hard to sue prison staff for assault and battery. Prison officials can touch you and use some force on you that would be illegal outside of prison.[15] Also, under Louisiana law, prison employees have "qualified immunity," which means they generally cannot be sued, when performing "discretionary functions," which are actions prison employees can choose to take but do not have to take.[16]

Also, while you may be able to sue an individual, you generally cannot sue the state of Louisiana or the Louisiana Department of Public Safety and Corrections for assault or battery because these institutions are "immune from liability," meaning they cannot be sued for intentional tort lawsuits.[17]

2. Negligence under Louisiana State Law

If another prisoner attacked you and you believe that prison officials were partly responsible for the attack or did not protect you from it, you may sue the prison and/or the prison officials. If prison officials did not participate in the attack, you may not sue the officials for battery or assault. Instead, you can sue the officials for negligence,[18] claiming that they negligently allowed another prisoner to attack you.[19]

To claim that the official was negligent, you must prove three things: (1) "duty," (2) "breach," and

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[15] Smith v. Dooley, 591 F. Supp. 1157, 1168 (W.D. La. 1984) ("[J]ail officials may use necessary force to protect themselves and to enforce prison regulations."); Diamond v. Thompson, 364 F. Supp. 659, 667 (M.D. Ala. 1973) (stating that prison officials may "use reasonable force to move inmates, maintain order, or ensure compliance with regulations"), *cited favorably in* Williams v. Kelley, 624 F.2d 695, 698 (5th Cir. 1980).

[16] LA. REV. STAT. ANN. § 9:2798.1(B) (2012) (waiving liability of public officials who are performing or failing to perform "policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties"); Easter v. Powell, 467 F.3d 459, 462 (5th Cir. 2006) ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.") (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982)); Royal v. Clark, 447 F.2d 501, 501–502 (5th Cir. 1971) ("Federal courts will not interfere in the administration of prisons absent an abuse of the wide discretion allowed prison officials in maintaining order and discipline."); Jackson v. State Dep't. of Corrs., 2000-2882, p. 9 (La. 5/15/01) 785 So. 2d 803, 809 (stating that prison officials have qualified immunity).

[17] Edelman v. Jordan, 415 U.S. 651, 662–663, 94 S. Ct. 1347, 1355, 39 L. Ed. 2d 662, 672 (1974) (holding that states are immune from lawsuits brought by citizens of that state in federal court); Citrano v. Allen Corr. Ctr., 891 F. Supp. 312, 320 (W.D. La. 1995) ("The Eleventh Amendment bars suits for damages against a state in federal court unless the state waives its immunity."); Anderson v. Phelps, 655 F. Supp. 560, 564 (M.D. La. 1985) (finding that the Louisiana Department of Public Safety and Corrections is immune from lawsuits because it is an agency of the state).

[18] Negligence means "[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, usu. expressed in terms of the following elements: duty, breach of duty, causation, and damages." Black's Law Dictionary (9th ed., 2009); *see also* Dobson v. La. Power and Light Co., 567 So. 2d 569, 574 (La. 1990) (defining negligence as "conduct which falls below the standard established by law for the protection of others against an unreasonable risk of harm").

[19] Barlow v. New Orleans, 241 So. 2d 501, 504, 257 La. 91, 99 (La. 1970) ("It is the rule, apart from statutory requirements, that a sheriff or police officer owes a general duty to a prisoner to save him from harm and the officer is liable for the prisoner's injury or death resulting from a violation of such duty by negligence or other acts."). *See* Chapter 17 of the main *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," for more on negligence and negligent torts.

(3) "causation."[20] "Duty" means that prison officials had a responsibility to prevent or stop the attack.[21] "Breach" means that the prison officials failed to act in accordance with their duty. "Causation" means that the breach of the prison officials' duty to protect you directly caused your injury.[22] You also must have been harmed or injured (damaged). For more information about harm, injury, and damage, *see* Chapter 10, Section B(2)(d) of the *Louisiana State Supplement*, "The State's Duty to Protect You and Your Property—Tort Actions."

Louisiana follows the *Parker* rule, which is often called the "bad blood" rule. *Parker* says that you must prove two things in order to sue prison officials or prisons for negligence. First, you must prove that the officials knew or had reason to believe that you would be harmed. Second, you must prove that the officials did not reasonably try to prevent the harm.[23] Overcoming the burden of proof for the *Parker* rule is very difficult in Louisiana.[24]

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[20] State *ex rel.* Jackson v. Phelps, 95-2294, p. 3 (La. 04/08/96); 672 So. 2d 665, 666–667 ("[P]laintiff must prove that the conduct in question was a cause-in-fact of the resulting harm, the defendant owed a duty of care to plaintiff, the requisite duty was breached by the defendant, and the risk of harm was within the scope of protection afforded by the duty breached."); *see also* Scott v. State, 618 So. 2d 1053, 1059 (La. App. 1 Cir. 1993) (stating the same test).

[21] *See, e.g.*, State *ex rel.* Jackson v. Phelps, 95-2294, p. 3 (La. 04/08/96); 672 So. 2d 665, 667 ("[P]enal authorities have a duty to use reasonable care in preventing harm after they have reasonable cause to anticipate it."); Barlow v. New Orleans, 241 So. 2d 501, 504, 257 La. 91, 99 (La. 1970) (stating "a sheriff or police officer owes a general duty to a prisoner to save him from harm"); Cotton v. City of Shreveport, 30,734, p. 5 (La. App. 2 Cir. 06/24/98); 715 So. 2d 651, 653–654 (finding that the city has a duty "to provide inmates who work in the jail with safe working conditions and equipment and to protect them from unreasonable risks of foreseeable harm"); Scott v. State, 618 So. 2d 1053, 1059 (La. App. 1 Cir. 1993) ("[P]rison authorities owe a duty to use reasonable care to protect inmates from harm and . . . this duty extends to protecting inmates from self-inflicted injury.").

[22] *See, e.g.*, Anderson v. Phelps, 451 So. 2d 1284, 1285 (La. App. 1 Cir. 1984) (finding that defendants' failure to post two security guards in each prison dormitory did not cause the prisoner's injury because his attacker would have injured the prisoner regardless of how many guards were present).

[23] Parker v. State, 282 So. 2d 483, 486 (La. 1973) ("[I]n order to hold the penal authorities liable for an injury inflicted upon an inmate by another inmate, the authorities must know or have reason to anticipate that harm will ensue and fail to use reasonable care in preventing the harm."), *followed in* State *ex rel.* Jackson v. Phelps, 95-2294, p. 3 (La. 04/08/96); 672 So. 2d 665, 667 (stating that whether penal authorities breached their duty to use reasonable care in preventing harm depends on whether they had reasonable cause to anticipate the harm); Harrison v. Natchitoches Parish Sheriff's Dep't., 04-0928, p. 4 (La. App. 3 Cir. 12/17/04); 896 So. 2d 101, 103 (finding there was no reasonable cause for penal authorities to anticipate harm to plaintiff); Brewer v. State, 618 So. 2d 991, 992 (La. App. 1 Cir. 1993) (finding that State was not liable for harm inflicted upon inmate despite previous violent encounter); Anderson v. Phelps, 451 So. 2d 1284, 1285 (La. App. 1 Cir. 1984) (concluding that the violation of a federal court order to post two security guards in each dormitory was not negligence *per se* (by itself)); Walden v. State, 430 So. 2d 1224, 1227 (La. App. 1 Cir. 1983) (finding that failure to follow prison policy did not violate legal duty to injured prisoner); Moore v. Foti, 440 So. 2d 530, 531–532 (La. App. 4 Cir. 1983) (finding there was no proof that the prison officer "knew or had reason to anticipate that harm would ensue to" prisoner because of an attack by a fellow prisoner over missing money); McGee v. State Dep't. of Corr., 417 So. 2d 416, 418 (La. App. 1 Cir. 1982) (finding that the state had no reason to anticipate the harm because there was no evidence that officials knew of previous threats or confrontations between the two prisoners); Neathery v. State Dep't. of Corr., 395 So. 2d 407, 410 (La. App. 3 Cir. 1981) (finding that prisoner failed to prove breach of legal duty by Department of Corrections or National Guard, despite complaints); Shields v. State Dep't. of Corr., 380 So. 2d 123, 125 (La. App. 1 Cir. 1979) (finding that Department of Corrections was not negligent despite an inmate's possession of acid thrown on plaintiff prisoner).

[24] *See, e.g.*, State *ex rel.* Jackson v. Phelps, 95-2294, pp. 4–5 (La. 4/8/96) 672 So. 2d 665, 667 (finding that the state was not liable for prisoner's injuries when he was attacked by another prisoner because prison officials did not know that there was any hostility between the two prisoners before the attack); Parker v. State, 282 So. 2d 483, 487 (La. 1983) (finding prison officials were not negligent for failing to prevent one prisoner from attacking another, even though victim told them that he was afraid of attack, because such statements are common and officials had acted reasonably to protect him by holding a conference with prisoners and searching for weapons); Bonnet v. Lafayette Parish Sheriff, 08-905, pp. 6–8 (La. App. 3 Cir. 02/04/09); 2 So. 3d 1280, 1284–1285 (finding that sheriff's department did not breach its duty to prevent prisoner from harming himself because he was placed in a medical holding cell and monitored every 15 minutes); Harrison v. Natchitoches Par. Sheriff's Dep't., 04-0928, p. 7 (La. App. 3 Cir. 12/17/04); 896 So. 2d 101, 105 (finding that sheriff's department was not negligent for failing to prevent one prisoner from attacking another because prison officials did not know that the attacker tended to have unprovoked violent outbursts or that there was any hostility between the two prisoners before the attack); Brewer v. State Dep't of Corr., 618 So. 2d 991, 992 (La. App. 1 Cir. 1993) (finding that prison officials and the Department of Corrections were not negligent when one prisoner seriously burned another because the victim did not prove that defendants probably knew or should have predicted the

You can sue a prison official, prison, or the state of Louisiana for negligence. If you sue a prison official for negligence, you should know that, like in assault and battery suits, prison officials have qualified immunity when performing discretionary functions, meaning they generally cannot be sued. However, unlike in suits involving assault and battery, which are intentional torts, the state of Louisiana is not immune from suits for negligence, as negligence is an ordinary tort.[25]

3. Eighth Amendment Protections from Harm

You can also sometimes sue prison officials under the Eighth Amendment of the Constitution if you are harmed in prison. You have a constitutional right to be free from assault under the Eighth Amendment,[26] which prohibits "cruel and unusual punishment."[27] You can make an Eighth Amendment claim if a prison official used too much physical force against you.[28] This Section will briefly explain how to make an Eighth Amendment claim if a prison official or another prisoner harms you. If you want to bring an Eighth Amendment claim, you should also read Chapter 24 of the *JLM*, which covers in detail the Eighth Amendment protections from assault.

To make an Eighth Amendment claim, you must prove that the force used against you had two components (or parts):

1) A *subjective component*: prison officials acted with sufficiently culpable (guilty enough) state of mind at the time of the assault; and
2) An *objective component*: you were injured or put in great risk of serious injury.[29]

This Section explains how to prove both of these components in order to successfully show that an assault against you violated the Eighth Amendment. Subsection (a) of this Section explains how to prove the subjective component, and Subsection (b) explains how to prove the objective component.

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attack, even though his attacker had previously stabbed him in prison); Anderson v. Phelps, 451 So. 2d 1284, 1285 (La. App. 1 Cir. 1984) (finding prison officials were not negligent when one prisoner seriously burned another because victim had not stated he was afraid of attack, victim himself testified he did not know he was going to be attacked, and prison officials testified they had no reason to believe victim was in danger); Walden v. State, 430 So. 2d 1224, 1227 (La. App. 1 Cir. 1983) (finding that the state did not breach its duty to protect prisoner from another prisoner's attack, even though guards violated prison policy by giving the attacker access to the prisoner, because guards had no reason to believe that the attack would happen); Moore v. Foti, 440 So. 2d 530, 533 (La. App. 4 Cir. 1983) (finding that sheriff was not negligent for failing to stop prisoners from setting another prisoner on fire or for giving prisoners the liquid deodorant that they used to start the fire because sheriff could not have predicted that the attack would happen).

[25] LA. CONST. art. XII, § 10 (amended 1995) ("Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.").

[26] This Chapter explains how the 8th Amendment's right to be free from cruel and unusual punishment can protect you from assault. But the 8th Amendment protects prisoners in other ways, too, such as from poor prison conditions like overcrowding and uncleanliness. *See* Chapter 16 of the main *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law." *See also* Chapter 23 of the main *JLM*, "Your Right to Adequate Medical Care," for information about lack of proper medical care.

[27] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[28] Cowart v. Erwin, 837 F.3d 444, 452–453 (5th Cir. 2016) ("In evaluating excessive force claims under the Eighth Amendment, the "core judicial inquiry" is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and adistically to cause harm."); Kron v. Tanner, No. 10-518, 2010 U.S. Dist. LEXIS 58120, at *8 (E.D. La. May 19, 2010), *available at* https://www.gpo.gov/fdsys/pkg/USCOURTS-laed-2_10-cv-00518/pdf/USCOURTS-laed-2_10-cv-00518-2.pdf (last visited Sept. 6, 2017) ("Without question, it is unconstitutional for a prison guard to use excessive force against an inmate. However, the United States Supreme Court has explained: '[W]henever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the 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.' Only in the latter instance will the force be considered unconstitutionally excessive.") (quoting Hudson v. McMillian, 503 U.S. 1, 6–7 (1992)); Smith v. Dooley, 591 F. Supp. 1157, 1167 (W.D. La. 1984) (stating that the 8th Amendment "guarantee[s] a state inmate's right to be free from physical abuse").

[29] Hudson v. McMillian, 503 U.S. 1, 8, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992) ("[C]ourts considering a prisoner's claim must ask both if 'the officials act[ed] with a sufficiently culpable state of mind' and if the alleged wrongdoing was objectively 'harmful enough' to establish a constitutional violation.").

a. Subjective Component: Culpable State of Mind

To prove the subjective component of an Eighth Amendment claim, you must show that the prison official was *thinking* of harming you or *knew* that you were being harmed at the time you were assaulted. In other words, you must show the prison official's "state of mind." If a prison official hurt you, courts will use the *Hudson* "malicious and sadistic" standard,[30] whereas if another prisoner hurt you and prison officials did not prevent or stop the attack, courts will use the *Farmer* "deliberate indifference" standard.[31]

i. *When a Prison Official Harms You: The* Hudson *Standard*

If a prison official injured you and wanted to maliciously harm you, you can sue the official under the Eighth Amendment. The court will use the "malicious and sadistic" standard that the Supreme Court created in *Hudson v. McMillian*[32] to determine whether the official's force against you was so "excessive" (extreme) that it violated the Eighth Amendment. The Supreme Court recently looked at the *Hudson* standard again in *Wilkins v. Gaddy*.[33] Under *Hudson* and *Wilkins*, you must show that the official's force was not "a good-faith effort to maintain or restore discipline," but rather was used "maliciously and sadistically" to hurt you.[34] This means that you must show that the official did not use force to keep the prison safe and orderly, but rather, to evilly and cruelly hurt you.

To decide whether the prison official wanted to maliciously hurt you, which speaks to his "state of mind," courts will look at:

1) The seriousness of your injuries;
2) Whether the force was necessary under the circumstances, or why the official used force;[35]
3) The relationship between the need to use force and the amount of force that was actually used;
4) The seriousness of the threat that disorder in the prison would pose to the safety of prisoners, prison staff, and visitors as a prison official would reasonably see it; [36] and
5) Efforts made by prison guards to decrease the amount of force used.[37]

To win, you must prove that: (1) you suffered an injury; (2) your injury resulted directly and only from the use of clearly unnecessary force; and (3) the force was objectively unreasonable.[38] To bring an

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[30] Hudson v. McMillian, 503 U.S. 1, 6–7, 112 S. Ct. 995, 998–999, 117 L. Ed. 2d 156, 165–166 (1992) ("Whenever prison officials stand accused of using excessive physical force" in violation "of the Cruel and Unusual Punishments Clause, the 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.").

[31] Farmer v. Brennan, 511 U.S. 825, 833–834, 114 S. Ct. 1970, 1976–1977, 128 L. Ed. 2d 811, 822–823 (1994).

[32] Hudson v. McMillian, 503 U.S. 1, 20–21, 112 S. Ct. 995, 1006, 117 L. Ed. 2d 156 (1992).

[33] Wilkins v. Gaddy, 559 U.S. 34, 37, 130 S. Ct. 1175, 1178, 175 L. Ed. 2d 995, 999 (2010) (per curiam).

[34] Wilkins v. Gaddy, 559 U.S. 34, 37, 130 S. Ct. 1175, 1178, 175 L. Ed. 2d 995, 999 (2010) (per curiam); Hudson v. McMillian, 503 U.S. 1, 6–7, 112 S. Ct. 995, 998–999, 117 L. Ed. 2d 156, 165–166 (1992); *see, e.g.*, Eason v. Holt, 73 F.3d 600, 602 (5th Cir. 1996) (stating the *Hudson* standard).

[35] Wilkins v. Gaddy, 559 U.S. 34, 39, 130 S. Ct. 1175, 1179, 175 L. Ed. 2d 995, 1000 (2010) (per curiam) (the core focus is on "the nature of the force—specifically, whether it was nontrivial and 'was applied . . . maliciously and sadistically to cause harm.'") (quoting Hudson v. McMillian, 503 U.S. 1, 7, 112 S. Ct. 995, 998–999, 117 L. Ed. 2d 156, 165–166 (1992)); *see also* Smith v. Dooley, 591 F. Supp. 1157, 1168 (W.D. La. 1984) ("[W]hen the necessity for the application of force by the jail officials ceases, the continued use of harmful force can be a violation of the Eighth and Fourteenth Amendments.").

[36] *See, e.g.*, Stroik v. Ponseti, 35 F.3d 155, 158 (5th Cir. 1994) ("In answering [the question of whether Ponseti's use of force was 'objectively reasonable,'] the court must 'look at the totality of the circumstances, paying particular attention to 'whether the suspect pose[d] an immediate threat to the safety of the officers or others.'").

[37] Hudson v. McMillian, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992) (describing factors to consider); *see also* Cowart v. Erwin, 837 F.3d 444, 453 (5th Cir. 2016) (quoting Kitchen v. Dall. Cty., 759 F.3d 468, 477 (5th Cir. 2014)); Williams v. Valenti, 432 Fed. App'x. 298, 301 (5th Cir. 2011); McCreary v. Massey, 366 Fed. App'x. 516, 518 (5th Cir. 2010); Moss v. Brown, 409 Fed. App'x 732, 733 (5th Cir. 2010); Baldwin v. Stalder, 137 F.3d 836, 839 (5th Cir. 1998); Bender v. Brumley, 1 F.3d 271, 278 (5th Cir. 1993); Hamilton v. Chaffin, 506 F.2d 904, 909 (5th Cir. 1975); Smith v. Dooley, 591 F. Supp. 1157, 1167–1168 (W.D. La. 1984); Le Blanc v. Foti, 487 F. Supp. 272, 275 (E.D. La. 1980).

Eighth Amendment claim, you do not have to prove that you suffered a *serious* physical injury, but you must show that you suffered at least *some* physical injury[39] and that the official injured you as a result of the excessive use of force.[40]

Remember, "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights."[41] Even if a prison official used force against you, you probably will not win if the official used force in order to maintain or restore order in the prison.[42]

Nevertheless, some uses of force may be so excessive that they do violate your constitutional rights.[43] Also, even if it was necessary for a prison official to use force to keep the prison safe and orderly, once force is no longer necessary the continued use of harmful force may violate the Eighth Amendment.[44]

ii. *When Another Prisoner or Unsafe Conditions Harm You: The* Farmer *Standard*

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[38] Anthony v. Martinez, 185 F. App'x. 360, 362 (5th Cir. 2006) (quoting Williams v. Bramer, 180 F.3d 699, 703, *clarified*, 186 F.3d 633, 634 (5th Cir. 1999)).

[39] Hudson v. McMillian, 503 U.S. 1, 9–10, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167–168 (1992) (stating that *de minimis* (small) uses of physical force generally do not violate the 8th Amendment); Williams v. Bramer, 180 F.3d 699, 703, *clarified*, 186 F.3d 633, 634 (5th Cir. 1999) ("[W]e do require a plaintiff asserting an excessive force claim to have 'suffered at least some form of injury.'") (quoting Jackson v. R.E. Culbertson, 984 F.2d 699, 700 (5th Cir. 1993) (per curiam)); Gomez v. Chandler, 163 F.3d 921, 924 (5th Cir. 1999) ("[T]he law of this Circuit is that to support an 8th Amendment excessive force claim a prisoner must have suffered from the excessive force a more than *de minimis* physical injury, but there is no categorical requirement that the physical injury be significant, serious, or more than minor."); Jackson v. R.E. Culbertson, 984 F.2d 699, 700 (5th Cir. 1993) (per curiam) ("Although, [plaintiff] need not show a significant injury, he must have suffered at least some injury."); Knight v. Caldwell, 970 F.2d 1430, 1432 (5th Cir. 1992) (stating that while a plaintiff does not need to prove significant injury to win an excessive force claim, he still must prove some injury, whether significant or insignificant); *c.f.* Wilkins v. Gaddy, 559 U.S. 34, 39–40, 130 S. Ct. 1175, 1179–1180, 175 L. Ed. 2d 995, 1000–1001 (2010) (per curiam) (holding that there is no minimum injury requirement, the core focus is on the nature of the force, and "the absence of 'some arbitrary quantity of injury' [does not] require[] automatic dismissal of an excessive force claim"); Thomas v. Comstock, 222 F. App'x. 439, 442 (5th Cir. 2007) (*per curiam*) (stating that *de minimis* force, including the use of chemical sprays, can support an excessive force claim, but "*only* if it is 'repugnant to the conscience of mankind.'") (quoting Hudson v. McMillian, 503 U.S. 1, 9–10, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167–168 (1992)); Brown v. Lippard, 472 F.3d 384, 386 (5th Cir. 2006) ("This Court has never directly held that injuries must reach beyond some arbitrary threshold to satisfy an excessive force claim."); *see, e.g.*, Siglar v. Hightower, 112 F.3d 191, 193–194 (5th Cir. 1997) (holding that prisoner did not raise a valid 8th Amendment claim because prisoner's bruised ear lasting for three days after the guard twisted it was a *de minimis* injury); Jackson v. R.E. Culbertson, 984 F.2d 699, 700 (5th Cir. 1993) (holding that prisoner did not raise a valid 8th Amendment claim because he suffered no injury when prison official sprayed him with a fire extinguisher).

[40] Anthony v. Martinez, 185 F. App'x. 360, 362 (5th Cir. 2006) (quoting Williams v. Bramer, 180 F.3d 699, 703, *clarified*, 186 F.3d 633, 634 (5th Cir. 1999)).

[41] Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973); *see also* Wilkins v. Gaddy, 559 U.S. 34, 37, 130 S. Ct. 1175, 1178, 175 L. Ed. 2d 995, 999 (2010) (per curiam) ("[N]ot 'every malevolent touch by a prison guard gives rise to a federal cause of action.'") (quoting Hudson v. McMillian, 503 U.S. 1, 9, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 165–166 (1992)); Le Blanc v. Foti, 487 F. Supp. 272, 275 (E.D. La. 1980) ("The management by a few guards of large numbers of prisoners, not usually the most gentle or tractable of men and women, may require and justify the occasional use of a degree of intentional force.") (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033, 94 S. Ct. 462, 38 L. Ed. 2d 32 (1973)).

[42] *See, e.g.*, Davis v. Cannon, 91 F. App'x. 327, 328 (5th Cir. 2004) (per curiam) (holding that a correctional officer did not violate prisoner's 8th Amendment rights by spraying him with a chemical agent because it was a good faith effort to maintain or restore discipline rather than a malicious or sadistic act); Jackson v. Cain, 864 F.2d 1235, 1243 (5th Cir. 1989) (citing Fulford v. King, 692 F.2d 11, 14–15 (5th Cir. 1982) ("[T]he use of handcuffs or other restraining devices constitute[s] a rational security measure and cannot be considered cruel and unusual punishment unless great discomfort is occasioned deliberately as punishment or mindlessly, with indifference to the prisoner's humanity."); Williams v. Kelley, 624 F.2d 695, 698 (5th Cir. 1980) (holding that police officers' use of a chokehold on drunk and unruly arrestee which killed him did not violate his constitutional right because it was a good faith effort to maintain or restore discipline).

[43] *See, e.g.*, Anthony v. Martinez, 185 F. App'x. 360, 362 (5th Cir. 2006) (finding that there was legally sufficient evidentiary basis for a reasonable jury to find that prison official used excessive force when he punched, kneed, and repeatedly struck prisoner while prisoner was on the ground, handcuffed, and under prison guards' control, and allegedly caused injuries including a bloody nose, seizures, migraine headaches, and nerve damage).

[44] Smith v. Dooley, 591 F. Supp. 1157, 1168 (W.D. La. 1984) (stating "when the necessity for the application of force by the jail officials ceases, the continued use of harmful force can be a violation of" the 8th Amendment).

The Eighth Amendment means prison officials need to keep you as safe as possible.[45] If officials know you might be hurt by another prisoner or by dangerous conditions, they need to try to protect you; if they do not, you can sue them under the Eighth Amendment.[46] The court will use the "deliberate indifference"[47] standard the Supreme Court created in *Farmer v. Brennan*.[48] *Farmer* says that a prison official is deliberately indifferent if he knew about a risk of harm to you but did not try to keep you safe.[49] *Even if you have not been harmed yet*, you can sue prison officials and claim that they ignored unsafe conditions or your risk of assault.[50]

To successfully make an Eighth Amendment claim that prison officials' deliberate indifference let another prisoner or a prison official assault you, you must prove that:

1) There was a substantial risk to your safety; *and*
2) The prison officials knew about this risk to your safety; *and*
3) The prison officials did not try to prevent the assault *or* the prison officials did nothing to stop the assault *or* the prison officials tried to prevent or stop the assault, but they did not try as hard as they should have (that is, their attempts to prevent the assault were not reasonable).

(a) A Substantial Risk to Your Safety

You must show that there is or was a substantial risk of serious harm to your safety from another prisoner. Substantial risk means the risk has to be large enough that the court finds it important. This is one element (part) of the objective component of the *Farmer* test. For more information on this element, see Section B(3)(b)(ii) below.

(b) Prison Officials Knew about This Risk

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[45] *See, e.g.*, Adames v. Perez, 331 F.3d 508, 512 (5th Cir. 2003) ("In particular, the [8th] Amendment imposes on prison officials a duty to protect prisoners from violence at the hands of other inmates.").

[46] Farmer v. Brennan, 511 U.S. 825, 833–834, 114 S. Ct. 1970, 1976–1977, 128 L. Ed. 2d 811, 822–823 (1994) (stating officials have responsibility to protect prisoners from other prisoners and "having stripped [prisoners] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course").

[47] 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. *See* Estelle v. Gamble, 429 U.S. 97, 104–105, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976) ("We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' . . . proscribed by the [8th] Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.") (quoting Gregg v. Georgia, 428 U.S. 153, 173, 96 S. Ct. 2909, 2925, 49 L. Ed. 2d 859, 875 (1976)).

[48] Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994) (stating that in prison-conditions cases, a prison official can be found liable under the 8th Amendment only if he showed "deliberate indifference" to prisoner's health or safety).

[49] Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) (holding that a prison official can be found liable under the 8th Amendment only if he was subjectively aware of an excessive risk to the prisoner's health or safety and ignored that risk); *see also* Gobert v. Caldwell, 463 F.3d 339, 346 (5th Cir. 2006) (restating the *Farmer* standard).

[50] Farmer v. Brennan, 511 U.S. 825, 843, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811, 829 (1994) ("[I]t does not matter . . . 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."); Helling v. McKinney, 509 U.S. 25, 34, 113 S. Ct. 2475, 2481, 125 L. Ed. 2d 22, 32 (1993) (finding that the 8th Amendment also protects against "sufficiently imminent dangers" so that prisoners do not have to wait until they get hurt before they take action); Gobert v. Caldwell, 463 F.3d 339, 349 (5th Cir. 2006) ("[T]he risk must be cognizable, but the consequences of that risk need not yet have materialized, in order to define the time to begin to determine whether the defendant disregarded the risk."); Gates v. Cook, 376 F.3d 323, 341 (5th Cir. 2004) (holding that an 8th-Amendment plaintiff did not have to prove that he was actually injured by exposure to raw sewage, only that such exposure posed a serious health risk).

You must also prove that prison officials knew that there was a substantial risk to your safety.[51] You cannot just say that prison officials *should have known* that there was a substantial risk to your safety.[52] But you do not have to prove that officials knew you were definitely going to be attacked. You only need to show that there was a substantial *risk* that you would be hurt *and* the officials knew about that risk.[53] You also do not have to show that officials knew who would assault or attack you.[54]

You can show that officials knew about this risk with direct evidence, with circumstantial evidence, or with both.[55] Circumstantial evidence means evidence that shows officials must have known about the risk. For example, evidence that the threat to your safety was obvious or "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past" is circumstantial.[56] Most of the time, it is very difficult to prove that officials knew about a substantial risk to your safety.[57] Trying to make such claims can be an uphill battle. Prison officials will likely try to prove that they did not actually know about the facts showing you were in danger. They may also argue that even if they did know of some risk to your safety, they reasonably believed the risk was not significant or important.[58] So it is very important for you to present evidence showing that prison officials actually did know of the risk. Your own complaints indicating that you felt that you were in danger, without any other evidence, are probably not enough. This is because courts do not expect prison officials to believe every complaint a prisoner makes.

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[51] Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) ("[A] prison official cannot be found liable under the [8th] Amendment for denying an inmate humane conditions of confinement unless the official knows of . . . an excessive risk to inmate health or safety."); *see also* Adames v. Perez, 331 F.3d 508, 512 (5th Cir. 2003) ("[I]n order to be deliberately indifferent, a prison official must be *subjectively aware* of the risk."); Lawson v. Dallas Cty., 286 F.3d 257, 262 (5th Cir. 2002) ("[T]he plaintiff must establish that the jail officials were actually aware of the risk."); Hare v. City of Corinth, 74 F.3d 633, 650 (5th Cir. 1996) (*en banc*) (holding that prison officials must be "be subjectively aware of this risk of serious injury").

[52] Farmer v. Brennan, 511 U.S. 825, 838, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 826 (1994) (holding that "an official's failure to alleviate a significant risk that he should have perceived but did not" cannot be the basis for an 8th Amendment claim); Domino v. Texas Dep't. of Criminal Justice, 239 F.3d 752, 756 (5th Cir. 2001) ("[T]he 'failure to alleviate a significant risk that [the prison official] should have perceived, but did not' is insufficient to show deliberate indifference.") (quoting Farmer v. Brennan, 511 U.S. 825, 838, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 826 (1994)); Hare v. City of Corinth, 74 F.3d 633, 650 (5th Cir. 1996) (*en banc*) (refusing to adopt "an objective measure of 'should have been aware'").

[53] Farmer v. Brennan, 511 U.S. 825, 843, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811, 829 (1994) ("The question under the [8th] Amendment is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial 'risk of serious damage to his future health.'") (quoting Helling v. McKinney, 509 U.S. 25, 35, 113 S. Ct. 2475, 2481, 125 L. Ed. 2d 22, 33 (1993)).

[54] Farmer v. Brennan, 511 U.S. 825, 843, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811, 829 (1994) (holding that prison officials may be liable even if they did not know that the "specific prisoner who eventually committed the assault" would likely attack the plaintiff).

[55] 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, 842, 114 S. Ct. 1970, 1981, 128 L. Ed. 2d 811, 828 (1994) (stating that prisoners can use circumstantial evidence to prove that the official knew about the risk, and jurors and fact-finders can conclude that the official knew about the risk "from the very fact that the risk was obvious"); Adames v. Perez, 331 F.3d 508, 512 (5th Cir. 2003) (discussing that prisoners do not need to provide direct evidence that the official knew about the risk and that they can prove knowledge through circumstantial evidence such as showing that the risk was "longstanding" and "pervasive").

[56] Farmer v. Brennan, 511 U.S. 825, 842–843, 114 S. Ct. 1970, 1981–1982, 128 L. Ed. 2d 811, 828–829 (1994); *see also* Easter v. Powell, 467 F.3d 459, 463 (5th Cir. 2006) (quoting Farmer v. Brennan, 511 U.S. 825, 842–843, 114 S. Ct. 1970, 1981–1982, 128 L. Ed. 2d 811, 828–829 (1994)).

[57] *See, e.g.*, Adames v. Perez, 331 F.3d 508, 512–513 (5th Cir. 2003) (holding that evidence showing that a few prisoners had previously escaped their cells and attacked others was not enough to prove prison officials' deliberate indifference because those isolated instances fell short of a pervasive problem that officials must have known about).

[58] Johnson v. Johnson, 385 F.3d 503, 525 (5th Cir. 2004) (noting that prison officials tried to defend themselves by attempting 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); *see also* Farmer v. Brennan, 511 U.S. 825, 844, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811, 830 (1994) (stating that prison officials can try to prove that they did not know of the underlying facts creating the risk or that they believed the risks to be insubstantial or nonexistent).

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

Finally, you must prove that the prison official did not act *even though* he knew there was a substantial risk that you would be hurt.[59] The official must have chosen *on purpose* not to help you because he wanted you to be harmed.[60] If a prison official took reasonable steps to help you, but you were harmed anyway, you will likely lose because the court will find that the official did not act with deliberate indifference. Deliberate indifference means that the official knew about the risk but decided not to do anything about it.[61]

If your Eighth Amendment claim is about prison conditions, and not assault, you should know that most poor prison conditions do not violate the Eighth Amendment. The Eighth Amendment does not mean prisons have to be comfortable. Harsh prison conditions probably do not violate your constitutional rights.[62] However, prison conditions violate the Eighth Amendment if the conditions are "inhumane" (or cruel),[63] are much harsher than punishment for your charge should be,[64] or do not give you your basic needs.[65] You must get basic needs while in prison, like food, clothing, shelter, and medical care.[66]

(d) Examples of *Farmer* Deliberate Indifference Cases

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[59] Farmer v. Brennan, 511 U.S. 825, 842, 114 S. Ct. 1970, 1981, 128 L. Ed. 2d 811, 828 (1994) (holding that a prison official is liable under the 8th Amendment if he "acted or failed to act despite his knowledge of a substantial risk of serious harm").

[60] Mace v. City of Palestine, 333 F.3d 621, 626 (5th Cir. 2003) ("Mere negligence or a failure to act reasonably is not enough. The officer must have the subjective intent to cause harm."); *see also* Bd. of Cty. Comm'rs v. Brown, 520 U.S. 397, 407, 117 S. Ct. 1382, 1390, 137 L. Ed. 2d 626, 641 (1997) (stating that "[a] showing of simple or even heightened negligence will not suffice" to prove deliberate indifference); Farmer v. Brennan, 511 U.S. 825, 835–836, 114 S. Ct. 1970, 1978, 128 L. Ed. 2d 811, 824–825 (1994) (stating that "deliberate indifference describes a state of mind more blameworthy than negligence" and "acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk"); Norton v. Dimazana, 122 F.3d 286, 291 (5th Cir. 1997) ("'Subjective recklessness,' as used in the criminal law, is the appropriate test for deliberate indifference."); Southard v. Tex. Bd. of Criminal Justice, 114 F.3d 539, 551 (5th Cir. 1997) ("'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action . . . . The 'deliberate indifference' standard permits courts to separate omissions that 'amount to an intentional choice' from those that are merely 'unintentionally negligent oversight[s].'") (quoting Bd. of Cty. Comm'rs v. Brown, 520 U.S. 397, 410, 117 S. Ct. 1382, 1391, 137 L. Ed. 2d 626, 643 (1997); Gonzalez v. Ysleta Indep. Sch. Dist., 996 F.2d 745, 756 (5th Cir. 1993) (citations omitted)).

[61] Farmer v. Brennan, 511 U.S. 825, 844, 114 S. Ct. 1970, 1982–1983, 128 L. Ed. 2d 811, 830 (1994) (stating there is no 8th Amendment violation if the official "responded reasonably to the risk, even if the harm ultimately was not averted"); *see also* Walker v. Nunn, 456 Fed. App'x. 419, 422 (5th Cir. 2011) (quoting Farmer v. Brennan, 511 U.S. 825, 844, 114 S. Ct. 1970, 1982–1983, 128 L. Ed. 2d 811, 829 (1994)); Adames v. Perez, 331 F.3d 508, 512 (5th Cir. 2003) ("Prison officials are not . . . expected to prevent all inmate-on-inmate violence . . . . Prison officials can be held liable for their failure to protect an inmate only when they are deliberately indifferent to a substantial risk of serious harm.").

[62] Farmer v. Brennan, 511 U.S. 825, 832–833, 114 S. Ct. 1970, 1976–1977, 128 L. Ed. 2d 811, 822–823 (1994) (quoting Rhodes v. Chapman, 452 U.S. 337, 348–349, 101 S. Ct. 2392, 2399–2400, 69 L. Ed. 2d 59, 69–70 (1981)); *see, e.g.*, Hernandez v. Velasquez, 522 F.3d 556, 559–561 (5th Cir. 2008) (finding that lock-down in a small, shared cell for thirteen months with no exercise, which caused prisoner to suffer muscle atrophy and depression, did not violate prisoner's 8th Amendment rights because prison officials never placed him at substantial risk of serious harm).

[63] Farmer v. Brennan, 511 U.S. 825, 832, 114 S. Ct. 1970, 1976, 128 L. Ed. 2d 811, 822 (1994).

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

[65] Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994) (quoting Rhodes v. Chapman, 452 U.S. 347, 347, 101 S. Ct. 2392, 2399, 69 L. Ed. 2d 59, 69 (1981)); Hernandez v. Velasquez, 522 F.3d 556, 560 (5th Cir. 2008); Gates v. Cook, 376 F.3d 323, 332 (5th Cir. 2004); Davis v. Scott, 157 F.3d 1003, 1006 (5th Cir. 1998); *see, e.g.*, Bibbs v. Early, 541 F.3d 267, 272 (5th Cir. 2008) ("[P]risoners have a right to protection from extreme cold.") (quoting Palmer v. Johnson, 193 F.3d 346, 353 (5th Cir. 1999)).

[66] Gates v. Cook, 376 F.3d 323, 332 (5th Cir. 2004) (finding that prison officials were deliberately indifferent to the substantial risk of harm that filth, heat, pest infestations, and inadequate mental health care posed to Mississippi death row prisoners. The court said, "Prison officials must provide humane conditions of confinement; they must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measure to ensure the safety of the inmates.").

This section describes how the United States Court of Appeals for the Fifth Circuit has decided certain deliberate indifference cases. This is the federal appeals court for Louisiana, so its decisions set the federal law in Louisiana.

In *Horton v. Cockrell*, the Fifth Circuit held that Horton, a prisoner, had an Eighth Amendment claim when prison officials failed to protect him from the attack of another prisoner named Jackson.[67] During a two-week period, Horton filed three grievances. He also made at least one oral complaint saying that Jackson had threatened him.[68] During the same two-week period, Jackson assaulted other prisoners and, according to Horton, tried to start a "race riot."[69] The court stated that Jackson was an "obvious risk" to other prisoners because he was violent so often. The court said that the risk would be obvious even if Horton did not file complaints.[70] The court said that the risk was so obvious that prison officials must have been aware of the risk that Horton would be assaulted. Because officials were aware of the risk, the court said the officials' failure to protect Horton was deliberate indifference.[71]

In other cases, however, the Fifth Circuit has denied Eighth Amendment claims. In *Adames v. Perez*, the court found that evidence showing a few other prisoners had previously escaped their cells and attacked others was not enough to prove that prison officials were aware of a risk of harm to the prisoner.[72] The court said the attacks were not a large problem at the prison, so the officials may not have known about them. Since the officials may not have known about them, the court did not find deliberate indifference.[73] In *Campbell v. Thomas*, the court held that officials had acted by moving the prisoner and his attacker to different cells, so the prisoner could not prove that officials' failure to act to protect him was deliberate indifference.[74] In *Davis v. Tucker*, the prison official looked for more evidence to support the prisoner's claim that other prisoners were going to assault him. The court held that the official was not deliberately indifferent because looking for more evidence was a reasonable response.[75]

In conclusion, to win an Eighth Amendment claim under the *Farmer* deliberate indifference standard, you must prove that prison officials (1) knew you were facing a substantial risk of serious harm and (2) ignored that risk by failing to take reasonable measures to stop another prisoner or prison official from attacking you.

b. Objective Component

To win an Eighth Amendment claim, you must prove both the subjective component and the objective component of the claim. This Subsection explains how to prove the objective component. If a prison official assaulted you, you must show that the official's actions were so harmful that they violated

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[67] Horton v. Cockrell, 70 F.3d 397, 401 (5th Cir. 1995) (per curiam) (holding that the prisoner's complaint should not have been dismissed as frivolous by the district court).
[68] Horton v. Cockrell, 70 F.3d 397, 400 (5th Cir. 1995) (per curiam).
[69] Horton v. Cockrell, 70 F.3d 397, 400 (5th Cir. 1995) (per curiam).
[70] Horton v. Cockrell, 70 F.3d 397, 401 (5th Cir. 1995) (per curiam).
[71] Horton v. Cockrell, 70 F.3d 397, 401 (5th Cir. 1995) (per curiam) ([T]he "factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.") (quoting Farmer v. Brennan, 511 U.S. 825, 842, 114 S. Ct. 1970, 1981, 128 L. Ed. 2d 811, 828 (1994)).
[72] Adames v. Perez, 331 F.3d 508, 512–513 (5th Cir. 2003) ("It is difficult to see how a few isolated incidents of inmates escaping their cells could constitute a 'longstanding and pervasive' problem of which the prison officials must have been aware.")
[73] Adames v. Perez, 331 F.3d 508, 514 (5th Cir. 2003) ("Adames may have demonstrated . . . that [prison officials] *should have* inferred . . . that inmates . . . might similarly escape from their cells. However, Adames failed to prove that [officials] *did* draw such an inference.").
[74] Campbell v. Thomas, 98 Fed. App'x. 308, 309 (5th Cir. 2004) (finding that prison officials had not demonstrated deliberate indifference to prisoner's verbal allegations of sexual abuse when they "responded to [the prisoner's] verbal complaints by moving him to different cells and by moving an inmate [the prisoner] identified as his assailant.").
[75] Davis v. Tucker, 322 Fed. App'x. 369, 371 (5th Cir. 2009) (finding that the prison official's choice to obtain corroboration before taking the prisoner into protective custody demonstrated a "reasonable response to a potential risk.").

your constitutional rights.[76] If there was a substantial risk of serious harm to you from another prisoner, you must show that a prison official's action or inaction put you at that risk. You have to show this whether or not you were actually assaulted.

i. *Seriousness of Harm from Prison Officials*

If you bring an Eighth Amendment claim against a prison official who assaulted you, you must prove the objective component that his actions were so harmful that they were "cruel and unusual punishment."[77] However, you do not need to have been seriously injured to prove the objective component. In *Hudson v. McMillian*, the Supreme Court held you do not always need serious injury to prove the "objective component" of the Eighth Amendment.[78]

Instead, courts will consider both the seriousness of your injury *and* the intent and motivation of the prison official who caused your injury.[79] This means that when the prison official's actions are not made in good faith (they are meant to harm or are unnecessary), less serious injuries can satisfy the objective component. For example, in *Hudson*, the Court found that the prisoner's relatively minor injuries, which included bruises, swelling, loosened teeth, and a cracked dental plate, were enough to satisfy the objective component. These injuries were enough specifically because the prison official's attack was unnecessary and meant to harm.[80]

In *Flowers v. Phelps,* the Fifth Circuit applied this same rule. It said that you do not need a more serious injury for Eighth Amendment claims of excessive force.[81] In *Flowers*, a prisoner had a sprained ankle and mild scratches. The court said that these injuries were enough to meet the objective component. This is because the correction officers' attack was not necessary and was not provoked (or caused) by the prisoner.[82]

But in *Davis v. Cannon*, the Fifth Circuit said that the objective component of the Eighth Amendment was not met when prison officials threw a prisoner to the ground and sprayed him with chemicals.[83] The result in this case was different because the officials did not spray the prisoner just because they wanted to harm him. Instead, they sprayed him in a good faith effort to make the prisoner behave after he refused to obey orders.[84] Also, because the official who sprayed the prisoner did not use excessive force, the officials watching the attack were also not deliberately indifferent.[85]

ii. *Substantial Risk of Serious Harm from Other Prisoners*

You can bring an Eighth Amendment claim against prison officials for deliberately ignoring the risk that another prisoner will attack you. To win, you must prove that you actually faced a substantial risk of serious harm. You can even make a *Farmer* deliberate indifference claim if you were never injured

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[76] Hudson v. McMillian, 503 U.S. 1, 8, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992) ("[C]ourts considering a prisoner's claim must ask . . . if the alleged wrongdoing was objectively 'harmful enough' to establish a constitutional violation.") (quoting Wilson v. Seiter, 501 U.S. 294, 303, 111 S. Ct. 2321, 2326, 1115 L. Ed. 2d 271, 282 (1991)).
[77] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").
[78] Hudson v. McMillian, 503 U.S. 1, 4, 112 S. Ct. 995, 997, 117 L. Ed. 2d 156, 164 (1992) (holding that "the use of excessive physical force against a prisoner may constitute cruel and unusual punishment when the inmate does not suffer serious injury").
[79] Hudson v. McMillian, 503 U.S. 1, 8–10, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 166–168 (1992) (holding that the injury must be considered against the context of the situation as well as the motivations and intent of the prison official who caused the injury).
[80] Hudson v. McMillian, 503 U.S. 1, 10, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 168 (1992).
[81] Flowers v. Phelps, 956 F.2d 488, 491 (5th Cir. 1992) ("[A] plaintiff who brings an excessive use of force claim need not show a significant injury in order to prove an Eighth Amendment violation."), *vacated in part on other grounds*, 964 F.2d 400 (5th Cir. 1992).
[82] Flowers v. Phelps, 956 F.2d 488, 491 (5th Cir. 1992), *vacated in part on other grounds*, 964 F.2d 400 (5th Cir. 1992).
[83] Davis v. Cannon, 91 F. App'x. 327, 329 (5th Cir. 2004).
[84] Davis v. Cannon, 91 F. App'x. 327, 329 (5th Cir. 2004).
[85] Davis v. Cannon, 91 F. App'x. 327, 329 (5th Cir. 2004).

or attacked. But to do that, you have to show that prison conditions put you at substantial risk of serious harm and the conditions are sufficiently serious.[86]

It is important that you know that for a *Farmer* deliberate indifference claim, it does not matter how seriously you were injured. It does not even matter whether you were injured at all.[87] Instead, what matters is whether the conditions of your imprisonment created a *substantial* risk that you would be injured.[88]

The *Farmer* Court did not explain how serious the risk must be in order to be "substantial."[89] But usually you must show that the risk you complain of is one that today's society would not allow.[90] *Horton v. Cockrell* is a good example of this. In that case, a prisoner named Jackson wanted a prisoner named Horton to give him money. Jackson threatened to assault Horton if Horton did not pay.[91] Horton attempted to report the threats but the officer said there was nothing he could do about the situation.[92] Later that day, Jackson made "threatening gestures" at Horton. Horton punched Jackson, and they got into a fight.[93] Horton filed an Eighth Amendment suit against prison officials for deliberately ignoring his substantial risk of harm from Jackson. Horton won this case. The court found that there was a "substantial risk of serious harm" because society does not allow threatening people like this inside or outside of prison.[94]

Remember that you have to prove two things. First, you have to prove that you faced substantial risk of serious harm. This is the "objective component" of the Eighth Amendment. Second, you also have to show that prison officials ignored a risk that they knew or should have known about. This is the "subjective component."

C. YOUR RIGHT TO BE FREE FROM SEXUAL ASSAULT

It is wrong for any prison official to touch you sexually. It is also wrong for any prisoner to touch you sexually without your consent. Sexual assault and rape are types of assaults. "Sexual assault" means any unwanted physical contact of a sexual nature, such as fondling your genitals. The law is clear that prisoners have a right to be protected from sexual assault.[95]

If you were raped or sexually assaulted, you should tell a prison official as soon as you can. You should also ask to go to the hospital. At the hospital, they should test you for sexually transmitted diseases. If you can get pregnant from the assault, they should test you for pregnancy. The health professional should collect your clothing, fingernail scrapings, pubic hair samples, blood samples, hair strands, and swab samples.[96] If you would like to speak with someone after the sexual assault or rape, you should ask for counseling.

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[86] Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994) (quoting Wilson v. Seiter, 501 U.S. 294, 298, 11 S. Ct. 2321, 2324, 115 L. Ed. 2d 271, 279 (1991)).

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

[88] *See, e.g.*, Scott v. Moore, 114 F.3d 51, 54 (5th Cir. 1997) (holding prison was not liable under *Farmer* test for sexual assault of female prisoner by male jailor because conditions under which she was held did not create "substantial risk" to her safety, especially since it was one-time act and officials were not aware of jailor's behavior with female prisoners).

[89] 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 in the footnotes 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").

[90] Farmer v. Brennan, 511 U.S. 825, 858, 114 S. Ct. 1970, 1989, 128 L. Ed. 2d 811, 838 (1994) (Blackmun, J., concurring) (noting that prison officials have a duty to ensure that "the conditions in our Nation's prisons in fact comport with the 'contemporary standard of decency' required by the Eighth Amendment").

[91] Horton v. Cockrell, 70 F.3d 397, 399 (1995) (per curiam).

[92] Horton v. Cockrell, 70 F.3d 397, 399 (1995) (per curiam).

[93] Horton v. Cockrell, 70 F.3d 397, 399 (1995) (per curiam).

[94] Horton v. Cockrell, 70 F.3d 397, 401 (1995) (per curiam).

[95] Johnson v. Johnson, 385 F.3d 503, 532 (5th Cir. 2004).

[96] Linda M. Petter & David L. Whitehill, *Management of Female Sexual Assault*, 58 AM. FAM. PHYSICIAN 920, table 2 (1998), *available at* http://www.aafp.org/afp/1998/0915/p920.html (last visited Jan. 9, 2018).

There are many rules that protect you from sexual assault and rape, including administrative procedures, criminal laws, and civil laws. Section One below explains how you can file a complaint about your sexual assault or rape. Section Two explains criminal rules against sexual assault. Section Two also describes federal criminal law and Louisiana state criminal law that make it illegal for prison officials to have any sexual contact with you. Finally, Section Three explains how you can sue prison officials and other prisoners for sexual assault and rape under the Eighth Amendment and Louisiana state law.

1. Filing a Complaint

If someone sexually assaulted or raped you, you can file a legal complaint. The Louisiana Department of Corrections website says that if you want to report an issue, you can speak with prison staff. You can also write a letter to them. If prison staff does not deal with the problem, you can use the Administrative Remedy Procedure for your prison to ask for a formal review of your complaint.[97] You might find it difficult to report a sexual assault or rape. But you should know that you have a right to not be sexually assaulted or raped. You may fear that your complaint will not be kept secret in your prisoner file and that you will be harassed or threatened. However, it is illegal for a prison official to punish you in any way for reporting the assault.[98]

2. Criminal Charges Against Your Attacker

It is a crime for any prison official to have any sexual contact with you. Therefore, whoever sexually assaulted or raped you may be charged criminally. You cannot bring criminal charges against your attacker by yourself. However, you can ask the government to bring charges against your attacker.

Only the government can choose whether to bring criminal charges. But it is still important for you to know your rights. The following subsections explain federal and Louisiana state criminal laws that make it illegal for prison officials to touch you sexually.

a. Federal Criminal Law: Sexual Relationships between Federal Prisoners and Prison Officials

Section 2243 of Title 18 of the United States Code makes it a crime for prison officials to have sexual intercourse (which means sex) or any type of sexual contact with prisoners in *federal* prisons.[99] The law applies to anyone with "custodial, supervisory, or disciplinary authority" over you.[100] This means the law applies to any prison official who is in charge of you. It is a federal felony to use force or threaten force to have sex in a federal prison.[101] It is always illegal in a federal prison for prison officials to have sexual contact with prisoners. It is a felony if the officials use or threaten force in order to have sexual contact with a prisoner. These laws only protect *federal* prisoners. The next subsection discusses Louisiana law that protects Louisiana prisoners.

b. Louisiana State Criminal Law: Sexual Relationships between Prisoners and Prison Officials

A Louisiana state law makes it a felony for prison officials to have "sexual intercourse or any other sexual conduct" with a prisoner.[102] It is illegal for prison officials to have any sexual conduct with you, even if you consented to it.

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[97] Frequently Asked Questions–La. Dept. of Pub. Safety and Corrections, *available at* http://doc.la.gov/frequently-asked-questions/ (last visited Nov. 20, 2016).
[98] Campbell v. Beto, 460 F.2d 765, 768 (5th Cir. 1972) (stating that prison officials may not threaten a prisoner with punishment for continuing his lawsuit against the officials and that "prisoner access to the courts is not to be curtailed or restricted by threats, intimidation, coercion or punishment").
[99] 18 U.S.C. § 2243(b) (2012).
[100] 18 U.S.C. § 2243(b) (2012).
[101] 18 U.S.C. § 2241(a) (2012) ("Whoever, . . . in a Federal prison, . . . knowingly causes another person to engage in a sexual act (1) by using force against that other person; or (2) by threatening . . . that other person . . . shall be fined under this title, imprisoned for any term of years or life, or both.").
[102] LA. STAT. ANN. § 14:134.1 (2017).

3. Bringing a Civil Action

If a prison official or another prisoner sexually assaulted you, you can bring a civil action against your attacker under the Eighth Amendment and under Louisiana state law. If you bring a civil suit, it is important to know that courts usually only hear claims of physical abuse. You can only win a civil suit if the court recognizes or hears the claim. They will hear emotional abuse claims only when you have also been physically injured. Under Section 803(d) of the Prison Litigation Reform Act ("PLRA"), you cannot bring a federal civil action for emotional injury unless you show that you have been physically injured, sexually assaulted, or raped.[103] This means it is very important to get physical evidence of sexual assault. Please read Chapter 14 of the main *JLM* for more information on the PLRA.

If a prison official sexually assaulted you, you may be able to sue him under the Eighth Amendment for "cruel and unusual punishment."[104] You can also sue him under state law for assault and battery.[105] Even though prison officials have the right to use some force to keep order and security within the prison, they have no right to sexually abuse you.[106] A guard cannot touch you in a sexual way or force you to touch him or her in a sexual way, or have sexual relations with him or her, and then claim that he or she is keeping order or punishing you for breaking a rule. Consensual sex between a prisoner and a prison official may also be the basis for a lawsuit. Louisiana courts have not decided whether sex between a prisoner and a prison official is always against the Eighth Amendment. However, some other states find that consensual sex between a prisoner and prison official is a "*per se*" violation of the Eighth Amendment, meaning that it is always a violation of the Eighth Amendment.[107] It is definitely a violation of the Eighth Amendment if the prison official abuses his position of power to encourage you to have sex or sexual contact with him.[108]

If another prisoner sexually assaulted you, you can sue prison officials under state negligence law or under the Eighth amendment for being deliberately indifferent to your safety. State negligence law is described in Section B(2) above. Claims under the Eighth Amendment are described below.

If another prisoner or prison official sexually assaulted you and prison officials did not try to prevent or stop the assault, you can make an Eighth Amendment claim that prison officials were deliberately indifferent to your safety.[109] You must prove both the subjective and objective components of the claim.[110] Section B(3) of this Chapter explains how to prove these elements. Because letting a prisoner

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[103] Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e(e) (2012).
[104] Hudson v. McMillian, 503 U.S. 1, 8, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992).
[105] LA. STAT. ANN. § 14:43.1 (2017) (sexual battery); LA. STAT. ANN. § 14:35 (2017) (simple battery); LA. STAT. ANN. § 14:38 (2017) (simple assault).
[106] Alberti v. Klevenhagen, 790 F.2d 1220, 1224 (5th Cir. 1986) ("A prisoner has a right to be protected from the constant threat of violence and from sexual assault.") (quoting Jones v. Diamond, 636 F.2d 1364, 1373 (5th Cir. 1981)); Women Prisoners of D.C. Dep't. of Corr. v. D.C., 877 F. Supp. 634, 665 (D.D.C. 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. 811, 823 (1994)), *vacated in part on other grounds*, 93 F.3d 910, 320 U.S. App. D.C. 247 (D.C. Cir. 1996).
[107] Carrigan v. Davis, 70 F. Supp. 2d 448, 454–455 (D. Del. 2007) (finding that sexual conduct between a prison guard and a prisoner, even if consensual in nature, is a *per se* (automatic) violation of criminal law and thus a violation of the 8th Amendment).
[108] White v. Ottinger, 442 F. Supp. 2d 236, 247–248 (E.D. Pa. 2006) (finding that a prisoner who engages in non-forcible sexual conduct with a prison official because he "feared repercussions if he did not submit to [the prison official's] advances" is not consensual and thus potentially in violation of the 8th Amendment).
[109] Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 824 (1994) (holding that to violate the 8th Amendment, a prison official must have a "sufficiently culpable state of mind" which means one of "deliberate indifference" to prisoner health or safety) (citing Wilson v. Seiter, 501 U.S. 294, 302–303, 111 S. Ct. 2321, 2326–2327, 115 L. Ed. 2d 271, 281–282 (1991)).
[110] Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994) (discussing the two components necessary to prove an 8th Amendment Claim: sufficiently serious harm and a sufficiently culpable state of mind). *See* Section B(3) of this Chapter for more information on the objective and subjective components of 8th Amendment violations.

rape you does not serve a goal of the criminal justice system,[111] some courts have found that the sexual abuse alone is enough to prove that the prison officials were culpable (which means guilty).[112] However, the Fifth Circuit in *Scott v. Moore* held that a city did not have a culpable state of mind. The city had under-staffed a city jail, which made it possible for a jailor to sexually assault a prisoner. The court found that the city was not deliberately indifferent to the prisoner's safety because the under-staffing alone did not harm the prisoner.[113] Therefore, the city was not deliberately indifferent to the prisoner's constitutional rights.[114] *See* Chapter 24, Section C(2), of the main *JLM* for more information on Eighth Amendment claims for sexual assault.

Both male and female prisoners are sexually assaulted and/or raped. However, female prisoners are particularly likely to be sexually assaulted[115] and courts are sometimes more open to the claims made by female prisoners. For example, some courts have found it unconstitutional for male guards to search female prisoners in some settings, but constitutional for female guards to search male prisoners in the same settings.[116]

D. CONCLUSION

This Chapter explained the legal meaning of "assault" and explained your right to be free from physical and sexual assault in prison. Different kinds of laws protect you against assault from prison officials and prisoners. Remember to complete the prison's administrative grievance or complaint processes before you file suit. If you do not use the prison's grievance process first, courts might not hear your case.

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[111] Farmer v. Brennan, 511 U.S. 825, 833, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994) (quoting Hudson v. Palmer, 468 U.S. 517, 548, 104 S. Ct. 3194, 3211, 82 L. Ed. 2d 393, 417 (1984)) ("[G]ratuitously allowing the . . . rape of one prisoner by another serves no 'legitimate penological objective.'").

[112] *See, e.g.*, Boddie v. Schnieder, 105 F.3d 857, 861 (2d Cir. 1997); *see also* Hudson v. McMillian, 503 U.S. 1, 6–7, 112 S. Ct. 995, 998–999, 117 L. Ed. 2d 156, 164 (1992).

[113] Scott v. Moore, 114 F.3d 51, 53–54 (1997) (holding city was not liable, even though prisoner successfully proved violation was committed with subjective deliberate indifference to her constitutional rights, because city never received any sexual assault reports on any jailors and this jailor had previously undergone background check, medical exam, and polygraph test, without raising any concerns).

[114] Scott v. Moore, 114 F.3d 51, 53 (1997) ("Here, however, [the prisoner] did not suffer from the mere existence of the alleged inadequate staffing, but only from . . . specific sexual assaults committed on but one occasion.").

[115] All Too Familiar: Sexual Abuse of Women in U.S. State Prisons, *available at* http://hrw.org/reports/1996/Us1.htm# (last visited Sept. 6, 2017) (noting that 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").

[116] *See, e.g.*, Oliver v. Scott, 276 F.3d 736, 739 (5th Cir. 2002) (holding that 4th and 14th Amendments were not violated after female prison guards strip searched male prisoner and observed him showering); *see also* Chapter 25 of the main *JLM*, "Your Right To Be Free From Illegal Body Searches," for more information about cross-gender body searches.