CHAPTER 24

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

A. Introduction

The United States Constitution and state laws protect incarcerated people from certain acts of violence and harassment. This includes attacks, rapes, and other forms of assault. If you believe that a guard or another incarcerated person has assaulted you, this Chapter can help explain your legal options.

This Chapter is divided into four parts. **Part B** describes your legal right to be free from assault. It also explains what you need to prove in order to make an Eighth Amendment claim. **Part C** discusses legal protections against sexual assault and rape. **Part D** outlines special issues for lesbian, gay, bisexual, transgender, and/or gender-nonconforming incarcerated people. **Part E** explains how to protect your right to be free from physical and sexual assaults.

Before starting your research, keep in mind that there are three types of laws that protect your rights in prison: (1) federal constitutional law, (2) federal statutory law, and (3) state law. Federal constitutional law comes from the United States Constitution, which protects incarcerated people from certain assaults. The most important constitutional protection against assault is the Eighth Amendment. The Fourteenth Amendment protects the rights of people who are being detained pretrial. For more information about the Fourteenth Amendment, see *JLM*, Chapter 34, "The Rights of Pretrial Detainees." This Chapter will explain the Eighth Amendment in more detail. For example, this Chapter will help you figure out if prison officials have violated your Eighth Amendment right to be free from cruel and unusual punishment in prison.[1] For a full list of the Constitution's Amendments, see *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law."

To help explain your constitutional rights, this Chapter will describe federal constitutional law cases decided by the U.S. Supreme Court. These cases apply to you no matter where you are imprisoned. This Chapter will also describe cases decided by "Courts of Appeals." These are the federal appeals courts below the U.S. Supreme Court. Unlike Supreme Court cases, these cases do not set the law for the entire country. Instead, they only apply to courts in the group of states that make up the circuit. There are twelve circuit courts in total. Therefore, before reading further, you may first want to look up which circuit court hears cases from your state. 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 other 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 cases from other circuits. If you are confused, you should read *JLM*, Chapter 2, "Introduction to Legal Research," for more information on how the judicial system is organized.

This Chapter also describes federal statutes, which are laws passed by the United States Congress. Finally, this Chapter will discuss state law. 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.

To summarize: if a guard or another incarcerated person has assaulted you in prison, you may be able to make a (1) federal constitutional law claim (a claim that your constitutional rights were

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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.

violated) and/or (2) a state law claim (a claim that a state law was violated). The specific state law claim that you bring depends on the state where you are imprisoned.

Regardless of where you are incarcerated, you cannot press criminal charges against your attacker. Only the government can press criminal charges.[2] The government has a lot of discretion (leeway) in choosing whether it wants to bring criminal charges against a person or a group of people. Victims cannot force the government to bring criminal charges against their attackers.[3] However, you may bring a civil law claim against your attacker. You do not need to wait for the government to bring a criminal charge against your attacker to bring a civil claim. In other words, if you have been assaulted and want to sue your attacker in court, you can bring a civil lawsuit even before the government charges your attacker with a crime. You can also bring a civil suit even if the government never charges your attacker at all. If you win a civil suit, you may be awarded damages (money). The court may also grant an injunction, which is a court order requiring a person to do or cease doing a specific action. For more information on filing a civil suit, see *JLM,* Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law."

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."[4] Specifically, an assault is a type of tort. A tort is a wrongful act one person does to another. Tort law has developed in each state as a part of the "common law," which is law created by judges when they decide cases. This means that if you want to sue your attacker based on state law, you will need to research cases decided in state courts to understand the laws that will apply to your case. In some states, the common law of torts has been codified. "Codified" means that the state legislature has organized the judicial case law on torts into "statutes" (written laws passed by the legislature).[5] You should check to see whether your state legislature has codified tort law. If it has, you can find the definition of assault in the state statute. Tort law has ***not*** been codified in New York State. This means that it only exists as judge-made common law. If you are confused about tort law, you should read *JLM*, Chapter 17, "The State's Duty to Protect You and Your Property: Tort Actions."

If you think your rights have been violated, you will first need to follow your prison's administrative grievance procedures before you can file a claim in court. For more information about how to file a grievance, see *JLM,* Chapter 14, "The Prison Litigation Reform Act" and *JLM,* Chapter 15, "Incarcerated Grievance Procedures." If the grievance system does not help you, or if it does not help you enough, you can then file a claim 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)[6] in state or federal court,

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[2] *See* Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 382 (2d Cir. 1973) (finding that incarcerated persons could not force the government to investigate or criminally charge prison officials who allegedly used extreme and deadly force during a prison uprising, explaining that the prosecutor is the only person who can bring criminal charges against prison officials, and the courts cannot review the prosecutor's decision to not file criminal charges); *see also* Lewis v. Gallivan, 315 F. Supp. 2d 313, 316–317 (W.D.N.Y. 2004) ("[T]he law is well settled that no private citizen has a constitutional right to bring a criminal complaint against another individual.").

[3] Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973).

[4] If you are incarcerated in a *federal* institution (a prison run by the federal government), you will need to sue for simple tort violations using the Federal Tort Claims Act ("FTCA"). The FTCA is a law that allows you to sue the federal government for negligent or harmful actions by its employees. Without the FTCA, you could not sue the federal government in tort because the federal government would be "immune" (unable to be sued) from this kind of suit. 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 (2003); *see also* 28 U.S.C. § 1346(b)(1) (stating that government officials can be sued "in accordance with the law of the place where the act or omission occurred"). For more information on how to bring a civil suit when your rights have been violated, see Section E(4) of Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law."

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

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

(2) File a tort action in state court (in the New York Court of Claims[7] if you are in New York State), or
(3) File an Article 78 petition[8] in state court to challenge an administrative determination 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: An Overview of the Options"; Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law"; Chapter 17, "The State's Duty to Protect You and Your Property: Tort Actions"; and Chapter 22, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules." If you decide to file a federal court claim, you ***must*** first read *JLM*, Chapter 14, "The Prison Litigation Reform Act," on the Prison Litigation Reform Act ("PLRA"). If you do not follow the steps required by the PLRA, you might lose your right to sue your prison in the future. You might also lose good time credit. It is very important that you follow the steps listed in *JLM*, Chapter 14, "The Prison Litigation Reform Act" to avoid bad outcomes for yourself and to increase your chances of winning your lawsuit.

B. Your Right to Be Free from Assault

This Part of the Chapter is organized into five different sections. Section 1 explains the legal definition of assault. Section 2 discusses how the Eighth Amendment protects you against assaults by other incarcerated people. Section 3 discusses how the Eighth Amendment protects you against assaults by prison officials. Section 4 outlines your right to be free from harassment. Section 5 explains why you should not use force to resist, even if you think an order, assault, or search by prison officials is illegal. Finally, Section 6 explains how state laws and state constitutions protect you from assault.

Most of this Chapter will focus on the rights of people who are in prison after being convicted of a crime. If you are being held in jail pretrial, different legal rights may apply to you.[9] For more information, see *JLM*, Chapter 34, "The Rights of Pretrial Detainees."

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 the unjustified and nonconsensual (not agreed to) touching of someone else.[10] "Assault" means any act—including a threat, verbal abuse, or harassment—that makes a person afraid of a physical attack from another person.[11] For example, an

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[7] 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* (an order from a judge that prevents a person from beginning or continuing specific actions). See Chapter 5 of the *JLM*, "Choosing a Court and a 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.

[8] 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. Examples are a challenge to a prison disciplinary proceeding disposition or a parole denial.

[9] *See* Kingsley v. Hendrickson, 576 U.S. 389, 135 S. Ct. 2466, 192 L. Ed. 2d 416 (2015) (holding that the 14th Amendment's Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment).

[10] Tort battery is the "nonconsensual, intentional, and offensive touching of another without lawful justification, but not necessarily with the intent to do harm or offense as required in a criminal battery." *Battery*, BLACK'S LAW DICTIONARY 173 (11th ed. 2019); *see also Battery as Tort*, BOUVIER LAW DICTIONARY (Desk ed. 2012) (defining tort battery as "intentionally touching another person without permission, causing either harm or offense").

[11] 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." *Assault*, BLACK'S

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 of prison, most threats, unwanted touching, and uses of force are torts and are, therefore, illegal. However, in prison, tort law allows prison staff to use some force that would not be allowed outside of prison in order to maintain peace and order in the facility.[12] Most courts will not find that prison officials violated your rights if they only threatened or harassed you with words. This is because courts often believe that prison officials sometimes need to use harsh words to maintain prison security and ensure that incarcerated people follow directions issued by guards. Courts will generally only find that your rights were violated if you were physically attacked. For more on torts and assault under state tort law, see *JLM*, Chapter 17, "The State's Duty to Protect You and Your Property: Tort Actions."

Like tort law, constitutional law requires an incarcerated person to show that they were physically harmed. Verbal threats by prison staff generally do not violate the Constitution.[13] 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.[14] Even then, under the Prison Litigation Reform Act ("PLRA"), you cannot sue for compensatory damages[15] in federal court for mental or emotional injury unless you were also physically injured.[16] In some circuits, you cannot sue for punitive damages unless

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LAW DICTIONARY (11th ed. 2019); *see also Assault*, BOUVIER LAW DICTIONARY (Desk ed. 2012) ("An 'assault' is an action that is intended to cause another person a harmful or offensive contact or an intended action that puts another person in apprehension of such contact.").

[12] *See, e.g.*, Comm'r of Correction v. Coleman, 303 Conn. 800, 804, 38 A.3d 84, 89 (2012) (finding that a prison had a legitimate interest in force-feeding an incarcerated person who was attempting a hunger strike.)

[13] *See* Cole v. Fisher, 379 F. App'x 40, 43 (2d Cir. 2010) (*unpublished*) ("[V]erbal harassment, standing alone, does not amount to a constitutional deprivation." (citing Purcell v. Coughlin, 790 F. 2d 263, 265 (2d Cir. 1986))); 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"); 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: "acts or omissions resulting in an inmate being subjected to nothing more than threats and verbal taunts do not violate the 8th Amendment"); Adkins v. Rodriguez, 59 F.3d 1034, 1037 (10th Cir. 1995) (stating that a prison guard's verbal comments about his "sexual prowess" and "sexual conquests" did not violate a constitutional right, but suggesting that "threats of violence" may be cognizable in an action arising under § 1983); 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 (2010) (finding that calling an incarcerated person "paranoid" and referring him to a mental health evaluation could be harassment but not serious enough to violate a constitutional right); Graves v. N.D. State Penitentiary, 325 F. Supp. 2d 1009, 1011–1012 (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))); Govan v. Campbell, 289 F. Supp. 2d 289, 299 (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 (2003))).

[14] *See* Irving v. Dormire, 519 F.3d 441, 448–449 (8th Cir. 2008) (finding that prison officers' multiple credible death threats, which began after the incarcerated plaintiff filed a lawsuit against the officers, were retaliatory and serious enough to violate the 8th Amendment); Northington v. Jackson, 973 F.2d 1518, 1524 (10th Cir. 1992) (finding incarcerated plaintiff had a § 1983 excessive force claim for psychological injuries when plain-clothed guards 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 insignificant because "convicted prisoners have a constitutional 'right to be free from the terror of instant and unexpected death' at the hands of their keepers" (citations omitted)); *see also* Hudson v. McMillian, 503 U.S. 1, 16–17, 112 S. Ct. 995, 1004, 117 L. Ed. 2d 156, 172 (1992) (Blackmun, J., concurring) (stating a "guard placing a revolver in an inmate's mouth and threatening to blow [the] prisoner's head off" would be an unnecessary and wanton infliction of pain amounting to an 8th Amendment excessive force violation).

[15] 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.

[16] The PLRA prohibits incarcerated people from bringing any federal civil lawsuits (including constitutional and tort claims) for mental or emotional injury suffered while in custody when the person did not also suffer a related physical injury or the commission of a sexual act. 42 U.S.C. § 1997e(e). The Federal Tort Claims Act has

you were physically injured, either.[17] See *JLM,* Chapter 14, "The Prison Litigation Reform Act," for information on the PLRA's physical injury requirement.

(a) Assault and Battery: State Claims vs. Federal Claims

(i) *State Torts and Intent*

If a prison official assaulted you, you can try to make a claim in state court based on state tort law. However, some states, like New York, have passed laws that give prison personnel immunity from state tort claims.[18] Instead, you must file a lawsuit against the state of New York in the Court of Claims.[19] The Court of Claims can only award money damages; it cannot issue an *injunction,* or an order from a judge that prevents a person from beginning or continuing specific actions. See *JLM*, Chapter 5, "Choosing a Court and a Lawsuit," for more information on the Court of Claims.

If you are not incarcerated in New York state, you should look up the law in your state to see if incarcerated people are permitted to bring state tort claims against prison personnel. For more information, see *JLM*, Chapter 2, "Introduction to Legal Research."

2. What To Do If You Were Assaulted by Other Incarcerated People

If you were assaulted by other incarcerated people while in prison, you have a few legal options. First, you could try suing the person or people who assaulted you. However, this might be a waste of time and effort if the person who attacked you was "judgment proof," which means that they do not have much money and will not be able to pay any damages that the court orders.

You could also try suing the prison or prison officials if you believe that they were partially responsible for what happened to you. One of your first steps will be determining whether you want to make a state tort claim or a constitutional claim. Each of these options is explained more below.

(a) State Tort of Negligence

If you were physically attacked by another incarcerated person and believe that prison officials were partly responsible for the attack, you may be able to sue the prison and/or the prison officials. Here, you cannot claim assault and battery because the prison officials did not actually attack you.[20] Instead, you can use the law of "negligence."[21] Negligence is different from assault and battery under state tort law. It means that a person (in this case, the prison official) failed to act reasonably, and as a result, you were hurt.[22] If another incarcerated person tries to attack you, prison officials are supposed to try to stop the attack. If they do not, you could claim that the prison officials were negligent. 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

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a similar limitation for people convicted of a felony (but not pretrial detainees or people convicted of a misdemeanors): no person convicted of a felony can "bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act." 28 U.S.C. § 1346(b)(2). See Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," for more information.

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

[18] N.Y. CORRECT. LAW § 24(1) (McKinney 2014).

[19] N.Y. CORRECT. LAW § 24(2) (McKinney 2014).

[20] If an officer participated in the attack, 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).

[21] See Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," for more on negligence and negligent torts.

[22] 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." *Negligence*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also Negligence (Negligent)*, BOUVIER LAW DICTIONARY (Desk ed. 2012).

words, you must show that the officials did not act like reasonably careful people to prevent the attack.[23] 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,[24] and (2) the officials did not act to prevent it.[25]

Winning a negligence claim against prison officials for an assault by another incarcerated person is difficult.[26] Courts have found negligence in only a few situations: when the attacker is an incarcerated person who officials knew or should have known was violent;[27] when officials placed the incarcerated plaintiff near a violent, mentally ill incarcerated person;[28] when officials placed the plaintiff near an armed incarcerated person;[29] or when the plaintiff was exposed to an incarcerated person who had a grudge against him or who had threatened him.[30]

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[23] 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 (AM. LAW INST. 2012). The Restatement of Torts is published by the American Law Institute and presents the general principles of tort law.

[24] *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 (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 (2001) (denying incarcerated plaintiff'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).

[25] *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 (2002) (describing the requirements for a negligence action).

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

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

[28] *See*, *e.g.*, Bartlett v. Commonwealth, 418 S.W.2d 225, 227–228 (Ky. 1967) (finding that the trial court erred in refusing to admit evidence showing that two incarcerated people who murdered a 15-year-old 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 incarcerated people if there is reasonable grounds to foresee danger). *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 ill incarcerated person who was taking medication). For examples of courts finding "deliberate indifference" to be a constitutional violation in similar situations, see Haley v. Gross, 86 F.3d 630, 642–643 (7th Cir. 1996) (affirming liability for officials who failed to act during a heated argument between plaintiff and a mentally ill incarcerated person); Glass v. Fields, No. 04-71014, 2007 U.S. Dist. Lexis 37089, at *24 (E.D. Mich. May 22, 2007) (finding that the objective component of the deliberate indifference test was met when plaintiff was put in the same cell as a detainee who claimed to be insane and was noted as prone to be violent). *But see* Hann v. State, 137 Misc. 2d 605, 611, 521 N.Y.S.2d 973, 977 (N.Y. Ct. Cl. 1987) (finding that it was not foreseeable that incarcerated person with history of assaultive behavior and who was recently released from psychiatric hospital would attack fellow incarcerated person).

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

[30] *See*, *e.g.*, Rangolan v. County of Nassau, 51 F. Supp. 2d 236, 238 (1999) (upholding a decision that a county jail was negligent by housing the plaintiff in the same "jail pod" as a person whom he had served as a confidential informant against), *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 that a prison was negligent when it placed two incarcerated people at the same facility in spite of a permanent separation order, resulting in a severe stabbing).

Courts have rarely found prisons to be negligent when the prison did not have enough supervisory staff on duty to prevent attacks.[31] However, it is very difficult to make a claim based on inadequate staff supervision, because you must prove that the prison officials acted with "deliberate indifference" towards your safety.[32] This means you must prove that the prison officials consciously knew of an excessive risk to your safety, and chose to disregard that risk. As you will see in the section below, "deliberate indifference" is a very difficult standard for incarcerated plaintiffs to meet. Many incarcerated plaintiffs who have tried to make negligence claims based on inadequate supervision have lost their cases, even if they were seriously injured or killed while in prison.[33]

(b) Constitutional Claim of Deliberate Indifference

This Section focuses on people who are in prison after being convicted of a crime. If you are being held in jail pretrial, different legal rights may apply to you.[34] For more information, see *JLM*, Chapter 34, "The Rights of Pretrial Detainees."

If another incarcerated person assaulted you, you may be able to make a federal constitutional claim of "deliberate indifference." "Deliberate indifference" means that the prison officials' actions or inactions were worse than negligence. You will have to prove that the prison officials actually knew that you were in serious danger but did nothing or too little to protect you.

If you make a deliberate indifference claim, courts will apply the standard from *Farmer v. Brennan* to determine whether the prison officials violated your Eighth Amendment rights.[35] The standard requires you, the plaintiff, to prove that:

(1) There was a substantial risk to your safety,
(2) The prison official knew about the risk to your safety, and
(3) The prison official chose to ignore the risk.[36]

If you are trying to sue multiple prison officials, you will need to prove all three parts of the *Farmer* standard for each person.

(i) *Proving a Substantial Risk to Your Safety*

First, you must show that:

(1) You were actually assaulted while in prison, *or*

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[31] *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).

[32] Sanchez v. State, 99 N.Y.2d 247, 249, 784 N.E.2d 675, 676 (2002) (finding that New York State owes a duty of care to safeguard incarcerated people from attacks by other incarcerated people).

[33] *See* Robinson v. U.S. Bureau of Prisons, 244 F. Supp. 2d 57, 65 (2003) (noting that to determine the foreseeability of an attack, courts may look at evidence "including staffing levels, the ability of staff to monitor the inmates, past behavior of inmates and prison staff, state regulations regarding the staffing of correctional facilities and the monitoring of inmates, and expert testimony regarding the staffing levels at issue"); Colon v. State, 209 A.D.2d 842, 844, 620 N.Y.S.2d 1015, 1016 (3d Dept. 1994) (reversing Court of Claims' judgment for incarcerated person who claimed the prison failed to provide adequate supervision after being attacked by a fellow incarcerated person in a prison engine repair shop during a supervisor's brief absence. The court found instead that the State provided reasonable supervision and that "unremitting supervision . . . was unnecessary and the fact that [the prison official was] not present at the time of the incident, in and of itself, is insufficient to support a finding that the State failed to exercise reasonable care").

[34] *See* Kingsley v. Hendrickson, 576 U.S. 389, 135 S. Ct. 2466, 192 L. Ed. 2d 416 (2015) (holding that the 14th Amendment's Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment).

[35] 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." (citations omitted) (quoting Wilson v. Seiter, 501 U.S. 294, 297, 302–303, 111 S. Ct. 2321, 2323, 2326–2327, 115 L. Ed. 2d 271, 278, 281–282 (1991))).

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

(2) Prison officials' actions or inactions put you at a "substantial risk of serious harm." You can make this type of claim whether or not you have actually been assaulted yet.[37] If you win, the judge will probably issue an order, telling the prison officials that they need to change their work practices to protect you better.

For a prison official's actions (or lack of action) to violate the Eighth Amendment, "the deprivation alleged must be, objectively, 'sufficiently serious.'" In *Farmer*, the Court did not explain how serious the risk must be in order to be "substantial."[38] Courts consider whether the alleged risk is so bad that it violates our society's "standards of decency."[39] In other words, the incarcerated person must show that today's society does not accept the risk he faced.[40] Courts do not consider the general, everyday risk of assault from other incarcerated people to be a "substantial risk" by itself.[41]

(ii) *Proving the Prison Officials Knew About This Risk*

After you prove that you faced serious risk of harm while you were incarcerated, you must prove that prison officials *knew* about the risk.[42] You can do this by proving that officers knew that you were particularly vulnerable (an easy or obvious target for attacks). Or, you can prove that officers knew that the person who attacked you was extremely dangerous. You do not need to show both, but if you can, it will definitely make your claim stronger.[43]

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[37] 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.").

[38] 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").

[39] *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.'").

[40] *See e.g.*, Vega v. Semple, 963 F.3d 259, 267 (2d Cir. 2020) (holding that incarcerated people's 8th Amendment rights were violated when they were exposed to radon gas, which is a chemical known to cause cancer); *see also* Helling v. McKinney, 509 U.S. 25, 35, 113 S. Ct. 2475, 2481, 125 L. Ed. 2d 22, 32–33 (1993) (finding that cellmate who smoked five packs of cigarettes a day created a potentially valid 8th Amendment claim due to unreasonable health risk).

[41] 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))).

[42] *See* Lewis v. Richards, 107 F.3d 549, 553–554 (7th Cir. 1997) (finding that incarcerated plaintiff failed to present sufficient evidence to show that officials knew of risk to his safety); 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).

[43] *See* Farmer v. Brennan, 511 U.S. 825, 843, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811, 829 (1994); *see also* Lewis v. Siwicki, 944 F.3d 427, 433–432 (2d Cir. 2019) ("The first *Farmer* factor, substantial risk of serious harm, depends not on the officials' perception of the risk of harm, but solely on whether the facts, or at least those genuinely in dispute on a motion for summary judgment, show that the risk of serious harm was substantial."); Brown v. Budz, 398 F.3d 904, 914–915 (7th Cir. 2005) (holding that 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, 902–903 (7th Cir. 2004) (holding that an incarcerated person could recover for assault that occurred in 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 person who was injured); Greene v. Bowles, 361 F.3d 290, 294 (6th Cir. 2004) (holding that a transgender incarcerated woman could recover for assault after she was attacked by a known "predatory inmate," either because leaving her in a unit with other high-security incarcerated people threatened her safety, or because placing the attacker in protective custody created a risk for the other occupants); LaMarca v. Turner, 995 F.2d 1526, 1535–1537 (11th Cir. 1993) (liability can be based on "general danger arising from a prison environment that both stimulated and condoned violence"); Coleman v. Wilson, 912 F. Supp. 1282, 1316 (E.D. Cal. 1995) (risk of harm from systemic medical care deficiencies was obvious); Abrams v. Hunter, 910 F. Supp. 620, 624–625 (M.D. Fla. 1995) (acknowledging potential liability based

It is not enough to claim prison officials *should have known* about the big risk to your safety[44] (but you might be able to make a state law negligence tort claim, as described in Subsection B(2)(a) above). Deliberate indifference claims require you to show that the prison officials themselves actually (subjectively) knew about the big risk to your safety, and they chose to ignore that risk.[45]

To prove that prison officials actually knew about the substantial risk to your safety, you can show direct evidence and circumstantial evidence.[46] For example, you could show evidence proving that the risk was around for a long time, or evidence showing that a lot of people in the prison knew about the risk.[47] In one New York case, the plaintiff (Knowles) was slashed in the face while he was in the recreation yard.[48] The plaintiff sued prison officials claiming that they knew he was in danger and chose to ignore the risk.[49] He presented evidence showing that guards had only patted down the incarcerated people when they had entered the recreation area, instead of going through the normal strip search procedures.[50] Furthermore, there was evidence that the prison officials knew about a "war" going on between Spanish-speaking and Jamaican incarcerated people. There was also evidence that they knew Knowles was one of the incarcerated people at risk because of the way that he looked and talked.[51] The court held that this was enough evidence to create uncertainty about whether or not the guards were deliberately indifferent to Knowles's safety.[52]

If you filed complaints with the prison because you believed that you were in danger, you should provide the complaints as evidence, too. But, your complaints alone may not prove that prison officials knew about the risk. Courts do not expect guards to believe every protest or complaint an incarcerated person makes.[53] You should expect prison officials to argue that they did not actually know about the facts showing that you were in danger. Or, they may try to prove that even if they did know about the facts, they had good reason to believe that the risk was minor.[54]

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on awareness of generalized, substantial risk of serious harm from prison violence), *aff'd*, 100 F.3d 971 (11th Cir. 1996); Knowles v. N.Y.C. Dept. of Corr., 904 F. Supp. 217, 221–222 (S.D.N.Y. 1995) (finding a valid claim where prison officials knew of an ethnic "war" among incarcerated people, and that plaintiff was part of a group at risk because of his accent and appearance).

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

[45] *See* Carter v. Galloway, 352 F.3d 1346, 1349–1350 (11th Cir. 2003) (dismissing medium-security incarcerated plaintiff's claim for assault, after plaintiff was stabbed by his maximum-security cellmate, because the officials' generalized awareness of risk did not satisfy the subjective awareness requirement).

[46] 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." (citation omitted)); *see also* Farmer v. Brennan, 511 U.S. 825, 840, 114 S. Ct. 1970, 1980, 128 L. Ed. 2d 811, 827 (1994) (stating that the "concept of constructive knowledge is familiar enough that the term 'deliberate indifference' would not, of its own force, preclude a scheme that conclusively presumed awareness from a risk's obviousness").

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

[48] Knowles v. N.Y.C. Dept. of Corr., 904 F. Supp. 217, 219 (S.D.N.Y. 1995).

[49] Knowles v. N.Y.C. Dept. of Corr., 904 F. Supp. 217, 218 (S.D.N.Y. 1995).

[50] Knowles v. N.Y.C. Dept. of Corr., 904 F. Supp. 217, 218–219 (S.D.N.Y. 1995).

[51] Knowles v. N.Y.C. Dept. of Corr., 904 F. Supp. 217, 222 (S.D.N.Y. 1995).

[52] Knowles v. N.Y.C. Dept. of Corr., 904 F. Supp. 217, 222 (S.D.N.Y. 1995).

[53] *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").

[54] *See* Johnson v. Johnson, 385 F.3d 503, 525 (5th Cir. 2004) (finding that it was reasonable for prison officials to believe that there was no danger to the incarcerated plaintiff or that it was reasonable to disbelieve the

For example, in one case, jail guards refused to move the plaintiff's cell even after he had multiple verbal arguments with his cell neighbor.[55] The plaintiff told jail guards that he was good at martial arts (this was a lie), so the guards believed that the plaintiff could protect himself in case of a fight. When his neighbor eventually attacked him and he was seriously injured, the plaintiff tried to sue the jail officials, claiming deliberate indifference. The plaintiff lost his case, because the court determined that the guards did not know the plaintiff was at serious risk of being harmed.[56]

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

Finally, you must prove that prison officials did not act reasonably to prevent or stop you from getting hurt after they knew that you were at risk.[57] In other words, you must prove that they learned about the risk to your safety and then purposefully chose to ignore it. This is similar to the subjective recklessness standard used in criminal law.[58]

Courts do not expect prison officials to successfully prevent every single act of violence that occurs between people in prison. Instead, they will look to see whether the officials made some type of reasonable effort to keep you safe after they learned that you were at risk. If the prison officials can prove that they made a reasonable effort to keep you safe, your deliberate indifference claim will probably fail—even if you can prove that you were harmed.[59] For example, in a 2020 case from Georgia, the plaintiff told a prison guard that another incarcerated person (Taylor) had entered his cell and threatened to kill him.[60] The guard promised the plaintiff that she would "look into" moving Taylor's cell. But, before the transfer could be completed, Taylor attacked the plaintiff, causing significant injury.[61] The plaintiff argued that the guard should have placed him in protective custody as soon as the guard learned about the threat; anything else was deliberate indifference.[62] But the Court of Appeals disagreed. The Court found that the guard had made some effort to prevent the attack, and that she should therefore not be liable.

In another case, a prison staff member told the plaintiff (Brown) to enter an area to get cleaning supplies.[63] The staff member knew that another incarcerated person with a grudge against Brown was in that area of the prison.[64] That incarcerated person assaulted and beat Brown.[65] Based on these

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

[55] Burrell v. Hampshire County, 307 F.3d 1, 5 (1st Cir. 2002).

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

[57] *See* Farmer v. Brennan, 511 U.S. 825, 841–842, 114 S. Ct. 1970, 1981, 128 L. Ed. 2d 811, 828 (1994) (holding that prison officials could not be liable for inhumane conditions of confinement unless the official had knowledge of specific risk to the plaintiff); *see also* Leibach v. State, 215 A.D.2d 978, 979-980, 627 N.Y.S.2d 463, 463-464 (3d Dept. 1995) (stating that where an attack was planned in secret, and correction staff was not aware of it, staff was not culpable).

[58] Farmer v. Brennan, 511 U.S. 825, 839, 114 S. Ct. 1970, 1980, 128 L. Ed. 2d 811 (1994) (defining recklessness as the choice to "consciously disregard" a substantial risk of serious harm).

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

[60] Mosley v. Zachery, 966 F.3d 1265, 1269 (11th Cir. 2020).

[61] Mosley v. Zachery, 966 F.3d 1265, 1269 (11th Cir. 2020).

[62] Mosley v. Zachery, 966 F.3d 1265, 1271 (11th Cir. 2020).

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

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

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

facts, the Fourth Circuit Court of Appeals held that prison officials had ignored a major risk to Brown's safety.[66]

In another case, correctional officers placed a gay incarcerated person in a cell with a known sexual predator despite their awareness of the gay person's particular vulnerabilities. He was subsequently raped by his cellmate. The court denied the officers' motion to dismiss, finding the officers had sufficient knowledge of a substantial risk of serious harm.[67]

3. What to Do If You Were Assaulted by a Prison Official

(a) When Is the Use of Force by Prison Staff Illegal?

As this Chapter explained above, not all physical touching or physical force is unlawful assault. The difference between lawful and unlawful assault is particularly important for incarcerated people. Actions that would be unlawful outside of prison may be allowed as "lawful force" in prison. For example, prison officers may use lawful force against incarcerated people to maintain order and to make sure rules are obeyed.[68]

Also, because corrections officers are part of the government, they can use the defense of qualified immunity[69] when sued under Section 1983. This means even if you can prove that you were assaulted, the officials may not be liable. For a detailed discussion of qualified immunity and Section 1983, see *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief From Violations of Federal Law."

(b) Protection from Assault Under the Eighth Amendment

The Eighth Amendment of the U.S. Constitution prohibits cruel and unusual punishment.[70] Under the Eighth Amendment, prison officials cannot use excessive physical force against you.[71] They also cannot purposely let someone else hurt you.[72]

There are two parts to a successful Eighth Amendment claim:

(1) A subjective part — prison officials must have acted with an intent to cause harm;[73] and

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

[67] Fox v. Superintendent, Stafford Cnty. Dept. of Corr., No. 11-cv-295-SM, 2012 U.S. Dist. LEXIS 83920, at *9 (D.N.H. June 18, 2012) (*unpublished*).

[68] N.Y. CORRECT. LAW § 137(5) (McKinney 2022) ("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)).

[69] Qualified immunity is "an immunity from civil suit extended to . . . public officials who are alleged to have violated the rights of a person while the official was performing a discretionary function of office, if the official's conduct does not violate a clearly established statutory or constitutional right." *Qualified Immunity*, BOUVIER LAW DICTIONARY (Desk ed. 2012); *see also Immunity*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining qualified immunity 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"); Cantrell v. DeKalb County, 78 S.W.3d 902, 906 (Tenn. Ct. App. 2001) (stating that, under qualified immunity, "governmental officials performing discretionary functions will be shielded from liability for civil damages as long as their conduct does not violate the clearly established constitutional or statutory rights of which a reasonable person would have known" (citing Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410–411 (1982))).

[70] U.S. CONST. amend. VIII.

[71] *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))).

[72] *See* Farmer v. Brennan, 511 U.S. 825, 833–834 114 S. Ct. 1970, 1976–1977, 128 L. Ed. 2d 811, 822–823 (1994) (holding that prison officials may be held liable for denying humane conditions of confinement only if they knew about a substantial risk of serious harm and chose to disregard that risk); *see, e.g.*, Ayers v. Coughlin, 780 F.2d 205, 209 (2d Cir.1985) (*per curiam*) (risk of harm to plaintiff arising from repeated threats made by other incarcerated people, which prison guard was aware of, supports a claim under § 1983).

[73] Hudson v. McMillian, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992) ("[T]he core judicial

(2) An objective part — you must have been injured by the prison guard.[74]

(i) *Subjective Part—Culpable State of Mind*

If you claim that a prison official assaulted you, a court will evaluate your claim using the standard established in *Hudson v. McMillian*.[75] The *Hudson* standard focuses on the prison guard's motivation for using physical force. A plaintiff must show that the prison guard chose to use force for "malicious and sadistic" reasons, which means that the guard was trying to be cruel and cause pain for no good reason.[76]

Prison guards are not violating the Eighth Amendment if they use force to keep order in the prison.[77] Guards and other officials are generally allowed to use force during a riot or other major prison violence.[78] They are also usually allowed to use force during smaller events when incarcerated people behave violently or disruptively.[79] But, if the force has no purpose and was simply meant to cause harm for no reason, then the official may be found to have violated the plaintiff's Eighth Amendment rights.[80]

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,[81]
(2) Whether 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

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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).

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

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

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

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

[78] Whitley v. Albers, 475 U.S. 312, 326, 106 S. Ct. 1078, 1087, 89 L. Ed. 2d 251, 265 (1986) (finding no 8th Amendment violation where incarcerated person was shot by guards during a prison riot); *see also* Wright v. Goord, 554 F.3d 255, 270 (2d Cir. 2009) (finding no 8th Amendment violation when guard placed one hand on plaintiff's stomach at the site of a recent surgery scar, because there was no evidence that the that guard knew or had reason to know that the plaintiff was healing from surgery).

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

[80] *See, e.g.*, Estate of Davis by Ostenfeld v. Delo, 115 F.3d 1388, 1394–1395 (8th Cir. 1997) (finding excessive force when a corrections officer struck a non-resisting plaintiff in the head and face 20 to 25 times while four other officers restrained his limbs); Locicero v. O'Connell, 419 F. Supp. 2d 521, 528–529 (S.D.N.Y. 2006) (finding that a incarcerated plaintiff adequately stated an 8th Amendment claim when he was seriously assaulted by a prison officer, and the prison facility had prior notice of the officer's previous use of excessive force).

[81] Courts look at the seriousness of your injuries in deciding the objective component of an 8th Amendment violation. *See* Hudson v. McMillian, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992) (citing Whitley v. Albers, 475 U.S. 312, 321, 106 S. Ct. 1078, 1085, 89 L.Ed.2d 251, 261 (1986)).

(5) Efforts the prison guards made to decrease the amount of force used.[82]

Remember that not "every malevolent touch by a prison guard gives rise to a federal cause of action."[83] The most important part of making a successful *Hudson* claim is proving that the prison official was *trying* to be cruel when he injured you. Your *Hudson* claim can succeed even if you did not sustain serious, lasting physical injury.[84] But, courts will still examine the extent of a plaintiff's injuries because it provides some indication of the amount of force applied, and because it may suggest whether the use of force was plausibly necessary in a particular situation.

The Ninth Circuit (covering Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington) has said that you do not need to show that the officer meant to hurt or punish a specific individual.[85] This means even if the officer meant to hit someone else, he can still be found liable if he hit you instead. For instance, in *Robins v. Meecham*, an incarcerated person was injured by a bird shot a correction officer had fired at another incarcerated person.[86] The court held that even though the officer did not mean to harm or punish Robins, the officer did mean to harm a different incarcerated person.[87] This was enough to make a successful *Hudson* claim.[88]

(ii) *Objective Part—Injury*

In order to make an Eighth Amendment claim against a prison official, you must prove that the official physically injured you.[89] In the Tenth Circuit, which covers Oklahoma, Kansas, New Mexico, Colorado, Wyoming, and Utah, you can alternatively try to prove that the officer incited other incarcerated people to harm you.[90]

After the Prison Litigation Reform Act (PLRA), you can no longer bring claims in federal civil court for mental or emotional injuries that are not related to physical injury. This means that if you bring a claim in federal civil court for mental or emotional injury that did not happen in relation to physical injury, the PLRA requirements may now prevent you from getting compensatory damages (and in some courts, punitive damages as well). "Damages" refers to the money awarded by a court to a person who has suffered loss, injury, or harm, either to the person's body or to property. For more information, see *JLM,* Chapter 14, "The Prison Litigation Reform Act."

Your claim can win whether your physical injury was big or relatively small, as long as you can prove that the officer injured you because he was trying to be cruel.[91]

Courts look to society's standards of good behavior to decide if an official's actions were bad enough to be considered "cruel and unusual."[92] In general, prison officials violate society's standards whenever they maliciously, evilly, or cruelly use force to cause harm "whether or not significant injury is

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

[83] Hudson v. McMillian, 503 U.S. 1, 9, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 165 (1992).

[84] Hudson v. McMillian, 503 U.S. 1, 9, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 165 (1992).

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

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

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

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

[89] However, some courts do not require you to show serious physical injury if you were sexually assaulted or raped. For more information on this exception, see Part C of this Chapter.

[90] *See, e.g.*, Benefield v. McDowall, 241 F.3d 1267, 1271–1272 (10th Cir. 2001) (determining that officers violated a plaintiff's 8th Amendment rights when they labeled him a snitch and informed other incarcerated people of that label, with knowledge of the obvious risk of danger associated with that label); *see also* Mackey v. Lyons, 52 F. App'x 468 (10th Cir. 2002) (*unpublished*).

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

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

evident."[93] But, "not . . . every malevolent [cruel] touch by a prison guard [raises] a federal cause of action."[94]

The Supreme Court has determined that "cruel and unusual punishment" does not include the use of very minor amounts of force. Courts have used the Latin phrase "*de minimis*" to describe this small amount of force. A small amount of force is not the same thing as a small injury.[95] "*De minimis*" means that a fact or thing is "so insignificant that a court may overlook it in deciding an issue or case."[96] Courts have found the following injuries to be *de minimis*: discomfort, sore wrists,[97] and cuts/swelling to the wrists.[98] Courts have found the following uses of force to be *de minimis*: hitting an incarcerated person once on the head,[99] spraying an incarcerated person with water,[100] pressing a fist against an incarcerated person's neck,[101] bruising an incarcerated person's ear during a routine search,[102] slamming an incarcerated person against a wall,[103] and hitting an incarcerated person with swinging keys.[104]

Because what counts as a constitutional violation can change 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 that were "serious" enough to support a successful *Hudson* claim.

(iii) *Examples of Successful* Hudson *Cases*

In *Hudson v. McMillian*, the incarcerated person suffered blows that caused "bruises, swelling, loosened teeth, and a cracked dental palate."[105] The Supreme Court found that the violence against Hudson and the injuries he suffered were serious enough to satisfy the "objective part" of the Eighth Amendment. This provided the basis for a constitutional claim. The table below provides examples of other successful *Hudson* cases:

Case Name	Citation	Summary
Jones v. Huff	789 F. Supp. 526 (N.D.N.Y. 1992)	A corrections officer violated an incarcerated person's Eighth

[93] Hudson v. McMillian, 503 U.S. 1, 9, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992) (internal quotation marks omitted).

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

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

[96] *De Minimis*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also De Minimis*, BOUVIER LAW DICTIONARY (Desk ed. 2012).

[97] Fillmore v. Page, 358 F.3d 496, 504–505 (7th Cir. 2004).

[98] Watson v. Riggle, 315 F. Supp. 2d 963, 969–970 (N.D. Ind. 2004); Liiv v. City of Coeur D'Alene, 130 Fed. App'x 848, 852 (9th Cir. 2005) (*unpublished*) (clarifying that while past cases 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).

[99] Olson v. Coleman, 804 F. Supp. 148, 150–151 (D. Kan. 1992), *vacated on other grounds*, Nos. 92-3281, 92-3334, 92-3335, 92-3369, 1993 U.S. App. LEXIS 10086 (10th Cir. Apr. 28, 1993) (*unpublished*).

[100] Jackson v. Culbertson, 984 F.2d 699, 700 (5th Cir. 1993) (holding that guard's spraying incarcerated plaintiff with water because he started a fire was *de minimis*).

[101] Candelaria v. Coughlin, 787 F. Supp. 368, 374–375 (S.D.N.Y. 1992), *aff'd*, 979 F.2d 845 (2d Cir. 1992).

[102] Siglar v. Hightower, 112 F.3d 191, 193–194 (5th Cir. 1997).

[103] Govan v. Campbell, 289 F. Supp. 2d 289, 300 (N.D.N.Y. 2003).

[104] *See* Norman v. Taylor, 25 F.3d 1259, 1263–1264 (4th Cir. 1994); White v. Holmes, 21 F.3d 277, 281 (8th Cir. 1994). *But see* United States. v. LaVallee, 439 F.3d 670, 687–688 (10th Cir. 2006) (rejecting the view that *de minimis* injury is conclusive evidence that *de minimis* force was used).

[105] Hudson v. McMillian, 503 U.S. 1, 10, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 168 (1992).

		Amendment rights when the officer ripped the incarcerated person's clothes off and beat him, causing a fracture to his left eye.
Giles v. Kearney	571 F.3d 318 (3d Cir. 2009)	Corrections officers hit and kicked an incarcerated person while he was on the ground even after he had stopped resisting.
Lewis v. Downey	581 F.3d 467 (7th Cir. 2009)	A prison officer used a Taser gun on an incarcerated person after he refused an order to get up from bed.
Williams v. Benjamin	77 F.3d 756 (4th Cir. 1996)	An incarcerated person was sprayed with mace and restrained on a bare-metal bed frame for more than eight hours without access to medical care or a toilet.
Flowers v. Phelps	956 F.2d 488 (5th Cir. 1992)	An incarcerated person was beaten by corrections officers, resulting in a sprained ankle.
Brooks v. Kyler	204 F.3d 102, 108 (3d Cir. 2000)	Two corrections officers attacked an incarcerated person while he was having a conversation with his lawyer over the phone. The officers put him in leg shackles and beat him until he was unconscious.

4. Your Right to Be Free from Harassment

This Section explains when harassment violates the Eighth Amendment. New York State defines harassment as "[e]mployee misconduct meant to annoy, intimidate, or harm an inmate."[106] Harassment can be verbal, physical, or sexual. Harassment may be about race, sex, disability, language, national origin, sexual orientation, or other characteristics. Sexual harassment is defined as "repeated verbal comments or gestures of a sexual nature to an inmate, detainee, or resident by a staff member, contractor, or volunteer, including demeaning references to gender, sexually suggestive or derogatory comments about body or clothing, or obscene language or gestures."[107]

The general rule is that verbal harassment does not violate the Eighth Amendment unless you are also physically threatened.[108] If you are being harassed, you should first try to file a grievance through the inmate grievance system, discussed in *JLM* Chapter 15, "Incarcerated Grievance Procedures."

(a) Verbal Harassment Alone

You should not make an Eighth Amendment claim based on verbal harassment only, because you will lose.[109] Courts do not think that verbal abuse is serious enough to create a constitutional

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[106] N.Y. COMP. CODES R. & REGS. tit. 7, § 701.2(e) (2024).

[107] 28 C.F.R. § 115.6 (2023).

[108] *See, e.g.*, Berry v. Oswalt, 143 F.3d 1127, 1133 (8th Cir. 1998) (holding that non-routine pat-downs combined with sexual comments and evidence that such acts caused the incarcerated person fear and frustration was enough to find a violation of the Eighth Amendment); Adkins v. Rodriguez, 59 F.3d 1034, 1037–1038 (10th Cir. 1995) (finding that prison official's alleged verbal sexual harassment did not violate the plaintiff's constitutional rights because it was not objectively sufficiently serious and the prison official did not act with deliberate indifference to plaintiff's health or safety).

[109] *See, e.g.*, Webster v. City of New York, 333 F. Supp. 2d 184, 201 (S.D.N.Y. 2004) ("Being subjected to verbally abusive language does not rise to the level of a constitutional claim in an Eighth Amendment context."); Minifield v. Butikofer, 298 F. Supp. 2d 900, 904–905 (N.D. Cal. 2004) (holding that only sexual harassment involving

violation—even if the verbal abuse is sexual or racial in nature. For example, the Sixth Circuit Court of Appeals, which covers Kentucky, Michigan, Ohio and Tennessee, ruled that a guard did not violate the plaintiff's constitutional rights when he banged on the plaintiff's cell door, threw food trays, made aggravating and insulting comments, and behaved in a racist manner.[110] Even if you can prove that a guard exposed his genitals while he was verbally harassing you, your Eighth Amendment claim will probably still fail.[111]

(b) Verbal Harassment with Physical Threats

Verbal harassment usually does not violate the Eighth Amendment. The only exception is if you were threatened with very serious physical force, such as a believable death threat. If you were physically threatened, you may have a claim for psychological injury.[112]

Even if your claim is based only on psychological injury, without any physical injury, you can sue the prison or prison officials for punitive damages.[113] You can also sue and ask the court to grant you injunctive relief, which is a court order to prevent officials or incarcerated people from harassing you further. For injunctive relief, you will need to show that the harassment is likely to happen again in the future.[114] For more information on injunctive relief, see *JLM*, Chapter 14, "The Prison Litigation Reform Act."

(c) Sexual Harassment

Comments of a sexual nature by themselves are usually not enough to violate the Eighth Amendment.[115] But, if you can prove that a prison official forced you to engage in nonconsensual sexual

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allegations of physical assault, rather than sexual assault involving verbal abuse, violates the Constitution; also noting plaintiff failed to establish physical injury where a prison official twice unzipped his pants and told plaintiff to grab his penis); 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).

[110] *See* Johnson v. Dellatifa, 357 F.3d 539, 546 (6th Cir. 2004) ("[W]hile the allegations, if true, demonstrate shameful and utterly unprofessional behavior . . . 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)).

[111] *See* Austin v. Terhune, 367 F.3d 1167 (9th Cir. 2004) (holding that a prison guard did not violate the plaintiff's 8th Amendment rights by making sexual and racist comments—even when the guard exposed his own genitals during the verbal harassment).

[112] *Compare* 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, constitute an 8th Amendment violation), *with* Carter v. Morris, 164 F.3d 215, 219 n.3 (4th Cir. 1999) (stating that plaintiff's arrest involving officers placing handcuffs too tightly and pushing her legs as she entered the patrol car was insufficient to support her excessive force claim), *and* Collins v. Cundy, 603 F.2d 825, 827 (10th Cir. 1979) (dismissing plaintiff's complaint because sheriff laughing and threatening to hang him was frivolous).

[113] Under a provision of the Prison Reform Litigation Act, incarcerated people are prevented from bringing a federal lawsuit for mental or emotional injury suffered while in custody "without a prior showing of physical injury." 42 U.S.C. § 1997e(e). However, several federal circuit courts have determined that that provision does not bar claims for punitive damages in the absence of physical injury. *See, e.g.*, Kuperman v. Wrenn, 645 F.3d 69, 73 & n.5 (1st Cir. 2011); Thompson v. Carter, 284 F.3d 411, 418 (2d Cir. 2002); Allah v. Al-Hafeez, 226 F.3d 247, 252 (3d Cir. 2000); Hutchins v. McDaniels, 512 F.3d 193, 197–198 (5th Cir. 2007) (*per curiam*); Calhoun v. DeTella, 319 F.3d 936, 941–942 (7th Cir. 2003); Royal v. Kautzky, 375 F.3d 720, 723 (8th Cir. 2004); Oliver v. Keller, 289 F.3d 623, 630 (9th Cir. 2002); Searles v. Van Bebber, 251 F.3d 869, 880–881 (10th Cir. 2001); Hoever v. Marks, 993 F.3d 1353, 1355–1356 (11th Cir. 2020).

[114] *See* Hutchins v. McDaniels, 512 F.3d 193, 197 (5th Cir. 2007) (noting that "the physical injury requirement does not bar declaratory or injunctive relief for violations of a prisoner's constitutional rights"); Zehner v. Trigg, 133 F.3d 459, 461–463 (7th Cir. 1997) (finding that an incarcerated plaintiff cannot sue for monetary damages but can sue for other kinds of relief in a lawsuit about asbestos exposure).

[115] *See* Adkins v. Rodriguez, 59 F.3d 1034, 1037–1038 (10th Cir. 1995) (finding that a prison official's alleged verbal harassment did not violate the plaintiff's 8th Amendment rights, because the harassment was not objectively sufficiently serious and the official did not act with deliberate indifference).

contact, you may be able to make an Eighth Amendment claim.[116] Because prison officials have so much power over incarcerated people, a corrections officer may try to force an incarcerated person into sexual conduct by threatening him with disciplinary action or some other punishment. This can be considered cruel and unusual punishment that violates the Eighth Amendment.

Courts are not clear on what counts as "nonconsensual sexual contact."[117] Courts will look to see if the sexual contact is against "evolving standards of decency" to decide if the act violated an incarcerated person's Eighth Amendment rights.[118] In other words, a court will look at what society believes is acceptable and considers good behavior to decide whether an attacker's behavior went against that standard. Sexual assault is a clear violation. When other forms of unwanted physical contact are combined with verbal sexual harassment, they may constitute cruel and unusual punishment in violation of the Eighth Amendment.[119] Both men and women can be survivors of sexual harassment or assault.[120]

If a prison official sexually harassed you, you can file a lawsuit both against that official and the prison. But keep in mind that it is difficult to make an Eighth Amendment claim for sexual harassment against a prison, because you must prove that the administrators showed "deliberate indifference" regarding the harassment.[121] In other words, you must show that the prison administrators knew or should have known of the risk of harassment and ignored it. Showing this knowledge is difficult unless you have evidence that you told the administrators about the problem or asked them for help.

(d) Reporting Harassment in New York

New York law defines harassment as "employee misconduct meant to annoy, intimidate, or harm an incarcerated individual."[122] It creates a special procedure for reporting harassment.[123] The

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[116] Courts do not use a uniform definition for "nonconsensual sexual contact," but the Bureau of Justice Statistics defines nonconsensual sexual acts as "unwanted contacts with another inmate or unwilling contacts with staff that involved oral sex, anal sex, vaginal sex, handjobs, and other sexual acts." ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUST. STATS., SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORTED BY INMATES, 2007, at 8 (2007), *available at* https://bjs.ojp.gov/content/pub/pdf/svsfpri07.pdf (last visited Mar. 31, 2024); ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUST. STATS., SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12, at 9 (2013), *available at* https://bjs.ojp.gov/content/pub/pdf/svpjri1112.pdf (last visited Mar. 31, 2024).

[117] *See* Watison v. Carter, 668 F.3d 1108, 1114 (9th Cir. 2012) (stating that guard did not violate plaintiff's 8th Amendment rights when he approached while plaintiff was on the toilet, rubbed his thigh against the plaintiff's thigh, and laughed); Blueford v. Prunty, 108 F.3d 251, 254–255 (9th Cir. 1997) (finding that prison employee did not violate the plaintiff's 8th Amendment rights when he pulled the plaintiff's hands toward plaintiff's own genitals, grabbed his own genitals, and demanded anal sex).

[118] *See, e.g.*, Crawford v. Cuomo, 796 F.3d 252, 259 (2d Cir. 2015) (describing "evolving standards of decency" (quoting Graham v. Florida, 560 U.S. 48, 58 (2010))).

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

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

[121] *See* Daskalea v. District of Columbia, 227 F.3d 433, 441 (D.C. Cir. 2000) (stating that a municipality can be found liable when its policy or custom inflicts the injury; finding that something constitutes a policy or custom when it arises out of deliberate indifference); *see also* Monell v. Dept. of Soc. Servs. of City of New York, 436 U.S. 658, 692, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611, 636 (1978) (finding that the government is only liable when one of its policies causes an employee to violate another person's constitutional rights.)

[122] State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Incarcerated Grievance Program § 701.2(e) (2016), *available at* https://doccs.ny.gov/system/files/documents/2022/12/4040.pdf (last visited Mar. 31, 2024); *see also* N.Y. COMP. CODES R. & REGS. tit. 7, § 701.2(e) (2024).

[123] State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Incarcerated Grievance Program § 701.8 (2016), *available at*

procedure says that if you think you are the victim of prison employee misconduct or harassment, you can tell the prison employee's direct supervisor (but be aware that this is not a requirement for filing a formal grievance).[124] You should also file a formal grievance with the clerk of the Incarcerated Grievance Resolution Committee ("IGRC").[125] The Committee will give this grievance to the prison superintendent for review.[126] After receiving the grievance, the superintendent will decide within twenty-five calendar days if the employee's conduct was harassment.[127] 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").[128]

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

5. Your Right to Refuse Illegal Orders

Courts believe that incarcerated people must follow orders so that prisons can be run in a safe and orderly way.[129] So, courts will generally give prison officials lots of leeway when they claim that they are enforcing orders. If you refuse to follow an order from a prison official, prison officials can use a reasonable amount of force to make you obey. This is true even if it turns out that the order involved an illegal form of punishment.[130] So, it is in your legal best interest to always follow orders issued by guards—even if you believe that the orders violate your constitutional rights.[131]

For example, in *Jackson v. Allen*, prison guards used force to push the plaintiff (Jackson) into a tiny, dark, dirty cell referred to as "The Hole."[132] The District Court of Arkansas later found use of The

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https://doccs.ny.gov/system/files/documents/2022/12/4040.pdf (last visited Mar. 31, 2024); *see also* N.Y. COMP. CODES R. & REGS. tit. 7, § 701.8 (2024).

[124] State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Incarcerated Grievance Program § 701.8(a) (2016), *available at* https://doccs.ny.gov/system/files/documents/2022/12/4040.pdf (last visited Mar. 31, 2024); N.Y. COMP. CODES R. & REGS. tit. 7, § 701.8(a) (2024).

[125] State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Incarcerated Grievance Program § 701.5(a) (2016), *available at* https://doccs.ny.gov/system/files/documents/2022/12/4040.pdf (last visited Mar. 31, 2024); N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(a) (2024). See Chapter 15 of the *JLM,* "Incarcerated Grievance Procedures" for more information on how to file a grievance complaint.

[126] N.Y. COMP. CODES R. & REGS. tit. 7, § 701.8(b) (2024).

[127] N.Y. COMP. CODES R. & REGS. tit. 7, § 701.8(f) (2024).

[128] N.Y. COMP. CODES R. & REGS. tit. 7, § 701.8(g) (2024).

[129] Griffin v. Comm'r of Pa. Prisons, No. CV-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).

[130] *See* Jackson v. Allen, 376 F. Supp. 1393, 1394 (E.D. Ark. 1974) (finding that an incarcerated person had no right to resist being thrown in "The Hole," even though use of The Hole was later found to be an unconstitutional form of punishment).

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

[132] *See* Jackson v. Allen, 376 F. Supp. 1393, 1394 (E.D. Ark. 1974); *see also* Smith v. Sec'y, Fla. Dept. of Corr., 358 F. App'x 60, 64 (11th Cir. 2009) (*unpublished*) (finding prison rule that incarcerated people must comply with all orders issued by guards was constitutional, even though the rule might mean incarcerated people will have to comply with illegal orders); Gossett v. Stewart, No. CV-08-2120-PHX-DGC (ECV), 2012 U.S. Dist. LEXIS 34374, at *29 (D. Ariz. Mar. 13, 2012) (*unpublished*).

Hole to be unconstitutional.[133] Still, the same court found that Jackson did not have a right to resist the guards, citing the prison's interest in maintaining security.[134] According to the court, the "right" thing for incarcerated people to do is obey the illegal order and then later try to sue the prison for damages.

The general rule is that an incarcerated person should always follow guards' orders.[135] But, there is one exception. In *Jackson v. Allen*, the court ruled that an incarcerated person may resist an illegal order to save himself from "immediate, irreparable and permanent physical or mental damage or death."[136] The court did not give specific examples of when an incarcerated person could legally refuse an order. The court just said that there would be exceptions only for "extreme circumstances."[137]

6. Protection Under State Constitutions and Statutes and Federal Statutes

You have already read how state tort law and federal constitutional law protect your rights against assault. State constitutions and statutes also protect your right to be free from assault. For example, the New York State Constitution prohibits cruel and unusual punishment.[138] It also does not allow you to lose your liberty without due process of law.[139]

If you are imprisoned in New York State, you will probably have the easiest time making an assault claim based on New York State law. For example, New York statutes say that prison officials cannot hit incarcerated people except under emergency circumstances. The law states, "[N]o officer or other employee of the department shall inflict any blows whatever upon any incarcerated individual, unless in self-defense, or to suppress a revolt or insurrection."[140] See *JLM*, Chapter 2, "Introduction to Legal Research," for information on how to find similar laws in your state.

In addition, federal statutes can protect the rights of federally incarcerated people to be free from assault. The Federal Bureau of Prisons owes a duty of care to persons in federal custody. This duty can be the basis for a suit against prison officials if you are attacked by other incarcerated people.[141] However, a court will look at state tort law to decide if the officials have failed their duties. Therefore, you should still research the tort law for your specific state (the state where your prison is located).[142]

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[133] *See* Hamilton v. Love, 328 F. Supp. 1182, 1193 (E.D. Ark 1971) ("If the conditions of detainment are such that they can only be considered punitive, or as punishment, then, of course, the subjecting of such detainees to such conditions would violate the due process requirements of the Fifth and Fourteenth Amendments, as well as the quoted provision of the Eighth Amendment.").

[134] *See* Jackson v. Allen, 376 F. Supp. 1393, 1395 (E.D. Ark. 1974) ("[E]xceptions to such a general rule (requiring obeyance to such orders) will have to be developed to cover those extreme circumstances where resistance to submission to unconstitutional punishment is necessary to prevent one's death or immediate, substantial, irreparable and potentially permanent mental or physical damage.").

[135] *See* Jackson v. Allen, 376 F. Supp. 1393, 1395 (E.D. Ark. 1974) ("Thus the Court concludes that the jail authorities could properly use reasonably necessary force to make Jackson obey their wrongful order to enter the 'hole'.").

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

[137] Jackson v. Allen, 376 F. Supp. 1393, 1394–1395 (E.D. Ark. 1974).

[138] N.Y. CONST. art. I, § 5.

[139] N.Y. CONST. art. I, § 6. In general, when you think about due process, know that you have two types of due process rights. Your right to procedural due process means government proceedings must treat you fairly. It limits the ways the government can take away your property, liberty, and life. Your right to substantive due process prevents government interference with other rights individuals have that the government cannot take away—rights such as privacy, speech, and religion.

[140] N.Y. CORRECT. LAW § 137(5) (McKinney 2022). 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.

[141] 18 U.S.C. § 4042(a)(2). *See* United States v. Muniz, 374 U.S. 150, 164–165, 83 S. Ct. 1850, 1859, 10 L. Ed. 2d 805, 816 (1963) (holding that the duty of care owed to incarcerated people housed in federal prisons is fixed by 18 U.S.C. § 4042, regardless of any conflicting state rules).

[142] Parrott v. United States, 536 F.3d 629, 637 (7th Cir. 2008) (finding that, in a suit brought under the Federal Tort Claims Act, Indiana tort law governs whether the duty of care is breached and whether that breach caused the injuries in question).

C. Sexual Assault and Rape

This Part of the Chapter explains the federal and state laws that protect incarcerated people from sexual assault and rape. "Sexual assault" means any physical contact of a sexual nature, such as fondling your genitals. Rape means forcible sexual intercourse (vaginal or anal intercourse).

If you were attacked by a prison official, you can sue the prison for violating your Eighth Amendment rights. You may also be able to bring a state tort claim of assault and battery, depending on the laws of your state. 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.[143] Any bodily contact between you and a prison official must be (1) lawful force necessary to maintain security and (2) must connect to helping the official run the prison (this is sometimes called a "legitimate penological justification"). A guard cannot sexually touch you or force you to have sex as a way of "disciplining" you for breaking a rule.[144] If a prison official does this, you can seek the protection of the law to get the official to stop hurting you.[145] You may also be able to sue the prison and collect monetary damages (money).

If another incarcerated person sexually assaulted you, you can claim that prison officials violated your Eighth Amendment rights if they knew that you were at risk of harm but did nothing about it.[146] 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 pregnancy (if you are a person who can get pregnant).[147] 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.[148] If you would like to speak with someone after the sexual assault or rape, the prison may provide counseling. If you are incarcerated in a New York State prison,

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[143] *See* Women Prisoners of D.C. Dept. of Corr. v. District of Columbia, 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. 2d 811, 823 (1994))), *vacated in part on other grounds*, 93 F.3d 910 (D.C. Cir. 1996).

[144] *See* Women Prisoners of D.C. Dept. of Corr. v. District of Columbia, 877 F. Supp. 634, 665 (D.D.C. 1994) (noting that although security concerns sometimes trump privacy interests, the evidence did not show any justification for the invasion of incarcerated women's privacy), *vacated in part on other grounds*, 93 F.3d 910 (D.C. Cir. 1996).

[145] *See* Women Prisoners of D.C. Dept. of Corr. v. District of Columbia, 877 F. Supp. 634, 665–666 (D.D.C. 1994) (holding that the District of Columbia was liable under U.S.C. 42 § 1983 for 8th Amendment violations—specifically, disregarding risk of sexual harassment and "failing to respond reasonably upon discovering instances of sexual harassment"), *vacated in part on other grounds*, 93 F.3d 910 (D.C. Cir. 1996); *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))).

[146] 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.").

[147] Even if your hospital pregnancy and/or sexually transmitted infection (STI) test comes back negative, you should ask for another of each around two weeks after the date you were attacked. For example, if you were raped on February 1, you should ask for a pregnancy test on February 15. This is because a pregnancy or STI test taken too early may come back with a false negative.

[148] *See* Linda M. Petter & David L. Whitehill, *Management of Female Sexual Assault*, AM. FAM. PHYSICIAN (Sept. 15, 1998), *available at* https://www.aafp.org/pubs/afp/issues/1998/0915/p920.html (last visited Mar. 31, 2024).

you should have access to the state's sexual violence phone hotline. The hotline provides counseling in English, Spanish, and other languages.[149]

You may also want to file a report about the sexual assault, which may lead the state to bring criminal charges against the staff member who assaulted you. Many incarcerated people are afraid that prison officials will punish them if they file grievances, especially if they are complaining about staff. You may be afraid that your complaint will not be kept private or that you will be harassed or threatened. It can be difficult to report a sexual assault or rape. But, you should know that any sexual contact by a corrections officer is wrong. You have a right to be free from such abuse. It is also wrong, and illegal under many state laws, for the prison guards to punish you or act against you for reporting the assault, although retaliation does happen.[150]

If you bring a civil suit, it is important to know that the Prison Litigation Reform Act allows claims based on physical abuse but not claims based solely on emotional damage.[151] 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 *JLM*, Chapter 14, "The Prison Litigation Reform Act," for more information on the PLRA.

2. Eighth Amendment Claims for Sexual Assault

This section will focus on the rights of people who are incarcerated after being convicted of a crime. If you are being held in jail pretrial, different legal rights may apply to you.[152] For more information, see *JLM*, Chapter 34, "The Rights of Pretrial Detainees."

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."[153] 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.'"[154]

In making a typical Eighth Amendment claim, you must prove that the prison official acted maliciously and sadistically for the purpose of causing harm (this gets to the official's subjective state of mind). But, if you can prove that a prison guard committed a sexual assault, at least some federal courts will assume that means "the guard acted maliciously and sadistically for the very purpose of causing harm, and the subjective component of the Eighth Amendment claim is satisfied."[155] And in most federal circuits, you do NOT need to show that you sustained serious bodily harm as a result of the rape or assault. This is because most federal circuit courts have recognized that "any sexual assault

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[149] To use the hotline, dial 777 on any phone in a Department of Corrections and Community Supervision facility. *Prison Sexual Assault*, N.Y. STATE COAL. AGAINST SEXUAL ASSAULT, *available at* https://nyscasa.org/get-help/prea (last visited Mar. 31, 2024).

[150] For more information on state laws relating to sexual assault and rape in prison, see Section C(6) of this Chapter, "State Law."

[151] 42 U.S.C. § 1997e(e) ("[N]o Federal civil action may be brought by a prisoner confined in a jail, prison or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.").

[152] *See* Kingsley v. Hendrickson, 576 U.S. 389, 400-401, 135 S. Ct. 2466, 2475, 192 L. Ed. 2d 416, 428-429 (2015) (holding that the 14th Amendment's Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment; "pretrial detainees (unlike convicted prisoners) cannot be punished at all").

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

[154] Women Prisoners of D.C. Dept. of Corr. v. District of Columbia, 877 F. Supp. 634, 665 (D.D.C. 1994) (quoting Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994)), *vacated in part on other grounds*, 93 F.3d 910 (D.C. Cir. 1996).

[155] Bearchild v. Cobban, 947 F.3d 1130, 1144 (9th Cir. 2020).

is objectively 'repugnant to the conscience of mankind'" and is therefore an Eighth Amendment violation.[156]

Some federal circuit courts have determined that one single act of sexual assault or rape can be serious enough to violate the Eighth Amendment.[157] However, in other federal circuits, you may have to show that you were subjected to "severe and repetitive" acts of sexual violence in order to make an Eighth Amendment claim.[158]

If you make an Eighth Amendment claim based on sexual assault or rape, the bulk of your legal case will probably center around proving that the prison official was trying to sexually gratify himself or humiliate you.[159] Expect the prison official to argue that he was performing some legitimate "official duty" and was NOT trying to harm you. Many of these cases arise in the context of strip searches, with the officers arguing that they were conducting legitimate searches with the goal of maintaining prison safety. Courts often rule in favor of the prison officials in cases like these.[160] Incarcerated people have sometimes managed to make successful Eighth Amendment claims related to strip searches—but only when they could show really good evidence as to the officer's state of mind.[161]

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[156] Bearchild v. Cobban, 947 F.3d 1130, 1144, 1145 (9th Cir. 2020); *see also* Sconiers v. Lockhart, 946 F.3d 1256, 1267 (11th Cir. 2020); Ricks v. Shover, 891 F.3d 468, 476 (3d Cir. 2018); Washington v. Hively, 695 F.3d 641, 643 (7th Cir. 2012); Giron v. Corr. Corp. of Am., 191 F.3d 1281, 1290 (10th Cir. 1999); Boddie v. Schnieder, 105 F.3d 857, 861 (2d Cir. 1997). *But see* Copeland v. Nunan, No. 00-20063, 2001 U.S. App. LEXIS 30986, at *4–7 (5th Cir. Feb. 21, 2001) (*unpublished*) (requiring an objective finding of serious injury to establish and 8th Amendment violation in the context of sexual assault).

[157] Bearchild v. Cobban, 947 F.3d 1130, 1144 (9th Cir. 2020); Sconiers v. Lockhart, 946 F.3d 1256, 1267 (11th Cir. 2020); Ricks v. Shover, 891 F.3d 468, 476 (3d Cir. 2018); Crawford v. Cuomo, 796 F.3d 252, 256 (2d Cir. 2015); Washington v. Hively, 695 F.3d 641, 643 (7th Cir. 2012).

[158] Buckley v. Dallas County, Civil Action No. 3:97-CV-1649-BC, 2000 U.S. Dist. LEXIS 5543, at *14 (N.D. Tex. Apr. 27, 2000) (*unpublished*) (dismissing an incarcerated person's 8th Amendment claim because the harm he suffered was not from severe and repetitive abuse); Redd v. Harvey, No. 10-622, 2010 U.S. Dist. LEXIS 89050, at *3 (W.D. La. Aug. 4, 2010) (*unpublished*) (finding that only severe or repetitive sexual abuse rises to the level of an 8th Amendment violation).

[159] Crawford v. Cuomo, 796 F.3d 252, 257–258 (2d Cir. 2015) ("In determining whether an Eighth Amendment violation has occurred, the principal inquiry is whether the contact is incidental to legitimate official duties, such as a justifiable pat frisk or strip search, or by contrast whether it is undertaken to arouse or gratify the officer or humiliate the inmate").

[160] *See, e.g.*, Rice v. King County, 243 F.3d 549 (9th Cir. 2000), *opinion reported in full at* No. 99-35257, 2000 U.S. App. LEXIS 29897, at *10–11 (9th Cir. Nov. 15, 2000) (*unpublished*); Johnson v. Carroll, No. 2:08-cv-1494 KJN P, 2012 U.S. Dist. LEXIS 79380, at *91–94 (E.D. Cal. June 6, 2012) (*unpublished*); Young v. Brock, No. 10-cv-01513-WJM-CBS, 2012 U.S. Dist. LEXIS 14262, at *11–12 (D. Colo. Feb. 7, 2012) (*unpublished*); Frierson v. Roberts, No. 11-3044-SAC, 2011 U.S. Dist. LEXIS 91931, at *7–8 (D. Kan. Aug. 17, 2011) (*unpublished*); Kiser v. Kramer, No. 10-609-LPS, 2010 U.S. Dist. LEXIS 116524, at *7–8 (D. Del. Nov. 2, 2010) (*unpublished*); Smith v. Los Angeles County, No. CV 07-7028-VAP (MAN), 2010 U.S. Dist. LEXIS 61985, at *19–20 (C.D. Cal. Apr. 22, 2010) (*unpublished*); Myles v. Gaskill, No. 1:09-cv-177, 2010 U.S. Dist. LEXIS 22965, at *11–13 (W.D. Mich. Jan. 8, 2010) (*unpublished*); Tarpley v. Stepps, No. 4:05-CV-573 CAS, 2007 U.S. Dist. LEXIS 19316, at *19–20 (E.D. Mo. Mar. 19, 2007) (*unpublished*); Buckley v. Dallas County, No. 3:97-CV-1649-BC, 2000 U.S. Dist. LEXIS 5543, at *16–17 (N.D. Tex. Apr. 27, 2000) (*unpublished*).

[161] *See, e.g.,* Wood v. Beauclair, 692 F.3d 1041, 1048–1051 (9th Cir. 2012) (finding an 8th Amendment violation when a female corrections officer subjected a male incarcerated person to unnecessary searches and grabbed his penis, after the male incarcerated person rejected her romantic advances); Calhoun v. Detalla, 319 F.3d 936, 939–940 (7th Cir. 2003) (finding sufficient facts to support a male incarcerated person's 8th Amendment claim where he alleged that male correctional officers conducted a strip search of him in front of female correctional officers; both the male and female officers laughed at the incarcerated person, made sexual comments, forced him to perform provocative acts, and pointed towards his buttocks with their sticks); Liner v. Goord, 196 F.3d 132, 136 (2d Cir. 1999) (finding an incarcerated plaintiff could move forward with an 8th Amendment claim against prison guards who physically and sexually assaulted him during a strip search, including by slamming his head into a wall repeatedly); Jordan v. Gardner, 986 F.2d 1521, 1522–1523 (9th Cir. 1993) (finding a prison policy that required male correctional officers to conduct random, suspicionless searches on female incarcerated people constituted cruel and unusual punishment under the 8th Amendment); Watson v. Jones, 980 F.2d 1165, 1166 (8th Cir. 1992) (finding facts alleged to be sufficient to support an 8th Amendment claim when female correctional officer performed almost daily pat-down searches on two male incarcerated people and examined their genitals, anus, and thigh areas); Carrington v. Easley, No. 5:08-CT-3175-FL, 2011 U.S. Dist. LEXIS 56805, at *8 (E.D.N.C.

3. Cases Related to Sexual Abuse of Incarcerated Women

While all people can be sexually assaulted and/or raped, incarcerated women are particularly vulnerable.[162] Courts are sometimes more sympathetic to female incarcerated people because of the greater chance of sexual abuse by prison guards. For example, some courts have found searches of incarcerated women by male guards to be unconstitutional, even if searches of male incarcerated people by female guards would be allowed under the same circumstances.[163] Some prisons have tried to hire only female corrections officers for women's prisons to try to prevent sexual abuse of incarcerated women.[164]

The tables below list cases where incarcerated women have won lawsuits based on claims of sexual assault or rape. They are organized by circuit. Unlike Supreme Court cases, these cases do *not* set the law for the entire country. Instead, they only apply within that circuit. Cases from a court of appeals within your circuit—which are cited like (2d Cir. 2000) or (9th Cir. 2005)—are what is called "mandatory authority," because lower courts within that circuit are required to follow them. You can still use cases from lower courts in your circuit—which are cited like (S.D.N.Y Jan. 1, 2000) or (D. Del. 1999)—and cases from other circuits, but these are only what is called "persuasive authority." These cases are called persuasive authority because, while they might persuade (convince) a court to make a certain decision, the court is free to ignore the case if it wants to. A court would probably (but not definitely) find a case from another lower court within the same circuit more persuasive than a case from a court of appeals in a different circuit. If you are confused, you should read *JLM*, Chapter 2, "Introduction to Legal Research," for more information on how the judicial system is organized.

So, to summarize, the best way to use the table below is to first figure out what circuit you are in (the states that each circuit cover are listed for your convenience). Then, you should focus on cases in your circuit, especially those from the courts of appeal. After that, you can look at other circuits to see if any cases are particularly close to your situation. If you find cases from another circuit that you think would be helpful in your situation, you can still cite those cases as a way to persuade the judge.

First Circuit Court of Appeals
(Maine, Massachusetts, New Hampshire, Rhode Island and Puerto Rico)

Case Name	Citation	Summary
Faas v. Washington County	260 F. Supp. 2d 198 (D. Me. 2003)	A male correctional officer forced a woman to show her breasts, placed his penis in her mouth, and masturbated on her body. On a second occasion, the correctional officer inserted his finger into her vagina.
Chao v. Ballista	806 F. Supp. 2d 358 (D. Mass. 2011)	A woman had between 50–100 sexual encounters with a male correctional officer. The

May 24, 2011) (*unpublished*) (finding an 8th Amendment violation when a guard attempted to put his mouth on an incarcerated person's exposed penis); Jackson v. Raemisch, No. 10-cv-212-slc1, 2010 U.S. Dist. LEXIS 78300, at *13–14, *22–24 (W.D. Wis. July 30, 2010) (finding an 8th Amendment violation when guards handcuffed an incarcerated person during a strip search, then laughed and made jokes about the person's sexual orientation); Turner v. Huibregste, 421 F. Supp. 2d 1149, 1152–1153 (W.D. Wis. 2006) (finding sufficient evidence to survive a motion to dismiss when a male correctional officer grabbed a male incarcerated person's buttocks and fondled his penis during a pat down search, asking, "What is this?").

[162] HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS 64 (1996), *available at* https://www.hrw.org/legacy/reports/1996/Us1.htm (last visited Mar. 31, 2024) (noting that the population of female incarcerated people 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").

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

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

		court found that this violated the Eighth Amendment and awarded the woman more than $70,000 in damages.

Second Circuit Court of Appeals
(Connecticut, New York and Vermont)

Case Name	Citation	Summary
Amador v. Andrews	655 F.3d 89 (2d Cir. 2011)	Women brought suit against New York State prisons, claiming that the current DOCS policies subject women to a substantial and unreasonable risk of sexual abuse.
Cash v. County of Erie	No. 04-CV-0182-JTC(JJM), 2009 U.S. Dist. LEXIS 91232 (W.D.N.Y. Sep. 29, 2009)	Woman in county jail was assaulted and raped by a male correctional officer. She was awarded a default judgment of $500,000 compensatory and $150,000 punitive damages.
Morris v. Eversley	205 F. Supp. 2d 235 (S.D.N.Y. 2002)	Formerly incarcerated woman sued a male correctional officer for rape. She successfully proved that the prison superintendent and assistant warden knew about the assaults happening in the prison, because other women in the prison had become pregnant.
Noguera v. Hast	99 Civ. 8786 (KMW)(AJP), 2000 U.S. Dist. LEXIS 11956 (S.D.N.Y. July 21, 2000)	A woman was repeatedly touched and forced to have oral sex and intercourse with a male officer. The court found that the prison wardens were liable because they knew of the risks.

Third Circuit Court of Appeals
(Delaware, New Jersey, Pennsylvania, and the Virgin Islands)

Case Name	Citation	Summary
Carrigan v. Davis	70 F. Supp. 2d 448 (D. Del. 1999)	A woman claimed a male correctional officer entered her room and raped her, while the correctional officer said she had seduced him. The court found that any sexual act between an incarcerated person and a correctional officer was a violation of the Eighth Amendment, regardless of "consent."

Fourth Circuit Court of Appeals
(Maryland, North Carolina, South Carolina, Virginia, and West Virginia)

Case Name	Citation	Summary
Etters v. Bennett	No. 5:09-CT-3187-D, 2011 U.S. Dist. LEXIS 27326 (E.D.N.C. Mar. 16, 2011)	A woman sued correctional officers, citing numerous instances of sexual assault. The court found that the allegations of repeated rape and the demand to expose her breasts and genitals to an officer, who then put his mouth on her breast, would be violations of the Eighth Amendment.
Mitchell v. Rappahannock Reg'l Jail Auth.	703 F. Supp. 2d 549 (E.D. Va. 2010)	A woman was sexually assaulted by a male correctional officer on more than ten occasions, including forced oral sex. The court found that the officer's supervisors could be held liable under the Eighth Amendment because they watched and participated in the abuse.
Carr v. Hazelwood	Civil Action No. 7:07cv00001, 2007 U.S. Dist. LEXIS 91962 (W.D. Va. Dec. 14, 2007)	Male correctional officer inserted his fingers into woman's vagina, causing her to urinate (pee) blood. The court found this allegation sufficiently stated an Eighth Amendment claim.

Heckenlaible v. Va. Peninsula Reg'l Jail Auth.	491 F. Supp. 2d 544 (E.D. Va. 2007)	A male correctional officer escorted a woman to the shower and stared at her while she showered, in violation of agency policy. That same day, he sexually assaulted her in her cell. The court found that the officer and jail officials could be held liable under state tort law theories and Fourteenth Amendment due process.
Oliver v. Harper	No. 5:09-CT-3027-H, 2011 U.S. Dist. LEXIS 29499 (E.D.N.C. Mar. 22, 2011)	A male officer forced a woman to have sex inside her cell. The court allowed the woman to proceed on her claim against the officer.

Fifth Circuit Court of Appeals
(Louisiana, Mississippi and Texas)

No successful cases.

Sixth Circuit Court of Appeals
(Kentucky, Michigan, Ohio and Tennessee)

Case Name	Citation	Summary
S.H. v. Stickrath	251 F.R.D. 295 (S.D. Ohio 2008)	Female minors in a detention facility filed suit on behalf of all girls confined in the facility, alleging that they were subjected to "grossly unconstitutional conditions of confinement," including physical and sexual abuse from staff. The parties entered into a settlement agreement to fix the conditions at the facility.

Seventh Circuit Court of Appeals
(Illinois, Indiana and Wisconsin)

Case Name	Citation	Summary
Hawkins v. St. Clair County	No. 07-142-DRH, 2009 U.S. Dist. LEXIS 16964 (S.D. Ill. Mar. 4, 2009)	A female juvenile detainee claimed that a male employee touched her genitals and breasts. The court denied summary judgment, finding that there were material issues of fact as to whether the abuse had occurred.

Eighth Circuit Court of Appeals
(Arkansas, Iowa, Minnesota, Missouri, Nebraska, North and South Dakota)

Case Name	Citation	Summary
Riley v. Olk-Long	282 F.3d. 592 (8th Cir. 2002)	A woman was raped by a male correctional officer. The court found that both the prison warden and the director of security were deliberately indifferent to the substantial risk of harm that officers presented to incarcerated women. The correctional officer was held personally liable for $20,000, and the warden was liable for $25,000 in punitive damages.
Ware v. Jackson County	150 F.3d 873 (8th Cir. 1998)	A woman was raped by a male correctional officer. The court found that there was sufficient evidence that prison officials were deliberately indifferent when investigators of sexual abuse allegations recommended that the officer be fired, but the officer was not fired, and no additional safety measures were put in place.
Berry v. Oswalt	143 F.3d 1127 (8th Cir. 1998)	A woman was raped by a male correctional officer. A jury found that the officer violated the incarcerated woman's Eighth Amendment rights and committed the state tort of outrage against her. The jury awarded her $65,000 in

		compensatory damages and $15,000 in punitive damages.
Kahle v. Leonard	477 F.3d 544 (8th Cir. 2007)	A male correctional officer sexually assaulted a female pretrial detainee on three separate occasions. The court denied a motion for summary judgment because a jury could find both the correctional officer and his supervisor liable under the Fourteenth Amendment.
Williams v. Prudden	67 F. App'x 976 (8th Cir. 2003)	A male correctional officer forcibly rubbed his pelvis against an incarcerated woman, grabbed her breast, demanded sexual favors, and tried to rape her. The court found the repeated conduct sufficient to state an Eighth Amendment claim.

Ninth Circuit Court of Appeals
(Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam and Northern Mariana Islands)

Case Name	Citation	Summary
Schwenk v. Hartford	204 F.3d 1187 (9th Cir. 2000)	A male correctional officer sexually assaulted a transgender woman by entering her cell and rubbing his penis on her buttocks. The court found this assault was enough to establish an Eighth Amendment claim against the officer.
Jordan v. Gardner	986 F.2d 1521 (9th Cir. 1993)	The court found that the prison's policy of requiring male correctional officers to conduct random, suspicionless searches on incarcerated women constituted cruel and unusual punishment under the Eighth Amendment.
Barkey v. Reinke	No. 1, 2010 U.S. Dist. LEXIS 104585 (D. Idaho Sep. 30, 2010)	A woman was sexually assaulted during a cross-gender pat search. The woman had used the PREA hotline to report the incident, so further exhaustion was unnecessary. The court denied both parties' motions for summary judgment.

Tenth Circuit Court of Appeals
(Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming)

Case Name	Citation	Summary
Gonzales v. Martinez	403 F.3d 1179 (10th Cir. 2005)	The court found that a sheriff could be held liable for deliberate indifference under the Eighth Amendment for the actions of male correctional officers. Evidence of prior physical assaults, lapses in jail security, and sexual harassment was enough to find that the sheriff was aware of the risk to incarcerated women.
Smith v. Cochran	339 F.3d 1205 (10th Cir. 2003)	A male state license examiner raped a woman while she was out of prison on work release. The court said this violated the Eighth Amendment.
Hall v. Terrell	648 F. Supp. 2d 1229 (D. Colo. 2009)	A male correctional officer routinely sexually assaulted and raped an incarcerated woman. She was awarded more than $350,000 in compensatory damages and $1 million in punitive damages against the individual officer.
Fleetwood v. Werholtz	No. 10-2480-RDR, 2011 U.S. Dist. LEXIS 43162 (D. Kan. Apr. 20, 2011)	A male correctional officer drove an incarcerated woman offsite to her work assignment. The officer grabbed her breasts and requested oral sex, which the woman felt she could not refuse. The court found this sufficient to support an Eighth Amendment claim against the individual

		officer but not against other prison officials because there was no evidence that they knew about the abuse.

Eleventh Circuit Court of Appeals
(Alabama, Florida and Georgia)

Case Name	Citation	Summary
Crocker v. City of Fairhope	No. 04-0184-WS-B, 2005 U.S. Dist. LEXIS 33887 (S.D. Ala. Mar. 30, 2005)	Incarcerated woman was raped three times and forced to engage in oral sex by a male jailer. Summary judgment was denied for both parties, finding that there was genuine issue of material fact as to whether the woman was raped or not.
Hammond v. Gordon County	316 F. Supp. 2d 1262 (N.D. Ga. 2002)	Incarcerated women argued that a male correctional officer engaged in sexual acts with them and made them strip to receive toiletries. One woman further alleged that male officers encouraged her to perform sexual acts on other incarcerated people in exchange for cigarettes. Two of the officers in question were convicted of criminal charges. The court found the individual correctional officers could be held liable under Eighth Amendment but the county could not.

D.C. Circuit Court of Appeals
(Washington D.C.)

Case Name	Citation	Summary
Daskalea v. District of Columbia	227 F.3d 433 (D.C. Cir. 2000)	The court affirmed an award of $350,000 against the District of Columbia and its Department of Corrections for ongoing sexual abuse of a female incarcerated person, due to correctional officer's routine sexual abuse of women in prison.
Women Prisoners of D.C. Dept. of Corr. v. District of Columbia	877 F. Supp. 634 (D.D.C. 1994)	Incarcerated women brought a class action suit against the District of Columbia Department of Corrections for widespread sexual abuse from male correctional officers. The court found that the sexual harassment "amounted to wanton and unnecessary subjection of pain" and "was so malicious that it violated contemporary standards of decency."

4. "Consensual" Relationships Between Incarcerated People and Prison Staff

Sometimes, incarcerated people enter into relationships with prison officials that look a little bit like romantic "dating" relationships. But, even if an incarcerated person consents[165] to being in a relationship with prison staff, the relationship may be illegal under state law. Forty-nine states have criminalized sexual contact between prison employees and incarcerated people.[166] Most of these states

[165] In the context of a sexual interaction, "consent" means that you agreed to have sex with somebody.

[166] *See* Crawford v. Cuomo, 796 F.3d 252, 259 nn.5–6 (2d Cir. 2015) (collecting state statutes). *See also* ALA. CODE § 14-11-31 (2018); ALASKA STAT. ANN. §§ 11.41.425(a)(2), 11.41.427(a)(1) (West 2007); ARIZ. REV. STAT. ANN. § 13-1419 (West 2020); ARK. CODE ANN. § 5-14-126(a)(1)(A) (2017); CAL. PENAL CODE § 289.6(a)(2) (West 2022); COLO. REV. STAT. ANN. § 18-3-404(f) (West 2023); CONN. GEN. STAT. ANN. §§ 53a-71(a)(5), 53a-73a(a)(1)(E) (West 2012); D.C. CODE §§ 22-3013, 22-3014, 22-3017 (West 2017); DEL. CODE ANN. tit. 11, §§ 780A, 780B (West 2010) (unpublished 2018 revision available on LexisNexis); FLA. STAT. ANN. § 944.35(3) (West 2010); GA. CODE ANN. § 16-6-5.1 (West 2016); HAW. REV. STAT. ANN. §§ 707-731(1)(c), 707-732(1)(f) (West 2008); IDAHO CODE ANN. § 18-6110 (West 2006 & Supp. 2008); 720 ILL. COMP. STAT. ANN. 5/11-9.2 (West 2017); IND. CODE § 35–44.1–3–10 (West 2012 & Supp. 2022); IOWA CODE ANN. § 709.16(1) (West 2016); KAN. STAT. ANN. § 21-5512 (2012); KY. REV. STAT. ANN. § 510.120 (West 2016); LA. STAT. ANN. § 14:134.1 (2018); ME. REV. STAT. ANN. tit. 17-A, § 253(2)(E) (West

have found that incarcerated people are legally incapable of consenting to sex with a prison official, and therefore the conduct amounts to statutory rape.

However, some states maintain statutes that allow prison officials to raise a "consent defense" to Eighth Amendment claims.[167] This means that if you try to sue the prison for sexual abuse that occurred between you and a prison official, the official might try to argue that your sexual relationship was "consensual" and that you should lose your lawsuit.

Some circuit courts have determined that an incarcerated person can consent to sexual contact with a prison employee, thus shielding the prison from liability for an Eighth Amendment violation.[168] Other lower courts (district courts) have found that sex between an incarcerated person and a guard is inherently coercive (pressured or forced) and that consent is not a defense.[169] Other than these few lower court opinions, however, the circuit courts have made clear that "consensual" sexual activity between incarcerated people and prison officials cannot give rise to an Eighth Amendment claim.[170]

In *Wood v. Beauclair*, the Ninth Circuit Court of Appeals provided a little more consideration to the power dynamic between prison officers and incarcerated people. The court held that an incarcerated person is entitled to a presumption[171] that a sexual act was nonconsensual, but an accused prison employee can rebut that presumption with a valid defense of consent. The Ninth Circuit acknowledged that the power dynamics between an incarcerated person and a guard problematizes the concept of consent but held that incarcerated people are capable of consent in certain situations.[172]

If you are trying to prove that your sexual encounters with a prison official were NOT consensual, you will want to show all of the ways that the official coerced you (used his power to get you to do things). For example, the *Wood* court ruled that trading favors or contraband for sex was evidence of

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2006); MD. CODE ANN., CRIM. LAW § 3-314 (West 2002); MASS. GEN. LAWS ch. 268, § 21A (West 2020); MICH. COMP. LAWS ANN. §§ 750.520c (1)(i–l) (West 2004); MINN. STAT. ANN. §§ 609.341(24)(2)(viii), 609.344(1)(m), 609.345(1)(m) (West 2018); MISS. CODE ANN. § 97-3-104 (West 2011); MO. ANN. STAT. § 566.145 (West 2012); MONT. CODE ANN. § 45-5-502(6)(a) (West 2009); NEB. REV. STAT. §§ 28–322; 28–322.01 (West 2010); NEV. REV. STAT. ANN. § 212.187 (West 2015); N.H. REV. STAT. ANN. § 632-A:4(III) (West 2016); N.J. STAT. ANN. § 2C:14-2(c)(2) (West 2015); N.M. STAT. ANN. § 30-9-11(E)(2) (West 2016); N.Y. PENAL LAW § 130.05(3)(e) (McKinney 2020); N.C. GEN. STAT. §§ 14–27.31(b-c) (West 2015); N.D. CENT. CODE ANN. § 12.1-20-06 (West 2008); OHIO REV. CODE ANN. § 2907.03(A)(6,11) (West 2020); OR. REV. STAT. ANN. §§ 163.452, 163.454 (West 2015); 18 PA. STAT. AND CONS. STAT. ANN. § 3124.2 (West 2015); 11 R.I. GEN. LAWS ANN. § 11-25-24 (West 2006); S.C. CODE ANN. § 44-23-1150 (2017); S.D. CODIFIED LAWS § 24-1-26.1 (2013); TENN. CODE ANN. § 39-16-408 (West 2011); TEX. PENAL CODE ANN. § 39.04 (West 2016); UTAH CODE ANN. § 76-5-412 (West 2015); VA. CODE ANN. § 18.2-64.2 (West 2012); WASH. REV. CODE ANN. §§ 9A.44.160, 9A.44.170, 9A.44.180 (West 2015); W. VA. CODE ANN. § 61-8B-10 (West 2020); WIS. STAT. ANN. § 940.225(2)(h) (West 2005); WYO. STAT. ANN. § 6–2–303(a)(vii) (West 2017).

[167] NAT'L INST. OF CORR., FIFTY-STATE SURVEY OF CRIMINAL LAWS PROHIBITING SEXUAL ABUSE OF INDIVIDUALS IN CUSTODY (2013), *available at* https://s3.amazonaws.com/static.nicic.gov/Library/021387.pdf (last visited Mar. 31, 2024) (providing a chart identifying statutes in 28 states as either explicitly rejecting consent as a defense or deeming incarcerated people incapable of consenting to sexual acts with correctional employees or officials).

[168] *See* Graham v. Sheriff of Logan Cnty., 741 F.3d 1118 (10th Cir. 2013); Hall v. Beavin, No. 98-3803, 1999 U.S. App. LEXIS 29700 (6th Cir. Nov. 8, 1999) (*unpublished*); Freitas v. Ault, 109 F.3d 1335 (8th Cir. 1997). Some lower courts have come to the same conclusion, barring incarcerated people who "consented" to sexual acts with prison employees from bringing 8th Amendment claims. *See* Fisher v. Goord, 981 F. Supp. 140 (W.D.N.Y. 1997) (holding that a woman's consent to sex negated her 8th Amendment claim).

[169] Carrigan v. Davis, 70 F. Supp. 2d 448, 452-453 (D. Del. 1999) (finding that any sexual act between an incarcerated person and a correctional officer was a per se violation of the 8th Amendment, regardless of consent); Williams v. Humphrey, No. 09-cv-202-bbc, 2009 U.S. Dist. LEXIS 43788, at *9 (W.D. Wis. May 20, 2009) (*unpublished*) (finding that even if an incarcerated person had consented to sexual activity with an officer, the officer was in a position of power over the inmate, and the sex was therefore coercive).

[170] Graham v. Sheriff of Logan Cnty., 741 F.3d 1118 (10th Cir. 2013); Hall v. Beavin, No. 98-3803, 1999 U.S. App. LEXIS 29700, at *4 (6th Cir. Nov. 8, 1999) (*unpublished*); Freitas v. Ault, 109 F.3d 1335, 1339 (8th Cir. 1997).

[171] A presumption is an idea that is taken to be true or assumed to be true. However, your opponent can "rebut" the presumption, which means to prove that it is NOT true using evidence.

[172] Wood v. Beauclair, 692 F.3d 1041, 1047, 1049 (9th Cir. 2012) (explaining that "[t]he power dynamics between prisoners and guards make it difficult to discern consent from coercion" and acknowledging "the coercive nature of sexual relations in the prison environment," and holding that "when a prisoner alleges sexual abuse by a prison guard . . . the prisoner is entitled to a [rebuttable] presumption that the conduct was not consensual").

coercion.[173] Other courts have also found relationships between guards to be coercive when the guard gives the incarcerated person too many gifts or special privileges in exchange for sex.[174]

You should also provide evidence showing that you refused the official's sexual advances. Even if you did not explicitly say "no" when the official tried to have sex with you, you can try to argue that your body language and actions made it very clear that you were scared and not in agreement with what was happening.[175]

Finally, even if your Eighth Amendment claim against a prison guard fails, you still may be able to bring a claim under state tort law. Remember that unwanted sexual contact and/or rape are both forms of assault. For more information on making a state law claim, see Section B(1) and Section C(6) of this Chapter. The government may also choose to prosecute (press criminal charges) against your rapist. However, you cannot force the government to prosecute your rapist.

5. Federal Law and the Prison Rape Elimination Act

In 2003, Congress passed the Prison Rape Elimination Act ("PREA"): the first federal statute 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 rape of incarcerated people, creates a review panel to hold annual hearings, and provides grants to states to fight the problem.[176] With this Act, the federal government recognized that sexual assault in prisons is a major problem.[177]

Even though the PREA was important for gathering statistics about sexual assault in prisons, it did not create a private right of action.[178] A private right of action allows a person to bring a lawsuit based directly on a public statute, the Constitution, or federal common law. The PREA does not have a private right of action, which means that it does not provide incarcerated people with a legal remedy. In most cases where incarcerated people raise PREA violations in their complaints, courts decline to consider the PREA at all because of the lack of a private right of action.[179]

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[173] Wood v. Beauclair, 692 F.3d 1041, 1047 (9th Cir. 2012) ("[T]he power dynamics between prisoners and guards make it difficult to discern consent from coercion. Even if the prisoner concedes that the sexual relationship is 'voluntary,' because sex is often traded for favors (more phone privileges or increased contact with children) or 'luxuries' (shampoo, gum, cigarettes), it is difficult to characterize sexual relationships in prison as truly the product of free choice.").

[174] *See* Chao v. Ballista, 806 F. Supp. 2d 358, 373–376 (D. Mass. 2011) (finding that the coercive sexual relationship between a female incarcerated person and male guard was sufficiently harmful to sustain an 8th Amendment violation even though the encounters were potentially consensual (meaning she did not explicitly refuse)); Williams v. Humphrey, No. 09-cv-202-bbc, 2009 U.S. Dist. LEXIS 43788, at *9 (W.D. Wis. May 20, 2009) (*unpublished*) (finding a relationship coercive when a male incarcerated person had sex with a female correctional officer in exchange for tobacco); Hammond v. Gordon County, 316 F. Supp. 2d 1262, 1285-1286 (N.D. Ga. 2002) (finding the exchange of sex for cigarettes to be evidence of a coercive relationship that violated the Eighth Amendment).

[175] *See* Brown v. Flowers, 974 F.3d 1178, 1181, 1184 (10th Cir. 2020) (finding that a woman did not consent to sex with a guard even though she did not physically resist, because she was afraid of the power that the guard had over her).

[176] Prison Rape Elimination Act of 2003, 34 U.S.C. §§ 30301–30309.

[177] The U.S. Department of Justice ("DOJ") released a report detailing the DOJ's efforts to deter sexual abuse of incarcerated people by federal corrections officers and made recommendations to help the DOJ prevent this sexual abuse (including better staff training and increased medical and psychological help for victims of abuse). *See* U.S. DEPT. OF JUSTICE, 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 Mar. 31, 2024).

[178] *See* De'Lonta v. Clarke, No. 7:11-cv-00483, 2013 U.S. Dist. LEXIS 5354, at *7–8 (W.D. Va. Jan. 14, 2013) (*unpublished*) (collecting cases stating that the PREA does not "create a private right of action for inmates to sue prison officials for noncompliance with the [PREA]").

[179] *See*, e.g., Winton v. Pa. Dept. of Corr., 263 A.3d 1240, 1244 (Pa. Commw. Ct. 2021) (dismissing plaintiff's claim based on the PREA because the PREA does not create a private cause of action); Fisher v. Fed. Bureau of Prisons, 484 F. Supp. 3d 521, 538 (N.D. Ohio 2020) (collecting cases and dismissing plaintiff's claims "[b]ecause the PREA does not provide [her] with a private right of action"); Chao v. Ballista, 772 F. Supp. 2d 337, 341 n.2 (D.

In the smaller number of cases where courts at least briefly considered plaintiffs' arguments regarding the PREA, they often remained unconvinced.[180] In *Jenkins v. Hennepin,* the plaintiff tried to rely on the PREA to help bolster his Eighth Amendment claim.[181] Jenkins was an incarcerated person who was sexually assaulted by two other incarcerated people.[182] Jenkins pointed to language in the PREA, which stated that failure to take measures to eliminate sexual abuse amounts to deliberate indifference in violation of the Eighth Amendment, and argued that the prison officials were deliberately indifferent because they failed to create any prison policy regarding sexual abuse.[183] Jenkins argued that the prison officials knew about the need for such a policy in part because of the PREA.[184] The district court ruled in favor of the prison officials. The court determined that although prison officials did have some knowledge of the PREA, Jenkins had not proven that the officials consciously understood the risk of rape and deliberately chose not to create a policy.[185]

Federal criminal law bans prison officials from having sexual contact with incarcerated people. Federal law criminalizes sexual intercourse or any type of sexual contact between persons with "custodial, supervisory or disciplinary" authority (like guards and wardens) and incarcerated people in federal correctional facilities.[186] It is a felony to use or threaten force to engage in sexual intercourse (or sexual contact) in a federal prison.[187] This means it is always illegal in federal prisons for prison officials to have sexual contact with incarcerated people. These laws only protect federally incarcerated people. Laws protecting state-incarcerated people are discussed in the next subsection.

Mass. 2011) (stating that the plaintiff cited "no authority" to support her argument that the "PREA allows a private cause of action" and noting that "every court to address the issue has held otherwise"); Faz v. N. Kern State Prison, No. CV-F-11-0610-LJO-JLT, 2011 U.S. Dist. LEXIS 111682, at *13–14 (E.D. Cal. Sep. 28, 2011) (*unpublished*) (finding that "the PREA does not create a private right of action"); Rivera v. Drake, No. 09-CV-1182, 2010 U.S. Dist. LEXIS 37933, at *7–8 (E.D. Wis. Mar. 23, 2010) (*unpublished*) (rejecting a plaintiff's claim based on the PREA because the law did not create a private cause of action); Brown v. Parnell, No. 5:09CV-P159-R, 2010 U.S. Dist. LEXIS 34378, at *14 (W.D. Ky. Apr. 6, 2010) (*unpublished*) (stating that the PREA "does not create a right of action that is privately enforceable by an individual civil litigant"); Inscoe v. Yates, No. 1:08-CV-001588 DLB PC, 2009 U.S. Dist. LEXIS 108295, at *8 (E.D. Cal. Oct. 28, 2009) (*unpublished*) (finding nothing in the PREA to suggest that it creates a private right of action); Rindahl v. Weber, No. CIV. 08-4041-RHB, 2008 U.S. Dist. LEXIS 105792, at *1–2 (D.S.D. Dec. 31, 2008) (*unpublished*) (rejecting plaintiff's claim based on the PREA because the PREA "does not create a private right of action"); Pirtle v. Hickman, No. CV05-146-S-MHW, 2005 U.S. Dist. LEXIS 40419, at *3 (D. Idaho Dec. 9, 2005) (*unpublished*) (barring plaintiff's claim because it is based on the PREA, which did not create a private right of action).

[180] *See* Doe v. United States, No. CV. 08-00517 BMK, 2011 U.S. Dist. LEXIS 46452, at *18–19 (D. Haw. Apr. 29, 2011) (*unpublished*) (rejecting motion for reconsideration based on the passage of the PREA because the law's passage was not evidence of sufficient magnitude to have likely influenced disposition); Tilga v. United States, No. 14-256 JAP/RHS, 2014 U.S. Dist. LEXIS 200785, at *48–52 (D.N.M. Dec. 5, 2014) (*unpublished*) (finding that the PREA did not require the Bureau of Prisons to take any specific mandatory action to combat sexual abuse).

[181] Jenkins v. County of Hennepin, No. 06-3625 (RHK/AJB), 2009 U.S. Dist. LEXIS 90961, at *6 (D. Minn. Sept. 30, 2009) (*unpublished*).

[182] Jenkins v. County of Hennepin, No. 06-3625 (RHK/AJB), 2009 U.S. Dist. LEXIS 90961, at *1–2 (D. Minn. Sept. 30, 2009) (*unpublished*).

[183] Jenkins v. County of Hennepin, No. 06-3625 (RHK/AJB), 2009 U.S. Dist. LEXIS 90961, at *6–8 (D. Minn. Sept. 30, 2009) (*unpublished*); *see* 35 U.S.C. § 30301(13) ("States that do not take basic steps to abate prison rape by adopting standards that do not generate significant additional expenditures demonstrate such indifference.").

[184] Jenkins v. County of Hennepin, No. 06-3625 (RHK/AJB), 2009 U.S. Dist. LEXIS 90961, at *10 (D. Minn. Sept. 30, 2009) (*unpublished*).

[185] Jenkins v. County of Hennepin, No. 06-3625 (RHK/AJB), 2009 U.S. Dist. LEXIS 90961, at *14 (D. Minn. Sept. 30, 2009) (*unpublished*); *see also* Hall v. Hawkins County, No. 2:05-CV-252, 2008 U.S. Dist. LEXIS 13119, at *13–14 (E.D. Tenn. Feb. 20, 2008) (*unpublished*) (finding that reports from National Prison Rape Elimination Commission about inadequate classification procedures in jail did not establish jail officials' knowledge that incarcerated persons with intellectual disabilities or gender nonconforming individuals would be vulnerable to sexual abuse under current classification procedures).

[186] 18 U.S.C. § 2243. For an example of criminal prosecution of a federal prison guard for violating this statute, see United States v. Vasquez, 389 F.3d 65, 66 (2d Cir. 2004) (affirming the conviction of a prison guard for five counts of sexual abuse of incarcerated people and one count of misdemeanor abusive sexual contact).

[187] 18 U.S.C. § 2241.

6. State Law

Today, every state but Oklahoma criminalizes sexual contact between incarcerated people and corrections officers.[188] Oklahoma only criminalizes sexual intercourse or penetration.[189] State laws can vary significantly, so you should consult the law of your state.[190]

In many states, including New York and California, any sexual conduct between a prison employee and an incarcerated person is a form of rape.[191] A New York State statute makes any sexual relations between incarcerated people and prison employees illegal. Thus, by state statute, New York State prison employees are criminally liable (responsible) for rape, sodomy, sexual misconduct, or sexual abuse if they have sexual contact with incarcerated people. Courts will consider any sexual contact between a prison official and an incarcerated person to be a crime even if the incarcerated person believed that he or she consented to the sexual contact.

Some states have also taken steps to protect incarcerated people from retaliation for reporting sexual misconduct by prison staff. For example, California has made it illegal for prison guards to retaliate against incarcerated people who report them for sexual assault.[192] Of course, even with such laws, retaliation still occurs and is a real concern. But, if your state law does not allow retaliation, the fact that the law forbids this behavior strengthens your legal claim.

7. Body Searches and Sexual Assault

If you were sexually assaulted during a body search, the bulk of your legal case will probably center around proving that the prison official was trying to sexually gratify himself or humiliate you.[193] Expect the prison official to argue that he was performing a legitimate "official duty" with the goal of

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[188] *See* Crawford v. Cuomo, 796 F.3d 252, 259 nn.5–6 (2d Cir. 2015) (collecting state statutes); *see also* ALASKA STAT. §§ 11.41.425(a)(2), 11.41.427(a)(1) (West 2007); ARIZ. REV. STAT. ANN. § 13-1419 (West 2020); ARK. CODE ANN. § 5-14-126(a)(1)(A) (West 2017); CAL. PENAL CODE § 289.6 (West 2014); COLO. REV. STAT. § 18-3-404(f) (West 2023); CONN. GEN. STAT. ANN.§§ 53a-71(a)(5), 53a-73a(a)(1)(E) (West 2012 & Supp. 2023); DEL. CODE ANN. tit. 11, § 780A (West 2010) (unpublished 2018 revision available on LexisNexis); D.C. CODE ANN. §§ 22-3013, 22-3014, and 22-3017 (West 2017); FLA. STAT. ANN. § 944.35 (West 2010); GA. CODE ANN. § 16-6-5.1(b) (West 2016); HAW. REV. STAT. ANN. §§ 707-731(1)(c), 707-732(1)(e) (West); IDAHO CODE ANN. § 18-6110 (2006); 720 ILL. COMP. STAT. ANN. 5/11-9.2 (West 2017); IND. CODE § 35–44.1–3–10 (West 2012); IOWA CODE ANN. § 709.16(1) (West 2016); KAN. STAT. ANN. § 21-5512 (2012); KY. REV. STAT. ANN. § 510.120 (West 2016); LA. STAT. ANN. § 14:134.1 (2018); ME. STAT. tit. 17-A, § 253(2)(N) (2023); MD. CODE ANN., CRIM. LAW § 3-314 (West 2002); MASS. GEN. LAWS ch. 268, § 21A (2010); MICH. COMP. LAWS ANN. §§ 750.520c (1)(i–l) (West 2004); MINN. STAT. ANN. §§ 609.341(24)(viii), 609.344(1)(d) & (1a)(i), 609.345(1)(d) & (1a)(i) (West 2018) (unpublished 2021 revision available on LexisNexis); MISS. CODE ANN. § 97-3-104 (West 2011); MO. ANN. STAT. § 566.145 (West 2012); MONT. CODE ANN. § 45-5-502(6)(a)(i) (West 2009) (*unpublished* 2023 revision available on LexisNexis); NEB. REV. STAT. §§ 28–322, 28–322.01 (West 2009); NEV. REV. STAT. ANN. §§ 212.187, 212.188 (West 2015); N.H. REV. STAT. ANN. § 632-A:4(III) (2016) (unpublished 2021 revision available on LexisNexis); N.J. STAT. ANN. § 2C:14-2(c)(2) (West 2015); N.M. STAT. ANN. § 30-9-11(E)(2) (West 2020); N.D. CENT. CODE ANN. § 12.1-20-06 (West 2008); N.Y. PENAL LAW § 130.05(3)(e)–(f) & (j) (West 2010); N.C. GEN. STAT. § 14–27.31 (West 2022); OHIO REV. CODE ANN. § 2907.03(A)(6), (11) (West 2020); OR. REV. STAT. ANN. §§ 163.452, 454 (West 2015); 18 PA. STAT. AND CONS. STAT. ANN. § 3124.2 (West 2021); 11 R.I. GEN. LAWS § 11-25-24 (West 2006); S.C. CODE ANN. § 44-23-1150 (2017); S.D. CODIFIED LAWS § 24-1-26.1 (2013); TENN. CODE ANN. § 39-16-408 (West 2011); TEX. PENAL CODE ANN. § 39.04 (West 2016); UTAH CODE ANN. § 76-5-412 (West 2022); VA. CODE ANN. § 18.2-64.2 (West 2012); VT. STAT. ANN. tit. 13. §3257 (West 2019) (unpublished 2021 revision available on LexisNexis); WASH. REV. CODE ANN. §§ 9A.44.160, 170, 180 (West 2015); W. VA. CODE ANN. § 61-8B-10 (2022); WIS. STAT. § 940.225(2)(h), (k) (West 2005); WYO. STAT. ANN. §§ 6–2–303(a)(vii), 6–2–30 (2023).

[189] OKLA. STAT. tit. 21 § 1111(A)(7) (2022). It is, however, against Oklahoma Department of Corrections' policy for any correction officer to have sexual contact with an incarcerated person. Oklahoma State, Department of Corrections, OP-030601, *Oklahoma Prison Rape Elimination Act*. § II(A) (2021).

[190] *See* HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS 39–42 (1996), *available at* https://www.hrw.org/legacy/reports/1996/Us1.htm (last visited Mar. 31, 2024).

[191] CAL. PENAL CODE § 289.6 (West 2019); N.Y. PENAL LAW § 130.05(3)(e)–(f) (McKinney 2020).

[192] CAL. CODE REGS. tit. 15, § 3401.5(f) (2016).

[193] Crawford v. Cuomo, 796 F.3d 252, 257–58 (2d Cir. 2015) ("In determining whether an Eighth Amendment violation has occurred, the principal inquiry is whether the contact is incidental to legitimate official duties, such as a justifiable pat frisk or strip search, or by contrast whether it is undertaken to arouse or gratify the officer or humiliate the inmate.").

maintaining prison safety. Courts often rule in favor of the prison officials in cases like these.[194] Incarcerated people have sometimes managed to make successful Eighth Amendment claims related to strip searches—but only when they can show really good evidence as to the officer's state of mind.[195]

You could also try to argue that the prison official violated your Fourth Amendment rights. The Fourth Amendment protects your right to be free from unreasonable searches and seizures. If you were subjected to sexual abuse during a body search, you may be able to claim that the prison violated your Fourth Amendment rights. Arguing "unreasonableness" will be the hardest part of trying to make a Fourth Amendment claim.[196] This is because the Supreme Court has recognized that prison guards need to be able to conduct strip searches and cavity searches in order to keep prisons free of contraband. As such, incarcerated people only have a very limited right to bodily privacy.[197]

The Supreme Court established the test for the constitutionality of prison regulations in *Turner v. Safley*.[198] A court determining the constitutionality of a body search will apply the *Turner* test. Under the *Turner* test, a prison can restrict incarcerated people's constitutional rights so long as the restriction is rationally related to a "legitimate penological objective." The four factors the Court must

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[194] *See, e.g.*, Cates v. Stroud, 976 F.3d 972, 975 (9th Cir. 2020); Renee v. Neal 483 F. Supp. 3d 606, 612–613 (N.D. Ind. 2020); Perez v. Ponte, 236 F. Supp. 3d 590, 604–605 (E.D.N.Y. 2017); Johnson v. Carroll, No. 2:08-cv-1494-JAM-KJN-P, 2012 U.S. Dist. LEXIS 122401, at *1–2 (E.D. Cal. Aug. 28, 2012) (*unpublished*); Young v. Brock, No. 10-cv-01513-WJM-CBS, 2012 U.S. Dist. LEXIS 14262, at *13–14 (D. Colo. Feb. 7, 2012) (*unpublished*); Reynolds v. Warzak, No. 2:09-cv-144, 2011 U.S. Dist. LEXIS 101398, at *32 (W.D. Mich. Sep. 7, 2011) (*unpublished*); Frierson v. Roberts, No. 11-3044-SAC, 2011 U.S. Dist. LEXIS 91931, at *8 (D. Kan. Aug. 17, 2011) (*unpublished*); Colston v. McLeod, No. 2:09-cv-240, 2011 U.S. Dist. LEXIS 16097 (W.D. Mich. Feb. 17, 2011) (*unpublished*); Kiser v. Kramer, No. 10-609-LPS, 2010 U.S. Dist. LEXIS 116524, at *8 (D. Del. Nov. 2, 2010) (*unpublished*); Smith v. Los Angeles County, No. CV 07-7028-VAP (MAN), 2010 U.S. Dist. LEXIS 61985, at *24 (C.D. Cal. Apr. 22, 2010) (*unpublished*); Myles v. Gaskill, No. 1:09-cv-177, 2010 U.S. Dist. LEXIS 22965, at *16 (W.D. Mich. Jan. 8, 2010) (*unpublished*); Tarpley v. Stepps, No. 4:05-CV-573 CAS, 2007 U.S. Dist. LEXIS 19316, at *19–20 (E.D. Mo. Mar. 19, 2007) (*unpublished*); Buckley v. Dallas County, No. 3:97-CV-1649-BC, 2000 U.S. Dist. LEXIS 5543, at *1 (N.D. Tex. Apr. 27, 2000) (*unpublished*).

[195] Parker v. Blackwell, 23 F.4th 517, 524 (5th Cir. 2022) (finding that a sheriff who rehired a jail officer who was previously fired for abusing incarcerated people violated incarcerated people's rights, as their abuse at the hands of the jail officer was the logical consequence of the choice to rehire him); Johnson v. Heins, 844 F. App'x 974, 976–977 (9th Cir. 2020) (*unpublished*) (finding that if guards probed an incarcerated person's rectum with a flashlight, they violated his 8th Amendment rights); Wood v. Beauclair, 692 F.3d 1041, 1048–1051 (9th Cir. 2012) (finding that a male incarcerated person stated an 8th Amendment violation when a female corrections officer subjected him to unnecessary searches and grabbed his penis, after the male incarcerated person rejected her romantic advances); Calhoun v. Detalla, 319 F.3d 936, 939–940 (7th Cir. 2003) (finding sufficient facts to support male incarcerated person's 8th Amendment claim where he alleged that male correctional officers conducted a strip search of him in front of female correctional officers; male and female officers laughed at the incarcerated person, made sexual comments, forced him to perform provocative acts, and pointed towards his buttocks with their sticks); Liner v. Goord, 196 F.3d 132, 136 (2d Cir. 1999) (finding that an incarcerated plaintiff could move forward with an 8th Amendment claim against prison guards who physically and sexually assaulted him during a strip search, including by slamming his head into a wall repeatedly); Jordan v. Gardner, 986 F.2d 1521, 1522–1523 (9th Cir. 1993) (finding that a prison policy requiring male correctional officers to conduct random, suspicionless searches on female incarcerated people constituted cruel and unusual punishment under the 8th Amendment); Watson v. Jones, 980 F.2d 1165, 1166 (8th Cir. 1992) (finding an 8th Amendment violation when female correctional officer performed almost daily pat-down searches on two male incarcerated people and examined their genitals, anus, and thigh areas); Carrington v. Easley, No. 5:08-CT-3175-FL, 2011 U.S. Dist. LEXIS 56805, at *8 (E.D.N.C. May 24, 2011) (*unpublished*) (finding an 8th Amendment violation when a guard attempted to put his mouth on an incarcerated person's exposed penis); Jackson v. Raemisch, No. 10-cv-212-slc1, 2010 U.S. Dist. LEXIS 78300, at *13–14, *22–24 (W.D. Wis. July 30, 2010) (*unpublished*) (finding an 8th Amendment violation when guards handcuffed an incarcerated person during a strip search, then laughed and made jokes about the person's sexual orientation); Turner v. Huibregste, 421 F. Supp. 2d 1149, 1152–1153 (W.D. Wis. 2006) (finding sufficient evidence to survive a motion to dismiss when a male correctional officer grabbed a male incarcerated person's buttocks and fondled his penis during a pat down search, asking, "What is this?").

[196] "The 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.

[197] *See* Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987); Bell v. Wolfish, 441 U.S. 520, 558, 99 S. Ct. 1861, 1884, 60 L. Ed. 2d 447, 480–481 (1979) (finding visual body cavity searches of incarcerated people following contact visits were not unreasonable under the 4th Amendment); Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 328, 132 S. Ct. 1510, 1517, 162 L. Ed. 2d 566, 576 (2012).

[198] Turner v. Safley, 482 U.S. 78, 78, 107 S. Ct. 2254, 2256, 96 L. Ed. 2d 64 (1987).

consider include whether (1) there is a "valid, rational connection" between the regulation and the interest; (2) whether "alternative means" remain open to incarcerated people to exercise their constitutional rights; (3) the impact that accommodation of the incarcerated people's rights would have on staff and other incarcerated people; and (4) and allocation of agency resources; and the availability of ready alternatives to the infringement. The incarcerated person has the burden of proving that his rights were violated.[199]

Courts will also try to balance an individual's interest with the government's interest.[200] Using this analysis, the Supreme Court has held that visual body cavity searches of convicted incarcerated people do not ordinarily violate the Fourth Amendment.[201] Suspicionless visual body cavity searches of people arrested for misdemeanors also do not necessarily violate the Fourth Amendment.[202] For more information on bodily searches, see *JLM*, Chapter 25, "Your Right to Be Free from Illegal Body Searches."

D. Assault and Rape of LGBTQ or Gender-Nonconforming Incarcerated People

This Part of the Chapter discusses special issues for lesbian, gay, bisexual, transgender, and/or queer people. *JLM*, Chapter 30, "Special Information for Lesbian, Gay, Bisexual, Transgender, and/or Queer Incarcerated People," explains these issues in more detail. Unless otherwise stated, this Part of the Chapter will focus on people who are incarcerated after being convicted of a crime. If you are being detained pretrial, your legal rights may be different. For more information, see *JLM,* Chapter 34, "The Rights of Pretrial Detainees."

Most people who are assaulted by other incarcerated people make Eighth Amendment deliberate indifference claims under *Farmer*,[203] although in one case, a court recognized a Fourteenth Amendment Equal Protection claim as well.[204] Please see Part B of this Chapter for more information on the *Farmer* standard. In order to make a deliberate indifference claim, you must present evidence that you may be a target of assault.[205]

It is important to report any threats against you so that prison officials know about specific problems. For example, if you seem vulnerable because you are gay, transgender, and/or gender-nonconforming, then you should report to prison officials any harassment or threats of rape by other incarcerated people. These reports will become very important evidence if you ever choose to sue the prison for harm that happened to you while you were incarcerated. When you report harassment or threats to prison officials, you need to show some specific evidence or examples because suspicions

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[199] Overton v. Bazzetta, 539 U.S. 126, 132, 123 S. Ct. 2162, 2168, 156 L. Ed. 2d 160, 170 (2003) ("The burden, moreover, is not on the State to prove the validity of prison regulations but on the prisoner to disprove it.").

[200] Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 327, 132 S. Ct. 1510, 1516, 162 L. Ed. 2d 566, 575 (2012) ("The need for a particular search must be balanced against the resulting invasion of personal rights." (citing Bell v. Wolfish, 441 U.S. 520, 559, 99 S. Ct. 1861, 1884, 60 L. Ed. 2d 447, 481 (1979))).

[201] Bell v. Wolfish, 441 U.S. 520, 558, 99 S. Ct. 1861, 1884, 60 L. Ed. 2d 447, 480–481 (1979).

[202] Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 330, 132 S. Ct. 1510, 1518, 162 L. Ed. 2d 566, 577 (2012).

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

[204] Johnson v. Johnson, 385 F.3d 503, 532–533 (5th Cir. 2004) (holding that incarcerated person's sexual-orientation-based equal protection claims were properly pleaded and actionable); R.G. v. Koller, 415 F. Supp. 2d 1129 (D. Hawaii 2006) (holding that a youth correctional facility violated LGBTQ youths' 14th Amendment rights by creating a pervasive climate of hostility towards the youths based on perceived LGBTQ status and that segregating the youths based on perceived status was a violation of their due process rights).

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

alone are not enough.[206] For example, you could provide evidence that someone is threatening to assault you and that they have previously assaulted other people.[207] With such evidence, you may be able to make a deliberate indifference Eighth Amendment claim, based on a theory 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 know that you may be able to get protection even if you are not gay but are more vulnerable to physical and sexual assaults because of how you look.[208] If you fear you will be assaulted, you may request to be placed in special housing or protective custody. This unfortunately usually also means you will lose certain privileges. Prison officials may also put you in protective custody or solitary confinement without your consent if they believe that is the only way to protect you.[209]

1. Special Protection for LGBTQ People

In general, courts have recognized that gay or gender-nonconforming people are often assaulted in prison, especially when placed in the general population,[210] and may need special consideration either at sentencing or after incarceration.[211] 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[212] in extraordinary or unusual circumstances.[213] Where the judge believes there is a serious risk you could be assaulted in prison or where prison officials say that they can protect you only by putting you in protective custody or solitary confinement, you can request better protective custody conditions or a shorter sentence. For example, several courts have ordered reduced sentences for incarcerated people at risk of assault because of their sexual orientation or appearance.[214]

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

[207] *See* Fox v. Superintendent, Stafford Cnty. Dept. of Corr., No. 11-cv-295-SM, 2012 U.S. Dist. LEXIS 83920, at *9–10 (D.N.H. June 18, 2012) (*unpublished*) (finding that gay incarcerated person alleged sufficient facts to support his allegation that officers ignored substantial risk to his safety when they placed him in a cell with someone known to be sexually violent, despite their awareness of the gay person's particular vulnerabilities).

[208] *See, e.g.*, United States v. Gonzalez, 945 F.2d 525, 526–527 (2d Cir. 1991) (upholding trial judge's decision to sentence a small, "feminine looking" man to a shorter prison sentence, because he was "unusually susceptible" to prison abuse).

[209] *See, e.g.*, City of New York, Department of Correction, Directive No. 6007R-A, Protective Custody (2010), *available at* http://www.nyc.gov/html/doc/downloads/pdf/6007R-A.pdf (last visited Mar. 31, 2024); State of New York, Department of Corrections and Community Supervision, Directive No. 4948, Protective Custody Status (2024), *available at* http://www.doccs.ny.gov/Directives/4948.pdf (last visited Mar. 31, 2024).

[210] *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 transgender woman into general population could threaten her safety); Johnson v. Johnson, 385 F.3d 503, 517–519 (5th Cir. 2004) (holding that officials must use all possible administrative means to protect incarcerated people from sexual abuse); Taylor v. Mich. Dept. of Corr., 69 F.3d 76, 83–84 (6th Cir. 1995) (holding a warden liable for providing inadequate protection against physical and sexual abuse of a vulnerable incarcerated person).

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

[212] A downward departure is when a judge uses his discretion to give a defendant a lower sentence.

[213] Koon v. United States, 518 U.S. 81, 111, 116 S. Ct. 2035, 2053, 135 L. Ed. 2d 392, 421 (1996). Note that *Koon*, however, dealt with incarcerated people who were susceptible to abuse because they were former 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").

[214] *See, e.g.*, United States v. Parish, 308 F.3d 1025, 1032–33 (9th Cir. 2002) (upholding downward departure because incarcerated person was particularly susceptible to abuse); United States v. Wilke, 156 F.3d 749, 754 (7th

Special treatment for LGBTQ incarcerated people was considered by the Second Circuit in *United States v. Lara*.[215] In this case, the court upheld the lower court's decision to reduce the sentence of a bisexual incarcerated person whose young appearance and bisexual orientation made him extremely vulnerable to physical attack.[216] Prison officials were able to protect him only by putting him in solitary confinement, so the court reduced his sentence.[217] A year after *Lara*, the Second Circuit also decided *United States v. Gonzalez*.[218] In *Gonzalez*, the court similarly reduced the sentence of a nineteen-year-old incarcerated person who was young, "effeminate," and likely to be victimized by his fellow incarcerated people.[219] Unlike in *Lara*, the incarcerated person in *Gonzalez* was not gay or bisexual but still vulnerable to homophobic attacks since the way he looked did not fit traditional views of masculinity.[220] In other words, as long as an incarcerated person looks like he might be gay, he is at a greater risk of attack, even if he is not actually gay. The *Gonzalez* court also found that the incarcerated person could get a shorter sentence even though he had not been attacked. Oppressive conditions without an actual attack may be enough to get a shorter sentence.[221]

2. Examples of Legal Claims Brought by LGBTQ Incarcerated People

In *Farmer v. Brennan*, a transgender incarcerated woman was placed in the general male prison population and was later beaten and raped by another incarcerated person.[222] The Supreme Court held that the incarcerated person may have had an Eighth Amendment claim. The Court sent the case back to the lower court to determine whether prison officials acted with deliberate indifference by failing to protect her.[223]

In *Young v. Quinlan*, incarcerated people sexually assaulted an incarcerated person who was small, young, and likely to be perceived by others as "effeminate." Officials ignored his requests for protection.[224] The Third Circuit ruled that the officials had violated the plaintiff's Eighth Amendment

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Cir. 1998) (holding that district court may consider defendant's sexual orientation and demeanor in considering whether downward sentence is warranted, but the court must provide a sufficient explanation of the reasons given and the nexus of the reasons to such vulnerability); United States v. Maddox, 48 F.3d 791, 798 (4th Cir. 1995) (holding that extreme vulnerability can be ground for downward departure, but this ground for departure should be construed narrowly); United States v. Tucker, 986 F.2d 278, 280 (8th Cir.1993) (finding that extreme vulnerability can provide a proper predicate for departure, although the court concluded that the defendant was not especially prone to victimization); United States v. Gonzalez, 945 F.2d 525, 526–27 (2d Cir. 1991) (upholding trial judge's decision to sentence a small, "feminine looking" man to a shorter prison sentence, because he was "unusually susceptible" to prison abuse); United States v. Lara, 905 F.2d 599, 601–02 (2d Cir. 1990) (reducing a sentence for a bisexual incarcerated person after prison officials put him in solitary confinement because solitary confinement was the only way the officials could protect him from assault). Note, however, that the Federal Sentencing Commission has discouraged, but not prohibited, the use of physical appearance in determining a person's potential for victimization and thus reduction in sentence. *See* Koon v. United States, 518 U.S. 81, 107, 116 S. Ct. 2035, 2050, 135 L. Ed. 2d 392, 418 (1996).

[215] United States v. Lara, 905 F.2d 599 (2d Cir. 1990).

[216] United States v. Lara, 905 F.2d 599, 601 (2d Cir. 1990) (noting how the defendant's sentence reduction was based on a mitigating factor that defense counsel brought up at resentencing, namely the "potential for victimization").

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

[218] United States v. Gonzalez, 945 F.2d 525 (2d Cir. 1991).

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

[220] 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*.")

[221] 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).

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

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

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

rights.[225] Similarly, the Sixth Circuit in *Taylor v. Michigan Department of Corrections* held that a prison violated an incarcerated plaintiff's Eighth Amendment rights when they put him in a sixty-person prison camp, even though his small build, youthful appearance, low IQ, and seizure disorder made him vulnerable to attack.[226] The Seventh Circuit also recognized an Eighth Amendment claim in *Pope v. Shafer* when an incarcerated person was assaulted after officials ignored internal affairs reports detailing threats against him.[227]

In *Greene v. Bowles*, a transgender incarcerated person was placed in protective custody to prevent attacks from other incarcerated people but was then severely beaten by another incarcerated person in the protective custody unit.[228] The Sixth Circuit recognized an Eighth Amendment deliberate indifference claim because the warden admitted that he knew that the attacker was a "predatory inmate," that the plaintiff was in protective custody because of her status as a vulnerable incarcerated person, and that both the attacker and plaintiff were being housed in the same unit.[229] Importantly, the Sixth Circuit held that vulnerable (transsexual, gay, gender-nonconforming, etc.) incarcerated people 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 incarcerated people, even if the officials did not know of any specific danger; or

(2) By proving that the officials knew that a predatory incarcerated person, without separation or other protective measures, could be dangerous to others, including the plaintiff.[230]

If you are a vulnerable incarcerated person attacked by a predatory incarcerated person, this makes it easier for you to prove that prison officials knew of the risk to your safety. You do not have to prove a particular incarcerated person presented a specific threat to your safety.[231]

In another important case, *Johnson v. Johnson*, an African-American gay incarcerated man sued prison officials after prison gangs sexually assaulted him and bought and sold him as a sexual slave for over eighteen months, even though the plaintiff had asked for protection.[232] The Fifth Circuit said the plaintiff had raised 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."[233] The Court further held that "[a]lthough it is not clear exactly

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

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

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

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

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

[230] 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.").

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

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

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

what type of action an official is legally required to take under *Farmer* . . . an official may not simply send the person into the general population to fight off attackers."[234]

In his lawsuit, Johnson also claimed that the prison officials' actions violated his equal protection rights under the Fourteenth Amendment.[235] Specifically, he claimed that, because of his sexual orientation, the officials failed to protect him like they protected other incarcerated people.[236] 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.[237] It is worth noting that the *Johnson* court accepted the plaintiff's equal protection claim without proof that other non-LGBTQ incarcerated people were treated differently. But you should remember that the law is still developing.

E. Legal Remedies Available for Victims of Unlawful Assault

This Part explains what legal actions you can take if you have been the victim of an unlawful assault. Section 1 explains how you should first complain using your prison's Incarcerated Grievance Program. Section 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. Section 3 explains how you can also file a state tort claim. Finally, Section 4 describes class action lawsuits (when a group of plaintiffs brings suit together).

Remember that different laws apply in state and federal prisons. Research the laws of your state and how incarcerated people in your state file suits in that state's courts. Federal constitutional rights are protected regardless of whether you are in a state or a federal prison. However, the legal claims you make and how you make them will be different depending on whether you are in state or federal court.

1. Incarcerated Grievance Program

If you believe your rights have been violated, you should first file an administrative grievance. See *JLM*, Chapter 15, "Incarcerated Grievance Procedures," for more detailed information on grievance procedures. 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" (use up) all administrative remedies first.[238]

2. 42 U.S.C. § 1983 (Section 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

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[234] Johnson v. Johnson, 385 F.3d 503, 527 (5th Cir. 2004); *see also* Farmer v. Brennan, 511 U.S. 825, 832–833, 114 S. Ct. 1970, 1976–1977, 128 L. Ed. 2d 811, 822–823 (1994) (explaining that jailers must "take reasonable measures to guarantee the safety of the inmates" and "are not free to let the state of nature take its course" (internal quotation marks and citation omitted)); James v. Hertzog, 415 F. App'x 530, 532 (5th Cir. 2011) (*unpublished*) ("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 omitted)).

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

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

[237] Johnson v. Johnson, 385 F.3d 503, 532 (5th Cir. 2004); *see also* 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.'" (quoting Hudson v. Palmer, 468 U.S. 517, 548, 104 S. Ct. 3194, 3211, 82 L.Ed.2d 393, 417 (1984) (Stevens, J., concurring in part and dissenting in part))).

[238] *See, e.g.*, Siggers v. Campbell, 652 F.3d 681 (6th Cir. 2011) (dismissing an incarcerated plaintiff's claims due to his failure to exhaust administrative remedies).

while acting "under color of any statute, ordinance, regulation, custom or usage, of any state."[239] You can sue federal officials in a similar suit, called a *Bivens* action.[240] However, *Bivens* actions are very limited. For more information, see *JLM,* Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law."

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.[241] 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."[242] 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.[243] 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,[244] even though the local officials may be individually liable under Section 1983.

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

3. Tort Actions

JLM, Chapter 17, "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.[245] 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 people incarcerated in New York and people incarcerated in other states should read Chapter 17 of the *JLM* for more information on how to bring a tort claim in state court.

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[239] 42 U.S.C. § 1983.

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

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

[242] Irwin v. City of Hemet, 22 Cal. App. 4th 507, 27 Cal. Rptr. 2d 433 (1994) (finding that an issue of material fact existed as to whether city's failure to train jail employees in suicide prevention amounted to deliberate indifference); 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).

[243] *See* Walker v. Sheahan, 526 F.3d 973, 977 (7th Cir. 2008) (dismissing a § 1983 claim due to lack of evidence of there being a practice of using excessive force and following a "code of silence"); Amnesty Am. v. Town of West Hartford, 361 F.3d 113, 125–127 (2d Cir. 2004) (reviewing the law of municipal liability in a damage suit for excessive force); 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))).

[244] 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)).

[245] 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 Chapter 5 of the *JLM*, "Choosing a Court and a Lawsuit: An Overview of the Options," for more information on the Court of Claims and Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," for more detailed information on tort actions.

4. Class Action Suits

Class actions are a type of lawsuit in which many plaintiffs sue together for similar violations of their rights.[246] Courts generally allow class actions where the following conditions are present:

(1) There are too many plaintiffs for the court to try each case individually,
(2) Each plaintiff's case is similar in fact and law,
(3) The claims or defenses of the representative parties are typical of the claims or defenses of the class (group of plaintiffs suing),
(4) The representative parties will fairly and adequately protect the interests of the class,[247] and
(5) Most of the claims would not be brought otherwise because each plaintiff's individual damages are too small.[248]

If a pattern of excessive force against incarcerated people exists within a prison, a class action suit may be brought on behalf of all of the incarcerated people in that prison. This suit can be brought against the wardens or administrators in charge of the overall operations of the prison.[249] 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."[250] 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.[251]

F. Conclusion

This Chapter described the legal meaning of "assault" and explained your right to be free from physical and sexual assault in prison. There are different sources of law offering you protection against guard and incarcerated person assault, and different ways to obtain relief for rights violations. Remember to complete administrative grievance processes before filing suit. Otherwise, federal courts will dismiss your lawsuit. You may also have state law remedies, but you must research the substance and procedures of the law in the state in which you are incarcerated.

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[246] See Chapter 5 of the *JLM*, "Choosing a Court and a Lawsuit: An Overview of the Options," and Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law," for more information on § 1983 class actions.

[247] FED. R. CIV. P. 23.

[248] *See, e.g.*, Tardiff v. Knox County, 365 F.3d 1, 7 (1st Cir. 2004) (holding that class action status is probably the only realistic way 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).

[249] *See, e.g.*, Ingles v. Toro, 438 F. Supp. 2d 203, 208–209 (S.D.N.Y. 2006) (approving settlement of a class action over excessive use of force by New York City prison guards; the city agreed to pay injured plaintiffs $2.2 million and revise its use-of-force directive and investigatory procedures, install new video cameras in prisons, and train guards in appropriate defensive techniques); Madrid v. Gomez, 889 F. Supp. 1146, 1254–1260 (N.D. Cal. 1995) (granting injunction in class action on behalf of all incarcerated people at a facility with constitutionally inadequate medical and mental health care); *see also* Anthony W. Accurso, *$12.5 Million to Settle Class Action Suit Over Strip Searches of NYC Jail Visitors*, PRISON LEGAL NEWS (Aug. 1, 2020), *available at* https://www.prisonlegalnews.org/news/2020/aug/1/125-million-settle-class-action-suit-over-strip-searches-nyc-jail-visitors/ (last visited Mar. 31, 2024).

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

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