CHAPTER 25

YOUR RIGHT TO BE FREE FROM ILLEGAL BODY SEARCHES*

A. Introduction

This Chapter explains your right to be free from illegal body searches. This Chapter explains your rights using both federal constitutional law (from the U.S. Constitution) and New York State laws. When addressing problems related to searches, including body cavity searches, courts generally refer to the Fourth Amendment, which protects you against unreasonable searches.[1] Remember that rulings from the U.S. Supreme Court apply to the whole country. If you are in a prison outside of New York, you should research the laws and cases in your state. You should try to use the laws and court decisions of the federal circuit where you are located.

This Chapter is divided into three parts. **Part B** briefly explains your rights regarding involuntary cross-gender exposure (when people of the opposite sex see your body against your wishes). **Part C** focuses on body searches for both men and women. If you believe your rights were violated, **Part D** will explain what your legal options are.

B. Involuntary Exposure

This Part discusses your privacy rights regarding your nude (naked) body[2] "Involuntary exposure" is when your nude or partly nude body is seen by guards of the opposite sex without your consent. For example, involuntary exposure might happen if you are using the showers and a guard enters.

While you are incarcerated, you lose some, but not all, of your rights to privacy. A prison (including prison officials) may do things that violate your right to privacy if the reason for doing so is "reasonably related" to a "legitimate penological interest."[3] Legitimate means something that is valid or genuine; penological means something related to a prison. So, one example of a legitimate penological interest is maintaining the security of the building (it is normal and valid for any prison to want to keep its building safe). Reasonably related means the action the prison is taking must actually make sense and have something to do with that legitimate penological interest. As an extreme example, a prison could probably not make a policy that no one is allowed to eat vegetables for security reasons (eating vegetables has nothing to do with the safety of incarcerated people or the prison staff).

So, courts will allow involuntary exposure when it is reasonably related to a legitimate penological interest. For example, courts have allowed female guards to view nude male incarcerated people during strip searches when the strip searches were done only during emergency situations, and the prison took precautions to minimize the amount of time women guards were present.[4] However, courts

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

[2] For other privacy rights, see *JLM*, Chapter 19, "Your Right to Communicate with the Outside World" (discussing monitoring telephone calls, inspecting mail, etc.), and *JLM,* Chapter 26, "Infectious Diseases: AIDS, Hepatitis, Tuberculosis, MRSA, and COVID-19 in Prisons" (on the right to privacy regarding health status).

[3] Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987).

[4] *See, e.g.*, Michenfelder v. Sumner, 860 F.2d 328, 330–337 (9th Cir. 1988) (holding that strip searches conducted by prison guards of the opposite sex of the incarcerated person were reasonable, as they were related to the prison's legitimate security concerns). For an example outside of the context of searches, see Thornburgh v. Abbott, 490 U.S. 401, 404, 109 S. Ct. 1874, 1877, 104 L. Ed. 2d 459, 467 (1989) (upholding a regulation that allowed prison wardens to prevent incarcerated people from reading books and magazines which were "determined detrimental to the security, good order, or discipline of the institution or . . . might facilitate criminal activity").

often disapprove of prison policies requiring incarcerated people to be routinely strip-searched or regularly seen naked by guards of the opposite sex.[5]

Courts have been somewhat unclear about which specific prison actions involving involuntary exposure violate your privacy rights.[6] One obstacle to challenging involuntary exposure situations is that prisons must obey federal employment discrimination laws that require male and female employees to be treated the same. So, prohibiting guards of the opposite sex from viewing nude incarcerated people may violate laws requiring equal employment opportunities because whether the guard is a man or a woman would then become a factor in employment decisions.[7]

Most courts have held that prison policies that might result in an opposite-gender prison official viewing a nude incarcerated person do *not* violate incarcerated people's rights.[8] For example, the Ninth Circuit in *Oliver v. Scott* held that an incarcerated man's Fourth and Fourteenth Amendment rights were not violated after female prison guards strip-searched him and observed him showering

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[5] *See* Mills v. City of Barbourville, 389 F.3d 568, 579 (6th Cir. 2004) ("As to jail employees of the opposite gender viewing prison inmates or detainees, we have recognized that a prison policy forcing incarcerated people to be searched by members of the opposite sex or to be exposed to regular surveillance by officers of the opposite sex while naked—for example while in the shower or using a toilet in a cell—would provide the basis of a claim on which relief could be granted.") (citations omitted); Fortner v. Thomas, 983 F.2d 1024, 1030 (11th Cir. 1993) (recognizing incarcerated people's right to bodily privacy "because most people have 'a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating'" (quoting Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1981))); Sepulveda v. Ramirez, 967 F.2d 1413, 1415–1416 (9th Cir. 1992) (noting that, in the Ninth Circuit, the right to bodily privacy was extended to incarcerated people in 1985 and was "clearly established" for parolees by 1988); Kent v. Johnson, 821 F.2d 1220, 1226–1227 (6th Cir. 1987) (recognizing that an incarcerated person has a constitutional claim when the prison fails to reasonably accommodate the interests of incarcerated people against unnecessary bodily exposure to guards of the opposite sex).

[6] *See* Ashann-Ra v. Virginia, 112 F. Supp. 2d 559, 565 (W.D. Va. 2000) (recognizing that routinely or regularly exposing an unclothed incarcerated man to female guards may constitute a constitutional violation, but suggesting that an evidentiary hearing may be required to make that determination for particular encounters); *see also* Oliver v. Scott, 276 F.3d 736, 744–746 (5th Cir. 2002) (upholding under *Turner*'s reasonable-relationship standard a policy "permitting all guards to monitor all inmates at all times" because it "increases the overall level of surveillance," and noting that bathrooms and showers can be the site of violence, making it reasonable for prisons to monitor such areas); Hill v. McKinley, 311 F.3d 899, 903–905 (8th Cir. 2002) (holding both male and female staff could participate in transfer of a naked incarcerated woman who was allegedly disobedient, since not enough female guards were available, but the woman's 4th Amendment rights were violated when the guards left her naked on a restraint board for a substantial period of time in the presence of male officers); Somers v. Thurman, 109 F.3d 614, 617–623 (9th Cir. 1997) (finding no clearly established 4th Amendment protection against cross-gender strip searches and dismissing 8th Amendment claim that female officers subjected male plaintiff to visual body cavity searches, watched him shower, pointed at him, and made jokes about him).

[7] *See* Csizmadia v. Fauver, 746 F. Supp. 483, 491–492 (D.N.J. 1990) (discussing the tension between incarcerated people's constitutional privacy rights and guards' equal employment rights). *But see* Tharp v. Iowa Dept. of Corr., 68 F.3d 223, 224–225 (8th Cir. 1995) (finding that assignment of female guards exclusively to female prison units did not violate equal employment rights and could be viewed as serving a positive interest for the prison as long as guards were not being denied opportunities for promotion or being discriminated against by these assignments).

[8] *See*, *e.g.*, Mills v. City of Barbourville, 389 F.3d 568, 579 (6th Cir. 2004) (finding no 4th Amendment violation where a male employee accidentally saw a female plaintiff's bare chest while female jailers were searching her upon entry to prison); Grummett v. Rushen, 779 F.2d 491, 496 (9th Cir. 1985) (rejecting claims by incarcerated people challenging assignment of female officers to male housing units); Smith v. Chrans, 629 F. Supp. 606, 611 (C.D. Ill. 1986) (dismissing case when an incarcerated person alleged nothing more than occasional and inadvertent sightings by female prison employees of incarcerated people in cells or open shower or toilet facilities engaged in basic bodily functions); Cerniglia v. County of Sacramento, No. 2:99-cv-01938-JKS-DAD, 2008 U.S. Dist. LEXIS 32346, at *49–52 (E.D. Cal. Apr. 18, 2008) (*unpublished*) (finding no violation of an incarcerated person's right to privacy where an incarcerated person was strip-searched in a dayroom where anyone could have seen him, but there was no evidence that anyone actually did). *But see* Morris v. Newland, No. CIV S-00-2794 GEB GGH P, 2007 U.S. Dist. LEXIS 15725, at *17–22 (E.D. Cal. Mar. 6, 2007) (*unpublished*) (dismissing claim that incarcerated person's 4th Amendment rights were violated by three prison guards watching him shower but ruling he could continue to litigate his retaliation claim, which was that the guards had "repeatedly ogled him in retaliation for his having filed inmate grievances regarding female guards being allowed to watch him showering or otherwise undressed").

and using the bathroom.[9] Similarly, the Eighth Circuit in *Timm v. Gunter* held that allowing female guards, like male guards, to pat search incarcerated men was a reasonable regulation and did not violate any of the incarcerated people's privacy interests.[10]

Courts have used several methods to balance incarcerated people's privacy rights and correction officers' right to be free from sex discrimination in employment. For example, the court in *Johnson v. Pennsylvania Bureau of Corrections* held that a prison's regulations were reasonable when it assigned female officers to patrol housing units since the officers were required to announce their presence when entering housing areas to avoid unnecessarily invading the privacy of incarcerated people of the opposite sex.[11] Other methods noted by courts or used by prisons include allowing incarcerated women to cover the windows of their cells for short periods of time,[12] allowing incarcerated people to cover their genitals with a towel when guards are present in the restrooms,[13] and providing pajamas for sleeping.[14] One court has even suggested that prisons should change the design of bathroom facilities to protect an incarcerated person's privacy rights.[15]

C. Body Searches

This Part discusses when and how prison officials are allowed to search your body. Section C(1) introduces the names that courts use for different types of body searches. Section C(2) explains the Fourth Amendment protections against illegal searches for convicted incarcerated people. Section C(3) explains how the Eighth Amendment also limits certain body searches. Section C(4) discusses DNA testing. Section C(5) describes your privacy rights under state law. Section C(6) describes your right to be free from illegal searches under New York law and prison regulations. Section C(7) explains the consequences of resisting a body search you think is illegal.

Note that people in jail who were recently arrested (arrestees) or who are waiting for trial (pretrial detainees) have more constitutional protections against body searches than incarcerated people who have been convicted. When you research your case, *remember that the reasonableness standard for searches of arrestees/pretrial detainees differs from the reasonableness standard for convicted incarcerated people.* For instance, strip/body cavity searches have been held to be unconstitutional where authorities had no reasonable suspicion that the arrestee was concealing contraband.[16] Also, law enforcement-related searches of pretrial detainees' cells are protected by the Fourth Amendment, but

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[9] Oliver v. Scott, 276 F.3d 736, 746 (5th Cir. 2002); *see also* Johnson v. Phelan, 69 F.3d 144, 147 (7th Cir. 1995) (noting that limiting the prison guards that could monitor incarcerated people in the shower or toilets to a specific gender or sexual orientation would be inefficient staff deployment and therefore is not required under the 8th Amendment).

[10] Timm v. Gunter, 917 F.2d 1093, 1100 (8th Cir. 1990) ("We are persuaded that allowing such searches on the same basis as same-sex pat searches is a reasonable regulation as applied at [the prison], and thus is not a constitutional violation.").

[11] Johnson v. Pa. Bureau of Correct., 661 F. Supp. 425, 432 (W.D. Pa. 1987).

[12] Torres v. Wis. Dept. of Health & Soc. Servs., 859 F.2d 1523, 1524 (7th Cir. 1988) (*en banc*) (noting that incarcerated women at a women's maximum-security prison were allowed to cover windows in the doors of their rooms with privacy cards for up to 10 minutes between the hours of 6 a.m. and 9 p.m. while they are dressing or using the toilet).

[13] Timm v. Gunter, 917 F.2d 1093, 1102 (8th Cir. 1990) ("The use of a covering towel while using the toilet or while dressing and body positioning while showering or using a urinal allow the more modest inmates to minimize invasions of their privacy.").

[14] Forts v. Ward, 621 F.2d 1210, 1217 (2d Cir. 1980) (finding that a "suitable nighttime garment" can protect incarcerated people from inappropriate viewing of their private parts).

[15] Arey v. Robinson, No. Y-90-3009, 1992 U.S. Dist. LEXIS 21810, at *29–30 (D. Md. Apr. 6, 1992) (*unpublished*) (stating that the "combined effect of [an] open dormitory and [an] open bathroom area" that puts incarcerated people "on display virtually 24 hours a day no matter how personal an activity" for guards of the opposite sex undermines "[b]asic human dignity").

[16] *See* Weber v. Dell, 804 F.2d 796, 802 (2d Cir. 1986).

searches of the cells of people who have already been convicted are not.[17] Section C(2) of this Part will discuss the reasonableness standard for searches of incarcerated people.

1. Types of Body Searches

It is important to remember that most searches of incarcerated people are legal. Prison officials may legally touch you for security reasons (for example, when performing a valid search).[18] However, courts have recognized that sometimes prison officials use searches—especially strip searches and body cavity searches—to harass or abuse incarcerated people. When a search is done to harass or abuse you, it is **not** legal.[19] Courts, including the Supreme Court, have created some standards to balance the needs of prisons and incarcerated people.[20] This Section explains five types of searches:

(1) Pat frisk search—a search where a prison guard searches your body and clothes while you are still dressed (but you will usually have to remove your hat, shoes, and coat);
(2) Strip search—a search where you remove all of your clothing, and the prison official searches your clothes after you take them off (the prison guard does not touch you or search your body cavities);
(3) Strip frisk search—a search where the official searches your clothes after you have taken them off and also looks at (but does not touch) your body cavities (all incarcerated people must bend over to have their anal cavities searched; women must also squat so that the guards can look into their vaginal cavity);
(4) Body cavity search—a search that includes contact with any or all of your body cavities; these searches should be performed by trained medical personnel only; and
(5) Cross-gender body search—any search performed by someone of the opposite sex.

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[17] Willis v. Artuz, 301 F.3d 65, 69 (2d Cir. 2002) (justifying the differential treatment of convicted incarcerated person's room because "a convicted prisoner's loss of privacy rights can be justified on grounds other than institutional security," such as punishment).

[18] Prison officials are allowed to use bodily force to maintain control and security within the prison as long as their actions relate to some penological need, meaning the action helps them manage and maintain control of the prison. *See* N.Y. CORRECT. LAW § 137(5) (McKinney 2014) ("When any incarcerated individual . . . 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."). *But see* Turner v. Huibregtse, 421 F. Supp. 2d 1149, 1152 (W.D. Wis. 2006) (finding that inappropriate fondling of an incarcerated person in a harassing manner, unlike the touching requisite to a search, may violate the person's constitutional rights).

[19] For more on harassment, see Section B(3) of *JLM*, Chapter 24, "Your Right to Adequate Medical Care."

[20] *See generally* Hudson v. Palmer, 468 U.S. 517, 526–527, 104 S. Ct. 3194, 3200–3201, 82 L. Ed. 2d 393, 403–404 (1984) (utilizing a reasonableness standard to evaluate whether incarcerated people have an expectation of privacy); Bell v. Wolfish, 441 U.S. 520, 558–559, 99 S. Ct. 1861, 1884, 60 L. Ed. 2d 447, 480–481 (1979) (using a reasonableness standard); *see also* Turner v. Safley, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79–80 (1987) (establishing a four-part test to determine if a prison regulation's violation of a constitutional right was reasonable), *superseded in part by statute*, Religious Freedom and Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, (codified at 42 U.S.C. § 2000cc-1) (introducing a standard for infringements on religious freedom).

2. Fourth Amendment Protections

Incarcerated people usually use the Fourth Amendment, which prohibits "unreasonable searches and seizures,"[21] to challenge body searches. Incarcerated people have some, but *very limited*, privacy rights to their bodies under the Fourth Amendment.[22]

This Section first tells you when courts do allow body searches under the Fourth Amendment. Subsection C(2)(a) explains the Fourth Amendment's "reasonableness standard," which courts use to determine whether a search is legal. Subsection C(2)(b) discusses strip-search cases, Subsection C(2)(c) discusses strip frisks, and Subsection C(2)(d) covers body cavity searches. Finally, Subsection C(2)(e) explains your limited right to be free from cross-gender body searches (body searches by the opposite sex).

(a) Reasonableness Standard for Searches of Incarcerated People

The lawfulness of a body search depends on whether a prison guard performs the search reasonably. In *Bell v. Wolfish*, the Supreme Court said that body searches conducted by prison guards while in prison are constitutional, but only if performed in a "reasonable manner."[23] Guards must act reasonably when searching incarcerated people because searches invade incarcerated people's privacy and can easily become abusive.[24] In other words, courts balance the state's need for the search against how much the incarcerated person's privacy is invaded.

The courts do not have one particular rule for what is reasonable in body searches. Instead, they have decided that some practices are unreasonable. To decide whether a search is unreasonable and unnecessarily invasive of incarcerated people's privacy, courts must look at (1) how the search is performed, (2) the scope of the search, (3) the reason for the search, and (4) the place of the search.[25]

Different courts make different decisions using this test, depending on how reasonable a court finds the prison officials' explanation for the search and the conduct during the search. Note that courts often believe prison officials when they claim that they had to search an incarcerated person for security reasons. Courts usually "defer" to prison safety policies, meaning courts usually do not want to second-guess the policies.[26] While courts will not allow prison officials to do anything they wish

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[21] U.S. CONST. amend. IV. But remember that the 4th Amendment does not protect you from searches and seizures of your prison cell because the Supreme Court has said that incarcerated people have no legitimate expectation of privacy in their prison cells. *See* Hudson v. Palmer, 468 U.S. 517, 526, 104 S. Ct. 3194, 3200, 82 L. Ed. 2d 393, 402–403 (1984) (holding that the 4th Amendment prohibition against unreasonable searches does not apply to prison cells because "[t]he recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions"); Block v. Rutherford, 468 U.S. 576, 591, 104 S. Ct. 3227, 3235, 82 L. Ed. 2d 438, 450 (1984) (holding searches of pretrial detainees' cells were not unconstitutional because they served the important government purpose of maintaining security in the jail); Willis v. Artuz, 301 F.3d 65, 68–69 (2d Cir. 2002) (holding that incarcerated people are not protected from cell searches prompted by prosecutors or police even though such searches are not related to prison security). *But see* United States v. DeFonte, 441 F.3d 92, 94 (2d Cir. 2006) (finding that even though is no reasonable expectation of privacy in prison cells for 4th Amendment purposes, attorney-client privilege protects an incarcerated person's journal kept in prison cell, since journal entries contained notes from conversations with the person's attorney).

[22] *See, e.g.*, Nicholas v. Goord, 430 F.3d 652, 658 (2d Cir. 2005), *cert. denied*, 549 U.S. 953, 127 S. Ct. 384, 166 L. Ed. 2d 270 (2006) ("[P]risoners retain a right to bodily privacy, even if that right is limited by institutional and security concerns."); Peckham v. Wis. Dept. of Corr., 141 F.3d 694, 697 (7th Cir. 1998) (noting that while incarcerated people have some limited protections under the 4th Amendment, "it is difficult to conjure up too many real-life scenarios where prison strip searches of inmates could be said to be unreasonable under the Fourth Amendment"); Fortner v. Thomas, 983 F.2d 1024, 1030 (11th Cir. 1993) ("We are persuaded to join other circuits in recognizing an incarcerated person's constitutional right to bodily privacy because most people have 'a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.'" (quoting Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1981))).

[23] Bell v. Wolfish, 441 U.S. 520, 560, 99 S. Ct. 1861, 1885, 60 L. Ed. 2d 447, 482 (1979).

[24] Bell v. Wolfish, 441 U.S. 520, 559–560, 99 S. Ct. 1861, 1884–1886, 60 L. Ed. 2d 447, 481–483 (1979).

[25] Bell v. Wolfish, 441 U.S. 520, 559, 99 S. Ct. 1861, 1884–1885, 60 L. Ed. 2d 447, 481–482 (1979).

[26] *See* Bell v. Wolfish, 441 U.S. 520, 547, 99 S. Ct. 1861, 1878, 60 L. Ed. 2d 447, 474 (1979) ("Prison

(courts can and have struck down unreasonable policies), a prison official can typically easily prove the need for a search policy. Some examples of "reasonable" searches are:

(1) a visual, public strip search and urine analysis drug test as part of a prison administration's efforts to stop prison drug use;[27]

(2) drawing an incarcerated person's blood or saliva to add DNA to a criminal profiling database;[28] and

(3) a policy of visually strip-searching all recently arrested people before admitting them to the general population of a detention center, regardless of the reason for their arrest, in order to prevent dangerous or illegal materials from entering the prison.[29]

In general, searches should not be performed abusively (in violation of the Eighth Amendment's ban on cruel and unusual punishment)[30] or conducted in an unnecessarily public manner.[31] *Who* conducts the search can be important—for example, some states require body cavity searches to be performed by trained medical personnel, and some courts are less likely to find a violation when a body cavity search is conducted by medical personnel.[32] *Where* the search is performed is also a factor—for example, prison officials should not perform strip searches in public without a good reason.[33] *Which*

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administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."); Bull v. City & Cnty. of San Francisco, 595 F.3d 964, 977 (9th Cir. 2010) (noting that courts owe great deference to prison officials' professional judgment); Whitman v. Nesic, 368 F.3d 931, 934–935 (7th Cir. 2004) (deferring to prison's claim of security justifications for requiring incarcerated people to be strip-searched before giving urine samples in a random drug testing program, because "[p]rison officials must be accorded wide-ranging deference in matters of internal order and security." (quoting Meriwether v. Faulkner, 821 F.2d 408, 417 (7th Cir. 1987))); Elliott v. Lynn, 38 F.3d 188, 191–192 (5th Cir. 1994) (agreeing with the prison's claim that a state of emergency existed to justify the deprivation of privacy where prison officials conducted a massive prison shakedown after an increase in murders and violence and strip searches were conducted in front of other incarcerated people and several non-prison staff).

[27] *See* Thompson v. Souza, 111 F.3d 694, 699–703 (9th Cir. 1997) (upholding a strip search conducted in front of other incarcerated people even though strip searches were not an official part of the prison's policy, and holding that requiring incarcerated people to provide urine samples for the purposes of drug tests does not violate their constitutional rights).

[28] *See* Hamilton v. Brown, 630 F.3d 889, 894–896 (9th Cir. 2011) (holding that prison officials can collect blood samples from incarcerated people for the purpose of DNA identification); Padgett v. Donald, 401 F.3d 1273, 1277–1280 (11th Cir. 2005) (holding that there is no constitutional violation in collecting saliva samples for the purpose of creating a DNA database of incarcerated people).

[29] *See* Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 333–334, 132 S. Ct. 1510, 1520–1521, 182 L. Ed. 2d 566, 579 (2012) (concluding that a prison policy of strip-searching every person admitted into a detention center, regardless of what offense they were arrested for, was constitutional).

[30] *See, e.g.*, Calhoun v. DeTella, 319 F.3d 936, 940 (7th Cir. 2003) (holding that conducting strip searches while opposite-sex staff were invited to watch, accompanied by sexual harassment and taunting, would be "designed to demean and humiliate" and would thus provide an 8th Amendment claim). *But see* Somers v. Thurman, No. 96-55534, 1997 U.S. App. LEXIS 12272, at *31 (9th Cir. Mar. 25, 1997) (*unpublished*) ("To hold that gawking, pointing, and joking violates the prohibition against cruel and unusual punishment would trivialize the objective component of the Eighth Amendment test and render it absurd.").

[31] *See, e.g.*, Farmer v. Perrill, 288 F.3d 1254, 1260 (10th Cir. 2002) (holding that the incarcerated person has "the right not to be subjected to a humiliating strip search in full view of several (or perhaps many) others unless the procedure is *reasonably related to a legitimate penological interest*") (emphasis in original).

[32] *See, e.g.*, CAL. PENAL CODE § 4030(j) (West 2023) (requiring that a body cavity search be conducted only by "a physician, nurse practitioner, registered nurse, licensed vocational nurse, or emergency medical technician Level II licensed to practice in [California]"); Turner v. Procopio, No. 13-CV-693-FPG-MJR, 2020 U.S. Dist. LEXIS 55052 at *25 (W.D.N.Y. Mar. 27, 2020) (*unpublished*) (holding that a physical body cavity search performed by a physician and licensed nurse was reasonable, even though the search warrant did not specify that the search had to be a physical cavity search); *see also* Geder v. Lane, 745 F. Supp. 538, 539 (C.D. Ill. 1990) (suggesting that medical personnel are authorized to perform a broader variety of searches than nonmedical personnel).

[33] *See, e.g.*, Farmer v. Perrill, 288 F.3d 1254, 1260–1261 (10th Cir. 2002) (permitting a challenge to visual strip searches en route to the recreation yard conducted in view of other incarcerated people and holding that for a visual strip search to be reasonable, it must be related to legitimate penological interests); Smith v. Taylor, 149 F. App'x 12, 14 (2d Cir. 2005) (*unpublished*) (noting that the presence of more officers at a strip search than prison rules authorized may suggest a privacy violation not necessary to serve penological interests).

incarcerated people are being searched is considered critical—courts allow more intrusive searches of maximum-security incarcerated people,[34] though the Supreme Court has held that even people who are arrested for minor crimes can be visually strip-searched when admitted into detention in the interest of prison security.[35]

The New York State Department of Corrections and Community Supervision ("DOCCS") relies on this standard (of what is or is not reasonable) when trying to figure out what kind of pat frisks are permitted. According to Directive No. 4910, a pat frisk is permitted if an official has "an articulable basis to suspect that an inmate may be in possession of contraband," among other reasons.[36]

The old reasonable suspicion standard required a "particularized and objective basis."[37] This meant that from an objective point of view, the circumstances leading up to the search would have made a reasonable person believe that a suspect was in possession of contraband.[38] The wording in the new standard—"articulable basis"—gives prison officials even greater leeway when determining if a pat frisk is necessary. As long as a prison official can give a reason (and it may not be a good reason) to suspect that you may be carrying contraband, he can pat frisk you.[39] An official will also pat frisk you before you speak with Department officials or enter the visiting room.[40]

(b) Strip Searches

In a strip search, you take off your clothes, and a prison official searches your clothes and inspects your naked body. In a strip search, the official does not touch you or search your body cavities. At least one circuit court has held that a strip search does not have to be "deliberate," meaning that an officer does not need to take specific actions, such as asking you to open your mouth or raise your armpits, for an inspection of your naked body to count as a strip search.[41] All that matters is that "viewing of

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[34] *See, e.g.*, Savard v. Rhode Island, 338 F.3d 23, 33 (1st Cir. 2003) (*en banc*) (noting the different 4th Amendment rights afforded to misdemeanant arrestees and convicted convicts); Arruda v. Fair, 710 F.2d 886, 886–888 (1st Cir. 1983) (upholding the practice of subjecting maximum-security incarcerated people to body cavity searches upon non-contact visitations, visits to the infirmary and library, and upon leaving cells, finding the practice reasonable given prison officials' need to find smuggled contraband among segregated incarcerated people in maximum-security prison); *see also* Michenfelder v. Sumner, 860 F.2d 328, 333 (9th Cir. 1988) ("The fact that Unit 7 houses the state's most difficult incarcerated people gives rise to a legitimate governmental security interest in procedures that might be unreasonable elsewhere."); Rickman v. Avaniti, 854 F.2d 327, 328 (9th Cir. 1988) (holding that policy of performing visual strip and body cavity searches on people held in administrative segregation unit whenever they left their cells was constitutional in light of security interests for most restrictive unit); Lopez v. Youngblood, 609 F. Supp. 2d 1125, 1136–1139 (E.D. Cal. 2009) (distinguishing a county jail's unreasonable blanket strip-search policy from the reasonable searches at a maximum security facility such as the one in *Michenfelder*).

[35] *See* Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 333–334 132 S. Ct. 1510, 1520, 182 L. Ed. 2d 566, 579 (2012); *see also* Brown v. Hilton, 492 F. Supp. 771, 776–777 (D.N.J. 1980) (holding visual anal inspections of incarcerated people entering a segregated unit were proper for incarcerated person who was an accomplice of two other incarcerated people caught with contraband).

[36] State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control of and Search for Contraband § IV(B) (2023).

[37] *See* Ornelas v. United States, 517 U.S. 690, 696, 116 S. Ct. 1657, 1661–62, 134 L. Ed. 2d 911, 918–19 (1996) (discussing "reasonable suspicion" in the context of a police officer's decision to stop, question, and inspect a car on suspicion that drugs were stored in that car).

[38] *See* Ornelas v. United States, 517 U.S. 690, 696, 116 S. Ct. 1657, 1661–1662, 134 L. Ed. 2d 911, 918–919 (1996).

[39] Though never explicitly discussed by the courts in the context of Directive No. 4910, an articulable basis standard is met in other contexts when the person conducting the search "possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant'" that belief. Michigan v. Long, 463 U.S. 1032, 1049, 103 S. Ct. 3469, 3480–3481, 77 L. Ed. 2d 1201, 1219–1220 (1983) (upholding a warrantless search of a car based on an officer's suspicion that it contained weapons that could be used to harm the officers).

[40] State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control of and Search for Contraband § IV(B) (2023).

[41] Wood v. Hancock Cnty. Sheriff's Dept., 354 F.3d 57, 63–65 (1st Cir. 2003) (defining strip searches as "exposing

the naked body was an objective of the search, rather than an unavoidable and incidental by-product."[42] Courts generally allow strip searches if prison officials have a legitimate reason based on safety and security for conducting the search. For example, a strip search might be allowed where there has been an increase in violence in violence at the prison or where incarcerated people have had contact with visitors from outside of the prison.[43] When a prison strip searches you *only* because it wants to harass or punish you (and not for any legitimate security reasons), the prison is violating your constitutional rights.[44] However, courts will allow strip searches, even for people charged with minor offenses, without reasonable suspicion.[45]

Courts often disagree about what the Fourth Amendment's reasonableness standard for strip searches actually means. For example, in *Arruda v. Fair*, the First Circuit held that a policy requiring incarcerated people in maximum-security facilities to be strip-searched when entering or leaving their units to go to the library or infirmary and after meeting visitors was reasonable.[46] Even though a guard accompanied incarcerated people to the infirmary and there was a wire screen in the visiting area, the court concluded this policy was reasonable because particularly dangerous people were involved.[47] However, in *Parkell v. Danberg*, the Third Circuit found that a prison conducting invasive strip searches three times per day in a maximum-security cell block was *not* reasonable because these searches did not realistically serve the prison's legitimate interest in preventing smuggling.[48]

Courts also look at the place of the search and the conditions of the search to see if the incarcerated person's privacy rights were violated.[49] For example, in *Hodges v. Stanley*, an incarcerated person complained that a prison official had physically attacked him and then strip-searched him, which the incarcerated person claimed was unconstitutional.[50] The incarcerated person claimed that he had been

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one's naked body to official scrutiny" and suggesting that the term may include a "clothing search" which requires the removal of all clothing in front of an officer). *But see* Stanley v. Henson, 337 F.3d 961, 963–964 (7th Cir. 2003) (concluding that an observed clothing swap in which an incarcerated person was never fully naked was not a "strip search" because it was an administrative procedure with the purpose of ensuring that contraband was not brought into the jail).

[42] Wood v. Hancock Cnty. Sheriff's Dept., 354 F.3d 57, 65 (1st Cir. 2003).

[43] *See, e.g.*, Brown v. Blaine, 185 F. App'x 166, 169 (3d Cir. 2006) (*unpublished*) (finding visual strip searches appropriate when conducted under institutional policy that mandated strip searches upon reentry to the restricted housing unit); Roberts v. Rhode Island, 239 F.3d 107, 112 (1st Cir. 2001) (noting that prisons have discretion to base searches on the type of crime for which an incarcerated person is convicted, such as justifying a search on the fact that the incarcerated person was charged with a violent felony); Peckham v. Wis. Dept. of Corr., 141 F.3d 694, 697 (7th Cir. 1998) (finding strip searches that were for legitimate, identifiable purposes and not for punishment or harassment purposes did not violate incarcerated person's rights); Thompson v. Souza, 111 F.3d 694, 700 (9th Cir. 1997) (upholding visual strip searches to search for drugs, even though the strip searches were not explicitly described in a drug search plan); Goff v. Nix, 803 F.2d 358, 366–371 (8th Cir. 1986) (upholding visual body cavity searches on incarcerated people before and after trips to hospital, visits to prison infirmary, other contacts with people outside the prison, and exercise period for incarcerated people in segregation).

[44] *See* Peckham v. Wis. Dept. of Corr., 141 F.3d 694, 697 (7th Cir. 1998) (suggesting that the 8th Amendment's prohibition against cruel and unusual punishment protects incarcerated people from strip searches intended to punish and harass); Harris v. Ostrout, 65 F.3d 912, 916 (11th Cir. 1995) (stating that if strip searches "are devoid of penological merit and imposed simply to inflict pain, the federal courts should intervene," and that strip searches may not be used to retaliate against 1st Amendment protected activity, such as the constitutional right of access to the courts); *see also* Whitman v. Nesic, 368 F.3d 931, 934 (7th Cir. 2004) (noting that a search must be "calculated harassment unrelated to prison needs" in order to be unconstitutional (quoting Meriwether v. Faulkner, 821 F.2d 408, 418 (7th Cir. 1987))).

[45] *See* Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 336, 132 S. Ct. 1510, 1521, 182 L. Ed. 2d 566, 560 (2012) (finding that a prison policy of strip-searching every person admitted into a detention center, no matter the offense arrested for, was constitutional).

[46] Arruda v. Fair, 710 F.2d 886, 886–888 (1st Cir. 1983).

[47] Arruda v. Fair, 710 F.2d 886, 886–888 (1st Cir. 1983).

[48] Parkell v. Danberg, 833 F.3d 313, 327–328 (3d Cir. 2016).

[49] *See*, *e.g.*, Evans v. Stephens, 407 F.3d 1272, 1281 (11th Cir. 2005) (*en banc*) (holding that searches conducted with little respect for arrestees' privacy, without sanitary precautions, and which included threatening and racist language were unreasonable).

[50] Hodges v. Stanley, 712 F.2d 34, 35 (2d Cir. 1983).

searched twice in a row, and he questioned the need for a second search. The Second Circuit noted that the first search, a mandatory procedure when incarcerated people were put in administrative detention, was proper. However, the court found that Hodges stated a constitutional claim because the second search was unnecessary.[51]

(c) Strip Frisks

"Strip frisk" means a visual search of an incarcerated person's clothes and body, including body cavities.[52] However, courts will sometimes call it a "strip search" but are really referring to a visual search where prison officials also check your body cavities.[53] For men, this may involve one or more of the following procedures:

(1) Opening his mouth and moving his tongue up and down and from side to side,
(2) Removing any dentures,
(3) Running his hands through his hair,
(4) Allowing his ears to be visually examined,
(5) Lifting his arms to expose his armpits,
(6) Bending over and/or spreading his buttocks to expose his anus to the frisking officer, or
(7) Spreading his testicles to expose the area behind his testicles.

For women, the procedures are the same, except women may also be required to squat to show their vagina.[54] It is important to remember courts sometimes use the terms "strip frisk search" and "visual body cavity search" to mean the same thing.

Courts usually require that prison officials be suspicious of a particular incarcerated person before strip frisks or body cavity searches are justified.[55] However, some courts now allow random strip frisk searches. For example, the Second Circuit in *Covino v. Patrissi* suggested that routine strip frisk searches may be reasonable and do not need to be limited to searching incarcerated people after contact visits.[56] Using the reasonableness standard, the court in *Covino* found that a regulation allowing random visual body cavity searches (which required the incarcerated man to remove his clothing, lift his genitals, and spread his buttocks for a visual examination) was reasonable.[57] Because the incarcerated people being searched were considered dangerous and the prison needed to prevent contraband, the court found that the prison officials' need to conduct these searches was more important than the incarcerated people's privacy.[58]

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[51] Hodges v. Stanley, 712 F.2d 34, 35–36 (2d Cir. 1983); *see also* Iqbal v. Hasty, 490 F.3d 143, 172 (2d Cir. 2007) (finding that the detainee stated a 4th Amendment claim when he stated that he was subjected to multiple consecutive strip searches and repeated strip and body cavity searches that might be understood to be punishment and not related to legitimate government purposes), *overruled on other grounds by* Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

[52] State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control of and Search for Contraband § IV(E)(1) (2023); *see also* Sec. & Law Enf't Employees v. Carey, 737 F.2d 187, 192 n.2 (2d Cir. 1984). Prison officials only *look* at your body cavities in a strip frisk search. If officials *touch* any body cavity, they are conducting a physical body cavity search. *See, e.g.*, CAL. PENAL CODE § 4030(c)(2) (West 2023).

[53] *See, e.g.*, Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 343, 132 S. Ct. 1510, 1525, 182 L. Ed. 2d 566, 585 (2012) (Breyer, J., dissenting); Abrams v. Erfe, No. 3:17-CV-1570 (CSH), 2018 U.S. Dist. LEXIS 110816, at *25–26 (D. Conn. July 3, 2018) (*unpublished*). *But see* Harris v. Miller, 818 F.3d 49, 58 (2d Cir. 2016) (noting the distinction between different types of searches and their level of intrusion).

[54] Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 343, 132 S. Ct. 1510, 1525, 182 L. Ed. 2d 566, 585 (2012) (Breyer, J., dissenting).

[55] *See*, *e.g.*, Vaughan v. Ricketts, 950 F.2d 1464, 1468–1469, 21 Fed. R. Serv. 3d (West) 959 (9th Cir. 1991) (requiring "reasonable cause" to justify manual rectal search), *rev'd on other grounds sub nom.* Koch v. Ricketts, 68 F.3d 1191 (9th Cir. 1995); *see also* Hartline v. Gallo, 546 F.3d 95, 100 (2d Cir. 2008) ("The Fourth Amendment requires an individualized 'reasonable suspicion that [a misdemeanor] arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest' before [he] may be lawfully subjected to a strip search.") (citation omitted).

[56] Covino v. Patrissi, 967 F.2d 73, 79 n.5 (2d Cir. 1992).

[57] Covino v. Patrissi, 967 F.2d 73, 79–80 (2d Cir. 1992).

[58] Covino v. Patrissi, 967 F.2d 73, 79–80 (2d Cir. 1992).

When prison officials conduct strip frisk searches to control a dangerous situation, courts usually do not find any constitutional violation.[59] For example, the Eighth Circuit in *Franklin v. Lockhart* held that a policy requiring visual body cavity searches of incarcerated people on punitive status, in administrative segregation, or in need of protection was justified by security concerns.[60] In *Elliott v. Lynn*, the Fifth Circuit held that a visual body cavity search of an incarcerated person in front of other incarcerated people and non-searching officers was justified as part of a prison-wide shakedown following an increase in murders.[61] The Ninth Circuit in *Thompson v. Souza* held that a visual strip search of an incarcerated person's body cavities was reasonably related to the prison's legitimate need to keep drugs out of the prison and, therefore, did not violate the Fourth Amendment.[62] The court reached this conclusion despite the facts that: the search happened in front of other incarcerated people, the search went beyond prison guidelines and the officials' search plan, and the person being searched was told to run his fingers around his gums after touching his genitalia.[63] Other courts have also held that a prison's safety concerns override incarcerated people's privacy rights in a strip-frisk situation.[64]

(d) Body Cavity Searches

A "body cavity search" (or "digital search") is an actual physical examination of the incarcerated person's anal and/or genital cavities conducted by a professional member of the health services staff.[65] During a digital body cavity search, a guard or prison official places his or her fingers into an incarcerated person's nose, mouth, ear, anus, and/or vagina. The test for deciding whether digital body cavity searches are reasonable is stricter than the test for any other type of search because body cavity searches are much more intrusive. The Ninth Circuit has established three requirements that must be satisfied in order for a digital body cavity search to be constitutional under the Fourth Amendment:[66]

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[59] *See*, *e.g.*, Serna v. Goodno, 567 F.3d 944, 953 (8th Cir. 2009) (holding that a body cavity search for a possible cell phone in a treatment facility for sex offenders did not violate the 4th Amendment, because "[c]ell phones and their potential to grant access to past or future victims for illegal purposes or to procure sexually explicit material also have the potential to negatively interfere with the Program's treatment goals."); Goff v. Nix, 803 F.2d 358, 367–368 (8th Cir. 1986) (holding that visual body cavity searches by prison officials did not violate the 4th Amendment, and prison administrators' decision to conduct such searches any time individuals moved outside the segregation unit or the confines of prison was entitled to deference).

[60] Franklin v. Lockhart, 883 F.2d 654, 656 (8th Cir. 1989).

[61] Elliott v. Lynn, 38 F.3d 188, 191–192 (5th Cir. 1994); *cf.* Moore v. Carwell, 168 F.3d 234, 236–237 (5th Cir. 1999) (noting that in the absence of emergency or extraordinary circumstances, body cavity searches by an officer of the opposite sex in view of other officers of the same sex may be a violation of the incarcerated person's constitutional rights).

[62] Thompson v. Souza, 111 F.3d 694, 700–701 (9th Cir. 1997).

[63] Thompson v. Souza, 111 F.3d 694, 697, 700–701 (9th Cir. 1997).

[64] *See* Thompson v. Souza, 111 F.3d 694, 700–701 (9th Cir. 1997); Givens v. Aaron, No. 3:14-cv-378-FDW, 2016 U.S. Dist. LEXIS 117324, at *3–12 (W.D.N.C. Aug. 31, 2016) (*unpublished*) (holding that a strip frisk conducted by at least 6 prison officials and video recorded was reasonable because of the prison's safety concerns that the incarcerated person had an illegal cell phone). *But see* Malik v. Miller, 679 F. Supp. 268, 269–270 (W.D.N.Y. 1988) (noting that if an incarcerated person could prove he endured a strip frisk in the middle of a hallway in front of 10 to 15 people who were not part of the search, his privacy interest could override the prison's claims of their security interest).

[65] *See* 28 C.F.R. § 552.11(d) (2023) (defining "digital or simple instrument search" as an "inspection for contraband or any other foreign item in a body cavity of an inmate by use of fingers or simple instruments, such as an otoscope, tongue blade, short nasal speculum, and simple forceps," but declaring that the search "may be conducted only by designated qualified health personnel").

[66] Wiley v. Serrano, 37 F. App'x 252, 253 (9th Cir. 2002) (*unpublished*).

(1) Prison officials must have reasonable cause to search the incarcerated person[67] (but this standard is less strict than probable cause);[68]
(2) The search must serve a valid penological (prison management) need;[69] and
(3) The search must be "conducted in a reasonable manner," which means the court will look at whether trained staff performed the search in private and under hygienic (clean) conditions.[70]

The Seventh Circuit in *Bruscino v. Carlson* held that a policy requiring rectal searches of incarcerated people returning to their cells was reasonable because guards found a lot of contraband, including knives and hacksaw blades, through those searches.[71] Furthermore, prison violence decreased after the searches began (which indicated the search policy could have led to the decrease in violence).[72] Please note, however, that *Bruscino* involved the U.S. Penitentiary in Marion, Illinois, a "prison designed to hold the most violent and dangerous prisoners in the federal system," which may explain why the court allowed these invasive searches to occur frequently.[73] As part of this search, incarcerated people returning to their cells were often subjected to a rectal search, where a paramedic inserted a gloved finger into the incarcerated person's rectum and felt around for contraband.[74]

Courts also often approve body cavity searches performed by X-ray.[75] For example, in *People v. Pifer,* the court held an X-ray search, which discovered a hypodermic syringe in the incarcerated person's rectal cavity, was reasonable.[76] The court found that the prison had significant and legitimate security interests that were more important than the incarcerated person's rights. The court also said that "an X-ray is far less humiliating, degrading, invasive, annoying and physically uncomfortable than a physical viewing of the anal cavity or physical invasion of the rectal cavity."[77]

The New York State Department of Corrections and Community Supervision (DOCCS) rules say that body cavity searches may only be done when "there are compelling reasons to believe that the

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[67] Vaughan v. Ricketts, 950 F.2d 1464, 1468–1469 (9th Cir. 1991) (holding that reasonable cause is required but declining to rule on whether it existed in that case), *rev'd on other grounds sub nom.* Koch v. Ricketts, 68 F.3d 1191 (9th Cir. 1995).

[68] Bell v. Wolfish, 441 U.S. 520, 560, 99 S. Ct. 1861, 1885, 60 L. Ed. 2d 447, 482 (1979) ("Balancing the significant and legitimate security interests of [prisons] against the privacy interests of the inmates, we conclude that [digital cavity searches] can [be conducted on less than probable cause].").

[69] Tribble v. Gardner, 860 F.2d 321, 322–325 (9th Cir. 1988) (holding that if rectal searches were conducted every time an incarcerated person is moved into a secure housing unit within a maximum security prison and for purposes unrelated to security considerations, the searches would violate the 4th Amendment); *see also* Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64 (1987) (holding that a prison regulation that impinges on incarcerated people's constitutional rights must be reasonably related to a legitimate penological interest), *superseded in part by statute*, Religious Freedom and Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, (codified at 42 U.S.C. § 2000cc-1(a)).

[70] *See* Vaughan v. Ricketts, 859 F.2d 736, 741 (9th Cir. 1988) (holding that rectal searches conducted in an open hallway on an unsanitary table were unreasonable); State v. Robinson, 105 Conn. App. 179, 198, 937 A.2d 717, 728 (Conn. App. Ct. 2008) (noting that any warrant for a body cavity search must contain instruction that the search is to be conducted under sanitary conditions); Nelson v. Dicke, No. 00-285 (JRT/FLN), 2002 U.S. Dist. LEXIS 5800, at *27–29 (D. Minn. Mar. 31, 2002) (*unpublished*) (finding that an incarcerated person likely had a 4th Amendment claim for being subjected to a cavity search that was, among other things, not conducted in a sanitary environment).

[71] Bruscino v. Carlson, 854 F.2d 162, 166 (7th Cir. 1988).

[72] Bruscino v. Carlson, 854 F.2d 162, 164–165 (7th Cir. 1988).

[73] Bruscino v. Carlson, 854 F.2d 162, 163 (7th Cir. 1988).

[74] Bruscino v. Carlson, 854 F.2d 162, 164 (7th Cir. 1988).

[75] *See, e.g.*, People v. Collins, 8 Cal. Rptr. 3d 731, 743–744, 115 Cal. App. 4th 137, 153–155 (Cal. Ct. App. 2004) (upholding an intended visual body cavity search of an incarcerated person and noting that X-ray searches are often reasonable and not harmful or uncomfortable when conducted by a specialized technician).

[76] People v. Pifer, 265 Cal. Rptr. 237, 238, 240–241, 216 Cal. App. 3d 956, 959, 962–963 (Cal. Ct. App. 1989) (finding that routine X-ray searches of all incarcerated people being transferred from one prison facility to another were reasonable).

[77] People v. Pifer, 265 Cal. Rptr. 237, 240, 216 Cal. App. 3d 956, 961 (Cal. Ct. App. 1989).

inmate or inmates to be searched have secreted contraband in an oral and/or genital cavity," which creates "a clear threat to the safety . . . of the facility and/or . . . any person."[78] A doctor must explain the process to the incarcerated person before performing a body cavity search.[79] The incarcerated person should have the opportunity to give up the contraband at this time.[80] A corrections officer of the same sex as the incarcerated person must be present during the search.[81]

Note that in New York, an X-ray search using the Body Orifice Scanning System ("the BOSS" or "the BOSS chair") is sometimes also called a metal detector search.[82] Whenever you are searched with the BOSS chair, you are required to be fully clothed.[83] Even if the X-ray search is being used after a strip search or a strip frisk, prison officials must let you put your undergarments, pants, and shirt back on first.[84] See Section C(6) of this Chapter for more information about these New York-specific prison rules.

(e) Cross-Gender Body Searches

When someone of the opposite sex searches your body, that is called a "cross-gender" body search. This Subsection explains what protections you have against cross-gender body searches. Part B of this Chapter, "Involuntary Exposure," explained your right not to be seen nude by prison officials of the opposite sex. The rules for involuntary exposure and the rules for cross-gender searches are very similar.

In some situations, courts have held that cross-body searches are illegal and, in those situations, you do have a right to be free from cross-gender body searches.[85] However, this right is very limited and, in most situations, courts will find that cross-gender body searches are legal.[86] In deciding

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[78] State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control of and Search for Contraband § IV(H) (2023).

[79] State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control of and Search for Contraband § IV(H) (2023) (noting that a primary care provider (PCP) must explain and conduct the body cavity search).

[80] State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control of and Search for Contraband § IV(H) (2023) (noting that the incarcerated person must have the opportunity to voluntarily yield the contraband).

[81] State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control of and Search for Contraband § IV(H) (2023).

[82] State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control of and Search for Contraband § IV(A) (2023).

[83] State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control of and Search for Contraband § IV(A) (2023).

[84] State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control of and Search for Contraband § IV(A), (G) (2023) (explaining that incarcerated people must be "wearing at least their undergarments," and stating that undergarments means "undershorts for males, and bra and panties for females").

[85] *See, e.g.*, Mills v. City of Barbourville, 389 F.3d 568, 579 (6th Cir. 2004) ("[W]e have recognized that a prison policy forcing incarcerated people to be searched by members of the opposite sex or to be exposed to regular surveillance by officers of the opposite sex while naked . . . would provide the basis of a claim on which relief could be granted."); Moore v. Carwell, 168 F.3d 234, 235–237 (5th Cir. 1999) (holding that an allegation of a strip and body cavity search performed by an officer of the opposite sex, absent an emergency or unavailability of a same-sex officer, was not frivolous for purposes of the 4th Amendment); Hayes v. Marriott, 70 F.3d 1144, 1147–1148 (10th Cir. 1995) (holding that summary judgment as to the 4th Amendment claim was inappropriate for defendants because plaintiff was subjected to a body cavity search "in the presence of over 100 people, including female secretaries and case managers"); Byrd v. Maricopa Cnty. Sheriff's Dept., 629 F.3d 1135, 1136–1137, 1143, 1147 (9th Cir. 2011), *cert. denied*, 563 U.S. 1033, 131 S. Ct. 2964, 180 L. Ed. 2d 246 (2011) (holding that "the cross-gender strip search performed on [plaintiff] was unreasonable as a matter of law . . . and violated [plaintiff's] rights under the Fourth Amendment to be free from unreasonable searches," where a non-uniformed female guard conducted a strip search on an incarcerated man in front of 10 to 15 non-participating officers).

[86] *See*, *e.g.*, Michenfelder v. Sumner, 860 F.2d 328, 334 (9th Cir. 1988) (holding that strip searches of incarcerated men that occasionally occurred in view of female guards do not violate the 4th Amendment); Grummett v. Rushen, 779 F.2d 491, 496 (9th Cir. 1985) (finding that a pat-down search of an incarcerated man, including his groin area, by female guards does not violate the 4th Amendment).

whether a cross-gender search is a violation of an incarcerated person's rights, courts must balance the incarcerated person's limited right to be free from invasions of privacy by members of the opposite sex against the state's interests in maintaining the security of the prison[87] and in avoiding sex discrimination in prison employment.[88] Because a majority of incarcerated people are male, if the courts held that female guards could never search incarcerated men it might make it harder for women to be hired as security guards (since conducting searches is an important duty of security guards), resulting in possible employment discrimination. Therefore, the state has to balance this interest of not discriminating against female security guards with the particular rights of incarcerated people not to be searched by a guard of the opposite sex. In summary, most cases addressing cross-gender searches in prisons focus first on the incarcerated person's right to privacy and then try to balance that right against the government's interests in maintaining security and in not discriminating against women. (Note also that even if a court finds that a search by a prison guard of the opposite sex was a violation of the incarcerated person's Fourth Amendment privacy rights, the guard may still be entitled to qualified immunity.)[89]

This balancing test is difficult, so different cases and courts produce different outcomes. Usually, the focus is on the specific facts of each case. For example, even though the Ninth Circuit has said that "it is highly questionable . . . whether prison inmates have a Fourth Amendment right to be free from routine unclothed searches by officials of the opposite sex,"[90] it declared a search "unreasonable as a matter of law" under the Fourth Amendment in another case.[91] Similarly, the Seventh Circuit has specifically said that not *all* cross-gender searches are permissible.[92] It stated that prisons should respect an incarcerated person's constitutional privacy where it is reasonable, taking into account prison security and equal employment for female guards.[93]

Your state may also have laws protecting incarcerated women or regulating searches by opposite-sex guards. For example, California law requires that all people incarcerated in California be searched

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[87] Hudson v. Palmer, 468 U.S. 517, 527, 104 S. Ct. 3194, 3200–3201, 82 L. Ed. 2d 393, 403–404 (1984) ("Determining whether [an incarcerated person's] expectation of privacy is 'legitimate' or 'reasonable' necessarily entails a balancing of interests. The two interests here are the interest of society in the security of its penal institutions and the interest of the prisoner in privacy within his cell.").

[88] *See, e.g.*, Timm v. Gunter, 917 F.2d 1093, 1096-1097, 1102 (8th Cir. 1990) (holding that it was not unreasonable for a prison to authorize female guards to conduct surveillance of all areas, including shower and toilet facilities, and to pat search incarcerated men on the same basis as male guards, given the prison's interest in protecting the equal employment rights of prison guards); Berl v. County of Westchester, 849 F.2d 712, 716 (2d Cir. 1988) (finding the County liable for employment discrimination under Title VII for refusing to consider two male guards for promotion to female unit of prison); Smith v. Fairman, 678 F.2d 52, 53–55 (7th Cir. 1982) (*per curiam*) (considering the state's "strong interest in avoiding sex discrimination in its hiring practices at the prison" and holding that "requiring plaintiff to submit to a limited frisk-type search by a female guard infringes upon no right guaranteed by the Constitution" where the "limited frisk" did not include the genital area); Bagley v. Watson, 579 F. Supp. 1099, 1104–1105 (D. Or. 1983) (holding that female corrections officers cannot be excluded from positions that involve performing pat-down frisk searches of clothed incarcerated men and visual observations of incarcerated men in various states of undress); Griffin v. Mich. Dept. of Corr., 654 F. Supp. 690, 702–703 (E.D. Mich. 1982) (finding gender an unacceptable occupational qualification for corrections officers). See Part B of this Chapter for a discussion of similar issues concerning involuntary exposure.

[89] *See, e.g.*, Lay v. Forker, 371 F. Supp. 2d 1159, 1166–1167 (C.D. Cal. 2004) (finding that a strip search of an incarcerated man in the presence of a female officer violated the 4th Amendment but that the officer was entitled to qualified immunity).

[90] Somers v. Thurman, 109 F.3d 614, 622 (9th Cir. 1997).

[91] Byrd v. Maricopa Cnty. Sheriff's Dept., 629 F.3d 1135, 1136–1137, 1143, 1147 (9th Cir. 2011) (holding that "the cross-gender strip search performed on [plaintiff] was unreasonable as a matter of law . . . and violated [plaintiff's] rights under the Fourth Amendment to be free from unreasonable searches," where a non-uniformed female guard conducted a strip search on an incarcerated man in front of 10 to 15 non-participating officers).

[92] Canedy v. Boardman, 16 F.3d 183, 188 (7th Cir. 1994).

[93] Canedy v. Boardman, 16 F.3d 183, 188 (7th Cir. 1994) (finding that an incarcerated man *did* have a cause of action against strip searches by female guards, because "where it *is* reasonable—taking account of a state's interests in prison security and in providing equal employment opportunity for female guards—to respect an inmate's constitutional privacy interests, doing so . . . is a constitutional mandate").

"in a professional manner."[94] Routine clothed searches of incarcerated men may be performed by prison officials of either sex, but searches of clothed incarcerated women should be performed only by female employees, except in emergency situations.[95] California prohibits opposite-sex guards (other than qualified medical staff) from performing unclothed body inspections "except under emergency conditions with life or death consequences."[96]

In New York, DOCCS allows female correction officers to routinely pat frisk most incarcerated men.[97] For women who are incarcerated in New York State, however, DOCCS notes that, "absent exigent circumstances," cross-gender pat frisks are not allowed.[98] For more information on New York DOCCS requirements, see Section C(6) of this Chapter.

(i) *Searches of Incarcerated Women by Male Guards*

It is very important that you read *all* of Part C of this Chapter, not just this Section. Courts will use the general rules explained in Part C to decide if a search was legal. This Subsection only explains some additional protections that incarcerated women may have against searches by male prison guards.

While all incarcerated people's rights to privacy are limited because of the nature of prison and incarceration,[99] courts are sometimes more sympathetic to women who are incarcerated. Some courts recognize that women have a greater privacy interest in certain situations because incarcerated women are particularly vulnerable to sexual abuse by correctional personnel. As a result, some courts have found searches of incarcerated women by male guards to be unconstitutional, even if the same searches of incarcerated men by female guards would be allowed under the same circumstances.

For example, in *Jordan v. Gardner*, the Ninth Circuit held that past sexual and physical abuse experienced by incarcerated women may affect the way they react to searches by male prison guards.[100] Because of this, the court found that incarcerated women who have suffered past sexual and physical abuse had particular vulnerabilities that could cause the cross-gender body searches to be more traumatic and mentally painful for them than a similar cross-gender body search of incarcerated men who have not suffered past sexual and/or physical abuse.[101] The court held that random, non-emergency, clothed body searches conducted by male guards on incarcerated women were

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[94] CAL. CODE REGS. tit. 15, § 3287(b) (2023) (requiring all searches of incarcerated people to "be conducted in a professional manner which avoids embarrassment or indignity to the inmate," and that, "[w]henever possible, unclothed body inspections of inmates shall be conducted outside the view of others"). Title 15 of the California Code of Regulations ("Crime Prevention and Corrections") contains the provisions concerning body searches of people who are incarcerated.

[95] CAL. CODE REGS. tit. 15, § 3287(b)(2)–(3) (2023).

[96] CAL. CODE REGS. tit. 15, § 3287(b)(1) (2023). The Operations Manual of the California Department of Corrections and Rehabilitation reflects the same policies. State of California, Department of Corrections and Rehabilitation, Operations Manual, Ch. 5, § 52050.16.5 (Jan. 1, 2024), *available at* https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2024/03/2024-DOM.pdf (last visited Jan. 28, 2024).

[97] State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control of & Search for Contraband § IV(B)(3)(a) (2023) (providing that "[p]at frisks [of incarcerated men] will be performed by Officers regardless of gender," but incarcerated men who are Muslim may request a male officer under some circumstances). In general, cross-gender pat-down searches of incarcerated men by female prison guards are constitutionally permissible. *See* Grummett v. Rushen, 779 F.2d 491, 495 (9th Cir. 1985) (permitting routine cross-gender pat-downs because "[t]hese searches do not involve intimate contact with an inmate's body"); Smith v. Fairman, 678 F.2d 52, 53–55 (7th Cir. 1982) (holding female guards may conduct pat-down searches without violating an incarcerated man's constitutional right to privacy).

[98] State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control of and Search for Contraband § IV(B)(3)(b) (2023).

[99] *See* Hudson v. Palmer, 468 U.S. 517, 527, 104 S. Ct. 3194, 3201, 82 L. Ed. 2d 393, 404 (1984) (stating that the "right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells").

[100] Jordan v. Gardner, 986 F.2d 1521, 1539–1540 (9th Cir. 1993).

[101] Jordan v. Gardner, 986 F.2d 1521, 1526 (9th Cir. 1993).

cruel and unusual punishment in violation of the Eighth Amendment.[102] During the searches, the guards rubbed, stroked, squeezed, and kneaded the women's bodies, including their covered breasts, buttocks, inner thighs, and crotches.[103] The policy required guards to "[p]ush inward and upward when searching the crotch and upper thighs" of the women and to check the crease in their buttocks with a downward motion with the edge of the hand.[104] Many of the women had been sexually or physically abused by men in the past, and one woman suffered severe distress after being searched.[105] The court found that prison officials knew of the risks of mental trauma and acted with deliberate indifference to the harm that the cross-gender clothed body searches were likely to cause.[106] The court additionally said the policy violated the Eighth Amendment because it was "unnecessary" for male guards to search the women since female guards could do the searches.[107] Other courts have also recognized that incarcerated women are entitled to greater privacy protection, though with some limitations.[108]

In general, male prison officials are allowed to conduct clothed body frisks of incarcerated women (where the outer garments/clothing of the person is searched),[109] cell searches,[110] and visual body cavity or strip searches (where incarcerated people must take off their clothes and be visually inspected by a guard).[111] Some states require that only medical personnel, not correctional personnel, do body

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[102] Jordan v. Gardner, 986 F.2d 1521, 1522–1523 1530–1531 (9th Cir. 1993). Other Circuits and the Supreme court may not adopt the doctrine of this case. *See* Hovater v. Robinson, 1 F.3d 1063, 1068 (10th Cir. 1993) (finding that the plaintiff could not prove that a prison policy allowing male guards to conduct searches of incarcerated women disregards a known or obvious risk that is very likely to result in the violation of an incarcerated person's constitutional rights). The *Jordan* court's decision was fact-specific to the particular prison in the case, and other courts have indicated that the case did not create a *per se* constitutional violation (meaning that cross-gender searches are not unconstitutional in all cases). *See* Carl v. Angelone, 883 F. Supp. 1433, 1440 (D. Nev. 1995) (finding that although the prison director transferred male correction officers out of women's prisons based on *Jordan*, cross-gender searches were not always unconstitutional; thus, prisons could not be forced to transfer the men based on their sex).

[103] Jordan v. Gardner, 986 F.2d 1521, 1523 (9th Cir. 1993).

[104] Jordan v. Gardner, 986 F.2d 1521, 1533 (9th Cir. 1993) (Reinhardt, J., concurring).

[105] Jordan v. Gardner, 986 F.2d 1521, 1523, 1539 (9th Cir. 1993).

[106] Jordan v. Gardner, 986 F.2d 1521, 1528–1529 (9th Cir. 1993).

[107] Jordan v. Gardner, 986 F.2d 1521, 1526–1528 (9th Cir. 1993); *see also* Berry v. City of Muskogee, 900 F.2d 1489, 1498 (10th Cir. 1990) (stating knowledge of risk of harm and failure to act to prevent the harm constitute deliberate indifference to a known or obvious risk that is very likely to result in the violation of an incarcerated person's constitutional rights).

[108] *See*, *e.g.*, Sepulveda v. Ramirez, 967 F.2d 1413, 1416–1417 (9th Cir. 1992) (denying qualified immunity to a male parole officer who walked in on a female parolee urinating as part of a required drug test); Forts v. Ward, 621 F.2d 1210, 1213 (2d Cir. 1980) (allowing incarcerated women to cover the window of their cells for privacy for 15-minute intervals); Torres v. Wis. Dept. of Health & Soc. Servs., 838 F.2d 944, 953 (7th Cir.) (noting, approvingly, that a state prison provided incarcerated women with appropriate sleepwear and allowed them to cover their windows while dressing or using the toilet to protect their privacy), *rev'd and remanded on other grounds*, 859 F.2d 1523, 1524–1525 (7th Cir. 1988) (*en banc*). *But see* Carlin v. Manu, 72 F. Supp. 2d 1177, 1184 (D. Or. 1999) (holding that male guards could be present as female guards strip-searched incarcerated women during an emergency removal to a male prison because the male guards were not touching the women).

[109] *See* Colman v. Vasquez, 142 F. Supp. 2d 226, 231–234 (noting that cross-gender pat-frisk exams are not facially unconstitutional, but denying dismissal of an incarcerated person's 4th Amendment claim so the court could learn more facts to determine the balance of incarcerated people's 4th Amendment rights against valid penological interests); *see also* Bell v. Wolfish, 441 U.S. 520, 558, 99 S. Ct. 1861, 1884, 60 L. Ed. 2d 447, 481 (1979) (upholding visual body cavity searches of incarcerated people against 4th Amendment challenge; the gender of the guards assigned to conduct the searches is not mentioned).

[110] *See* Hudson v. Palmer, 468 U.S. 517, 525–526, 104 S. Ct. 3194, 3199–3200, 82 L. Ed. 2d 393, 402–403 (1984) (holding that incarcerated person has no reasonable expectation of privacy in his cell and that "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell"); Martin v. Lane, 766 F. Supp. 641, 646 (N.D. Ill. 1991) (applying *Hudson* to deny relief under the 4th Amendment to an incarcerated person whose cell was searched during a lockdown).

[111] *See* Lee v. Downs, 641 F.2d 1117, 1120–1121 (4th Cir. 1981) (finding that the presence of male guards during the body cavity search of an incarcerated woman by a female nurse was reasonably necessary to restrain the incarcerated person and therefore did not violate her 4th Amendment rights, but also suggesting that if female

cavity searches that involve physical intrusion or extraction of a foreign object from a body cavity.[112] Similarly, body cavity searches requiring the use of one's fingers, called "digital body searches," are unreasonable unless medical personnel do these searches in a hygienic manner in a private area.[113] The presence of male officers is also a circumstance that might make a digital body search unreasonable.[114] A woman's pregnancy may justify even stricter standards for cavity searches.[115]

Your state may have specific laws to protect you or to regulate searches by opposite-sex guards. California, for example, prohibits opposite-sex guards from performing unclothed body inspections in non-emergency situations.[116] In New York, DOCCS policy requires that, whenever possible, female guards—not male guards—should pat frisk incarcerated women.[117] If a male officer has to perform a pat frisk search of an incarcerated woman (because, for example, a female officer is not available), he must try to search the incarcerated person in a public location.[118] In New York, male guards cannot perform non-emergency pat frisks on incarcerated women; they can only perform a pat frisk on a woman in the case of "temporary and unforeseen circumstances that require immediate action" to combat any threats to the institution's security or order.[119] Even when a male officer performs a pat frisk on an incarcerated woman because of emergency circumstances, the officer must report the date,

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guards had been able to restrain the woman by themselves, the presence of male guards would have been unnecessary and potentially unreasonable).

[112] *See, e.g.*, DaVee v. Mathis, 812 S.W.2d 816, 824–826 (Mo. Ct. App. 1991) (concluding that while searches involving physical intrusion and removal of foreign objects must be conducted by medical personnel, the search in question did not involve physical contact and was thus reasonably conducted by non-medical personnel); United States *ex rel.* Guy v. McCauley, 385 F. Supp. 193, 199 (E.D. Wis. 1974) ("The intrusion into or the examination of either the vaginal or anal cavities must be made by skilled medical technicians . . . .").

[113] *See* Bonitz v. Fair, 804 F.2d 164, 172–173 (1st Cir. 1986) (holding that digital body searches of incarcerated women were unreasonable and in violation of the 4th Amendment because non-medical personnel performed the searches in an unhygienic manner and in the presence of male personnel), *overruled on other grounds by* Unwin v. Campbell, 863 F.2d 124, 128 (1st Cir. 1988); United States *ex rel.* Guy v. McCauley, 385 F. Supp. 193, 198 (E.D. Wis. 1974) (finding that a search "abused common conceptions of decency and civilized conduct" and violated the 5th Amendment (even though it was done in a sanitary manner by female officers) because it involved forcing a pregnant woman to bend over painfully, the police officers conducting the search were not medically trained, and the search was not conducted in a medical environment); *see also* Rodriquez v. Furtado, 950 F.2d 805, 811 (1st Cir. 1991) (holding that a body cavity search of a female patient by a doctor in a hygienic and private setting pursuant to a search warrant was reasonable). Some states have statutes specifically requiring that medical personnel perform body cavity searches of incarcerated people. *See, e.g.*, MICH. COMP. LAWS ANN. § 764.25b(5) (West 2000).

[114] *See* Bonitz v. Fair, 804 F.2d 164, 172–173 (1st Cir. 1986) (searching incarcerated women in the presence of male officers is one factor that the court considered in finding the search to be unreasonable).

[115] *See* United States *ex rel.* Guy v. McCauley, 385 F. Supp. 193, 198 (E.D. Wis. 1974) (holding that a visual vaginal search of a woman who is 7-months pregnant "abuse[s] common conceptions of decency and civilized conduct" when the search is conducted in a non-medical environment by non-medical officers, and it was painful for the woman to bend over).

[116] CAL. CODE REGS. tit. 15, § 3287(b)(1) (2023). The Operations Manual of the California Department of Corrections and Rehabilitation reflects the same policies. State of California, Department of Corrections and Rehabilitation, Operations Manual, Ch. 5, § 52050.16.5 (Jan. 1, 2024), *available at* https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2024/03/2024-DOM.pdf (last visited Jan. 28, 2024).

[117] State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control of and Search for Contraband § IV(B)(3)(b) (2023). Pat frisks are required when incarcerated people are entering the visiting room, when an entire area of the institution is being searched, when an officer has an articulable basis to suspect an incarcerated person possesses contraband, or as directed by supervisory staff. Pat frisks are also allowed when an incarcerated person is going or returning to housing, program, and recreation areas and outside work details.

[118] State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control of and Search for Contraband § IV(B)(3)(b) (2023).

[119] State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control of and Search for Contraband § IV(B)(3)(b) (2023).

time, place, and reason for the pat frisk, and they cannot use the palms of their hands while frisking the woman's breast area.[120]

Some prisons have tried to hire female prison officers for certain jobs in women's prisons.[121] However, prisons can be sued for employment discrimination if they do this, since federal law prohibits employment discrimination based on sex,[122] and courts have held that hiring officers of only one gender for a particular prison, block, or task violates this law.[123] Courts consider the state's interest in equal employment opportunities for correctional officers to be strong compared to an incarcerated person's privacy interest in her body, as long as the cross-gender interactions are not offensive, disrespectful, or unprofessional.[124] This is why male guards may be allowed to search women who are incarcerated.

In conclusion, courts will balance the invasive nature of the search against the prison's interests in security and equal employment opportunities. However, prison officials must still try to provide privacy to incarcerated people if it is reasonable to do so, and they should also train prison employees to carry out searches professionally, without being unnecessarily intrusive.[125]

3. Eighth Amendment Limitations

JLM, Chapter 24, "Your Right to be Free from Assault by Prison Guards and Other Incarcerated People," explains your rights under the Eighth Amendment, which prohibits cruel and unusual punishment. As this Chapter explains, courts usually view illegal search claims as possible violations of the Fourth Amendment. Sometimes, however, a court may believe a search was so unreasonable

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[120] State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control of and Search for Contraband § IV(B)(3)(b) (2023).

[121] Indiana requires a "prison matron" be appointed for female prisons. IND. CODE ANN. § 36-8-10-5 (West 2016); California protects all incarcerated people from room searches performed solely by officers of the opposite sex and ensures that a trained female staff member is available and accessible to supervise incarcerated women. CAL. PENAL CODE § 4021 (West 2023). Michigan provides that if incarcerated people are subject to body cavity searches by a person of the opposite sex, another person of the same sex as the incarcerated person must also be present. MICH. COMP. LAWS ANN. § 764.25b(5) (West 2000).

[122] 42 U.S.C. § 2000e-2(a)–(d) ("Title VII").

[123] *See* Henry v. Milwaukee County, 539 F.3d 573, 581–586 (7th Cir. 2008) (finding that a prison policy which required staff overtime shifts to be staffed by same-sex guards and so reduced the number of shifts available to women was not reasonably necessary to achieve the goals of rehabilitation, security, and privacy); *see also* Forts v. Ward, 621 F.2d 1210, 1216–1217 (2d Cir. 1980) (holding that male prison guards could not be excluded from night shifts in a women's prison because other measures to ensure privacy of incarcerated person were available). *But see* Robino v. Iranon, 145 F.3d 1109, 1110–1111 (9th Cir. 1998) (upholding policy excluding male prison guards from certain posts in order to accommodate the privacy of incarcerated women and reduce the risk of sexual conduct between guards and incarcerated people when male prison guards still had many other employment opportunities in the system).

[124] *See* Grummett v. Rushen, 779 F.2d 491, 496 (9th Cir. 1985) (finding a prison policy which allowed female guards to conduct pat-down searches was not a violation of the incarcerated person's privacy when "the searches are performed by the female guards in a professional manner and with respect for the inmates"); *see also* Robins v. Centinela State Prison, 19 F. App'x. 549, 550–551 (9th Cir. 2001) (*unpublished*) (finding that while generally the search of incarcerated men by female officers may not violate the 4th Amendment, a search that is "completely unprofessional and offensive" may be such a violation).

[125] *See* Timm v. Gunter, 917 F.2d 1093, 1100 (8th Cir. 1990) (upholding cross-gender pat searches when female guards are trained to perform pat searches of incarcerated men in a professional manner); Torres v. Wisconsin Dept. of Health & Soc. Servs., 859 F.2d 1523, 1524–1525 (7th Cir. 1988) (noting procedures in place to minimize intrusions on the privacy of incarcerated people). *But see* Cameron v. Hendricks, 942 F. Supp. 499, 503 (D. Kan. 1996) (stating that the availability of less intrusive measures is only one factor in determining the reasonableness of a search and that officials are not required to perform the "least intrusive" search).

that it violates the Eighth Amendment's prohibition against cruel and unusual punishment.[126] Some illegal searches may also be considered assault and battery.[127]

There is no clear standard about how much pain and suffering is unconstitutional. Courts usually say "the unnecessary and wanton infliction of pain" violates the Eighth Amendment.[128] Whether a search is considered an "unnecessary and wanton infliction of pain" depends on the circumstances, because it may be necessary for prison officials to use more force in certain situations. In general, however, infliction of pain is considered "unnecessary and wanton" when the prison official is acting in bad faith and for no other reason but to cause harm.[129] Prison officials' behavior must meet this standard before a court will find a constitutional violation. But if the official acts to further some legitimate penological interest and if the pain suffered is not the main purpose of the search, then courts will probably say that your constitutional rights were not violated.[130] If you believe your Eighth Amendment rights were violated by an illegal search, you should read *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law," and Chapter 24, "Your Right to be Free from Assault by Prison Guards and Other Incarcerated People," for more information.

With regard to body searches, the Eighth Amendment is most often triggered by the manner in which the searches happen and, at times, because of the purpose of the searches. In *Meriwether v. Faulkner*, the plaintiff was a transgender woman who said that guards made her strip to harass her and to see her body parts after she had a gender-affirming surgery.[131] She also said that there were no security reasons to search her.[132] The court said that such searches might violate the Eighth Amendment. In addition, in *McRorie v. Shimoda*, the court sustained an Eighth Amendment claim against a prison guard who stuck his baton into the anus of an incarcerated person during a strip search.[133]

The Seventh Circuit in *Isby v. Duckworth* held that a rectal cavity search conducted in a private room by a doctor, who put a gloved and lubricated finger into the incarcerated person's anus to check for a weapon, was not abusive because it was not an unreasonable precaution after hearing a gunshot.

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[126] *See, e.g.*, Jordan v. Gardner, 986 F.2d 1521, 1524–1531 (9th Cir. 1993) (*en banc*) (finding that a policy allowing male corrections officers to conduct random, non-emergency clothed body searches on incarcerated women without suspecting the women of any offense violated the 8th Amendment); Tribble v. Gardner, 860 F.2d 321, 325–326 (9th Cir. 1988) (finding that a rectal probe may have violated the 8th Amendment if it was conducted for purposes unrelated to security considerations, where an incarcerated person's clothing, hair, hands, and other body cavities were not searched and incarcerated person's recent X-ray revealed no contraband in his rectum).

[127] *See, e.g.*, Hammond v. Gordon County, 316 F. Supp. 2d 1262, 1293–1294 (N.D. Ga. 2002) (holding that an incarcerated woman presented enough evidence to support a claim of assault and battery by alleging that a guard inserted his fingers into her vagina).

[128] *See* Hudson v. McMillian, 503 U.S. 1, 5–10, 112 S. Ct. 995, 998–1000, 117 L. Ed. 2d 156, 165–168 (1992) (stating that, although "the unnecessary and wanton infliction of pain" is a violation of the 8th Amendment, the 8th Amendment also allows some use of force and allows force that is in proportion to the need to keep order); Gregg v. Georgia, 428 U.S. 153, 173, 96 S. Ct. 2909, 2925, 49 L. Ed. 2d 859, 874–875 (1976) (holding that a court must determine whether a punishment involves the unnecessary and wanton infliction of pain and whether the punishment is grossly out of proportion to the severity of the crime [meaning the punishment is much more severe than the crime]); *see also* Baze v. Rees, 553 U.S. 35, 54–57, 62, 128 S. Ct. 1520, 1531–1534, 1537, 170 L. Ed. 2d 420, 432–437, 440 (2008) (upholding the three-drug lethal injection protocol on the grounds that neither the risk of improper administration of the first drug nor the failure to adopt more humane alternatives constitute a "wanton infliction of pain under the Eighth Amendment").

[139] *See* Whitley v. Albers, 475 U.S. 312, 321–322, 106 S. Ct. 1078, 1085, 89 L. Ed. 2d 251, 262 (1986) (holding that an incarcerated person's 8th Amendment rights were not violated even after a prison officer shot the incarcerated person in the leg in the course of a prison riot).

[130] *See* Del Raine v. Williford, 32 F.3d 1024, 1038–1042 (7th Cir. 1994) (finding that while rectal searches may inflict pain, if the official has a legitimate reason to conduct them, they do not violate the 8th Amendment); *see also* Gillis v. Litscher, 468 F.3d 488, 494 (7th Cir. 2006) (finding that a behavioral modification program imposed on an incarcerated person for breaking a rule may have violated his 8th Amendment rights if he could show that the prison officials disregarded a substantial risk of serious harm to him when they imposed it).

[131] Meriwether v. Faulkner, 821 F.2d 408, 411, 417 (7th Cir. 1987).

[132] Meriwether v. Faulkner, 821 F.2d 408, 417–418 (7th Cir. 1987).

[133] McRorie v. Shimoda, 795 F.2d 780, 781–783 (9th Cir. 1986).

The Seventh Circuit held this even though the doctor laughed before doing the search and guards held the incarcerated person down.[134] Similarly, the Ninth Circuit in *Somers v. Thurman* held that an incarcerated man did not state an Eighth Amendment claim based on allegations (statements) that female guards pointed and joked among themselves while observing him showering and while conducting a body cavity search of him.[135] However, the Ninth Circuit in *Dockery v. Bass* held that an incarcerated person may have an Eighth Amendment claim when officials strip-searched him twice, causing him pain from handcuff use and forcing a tube up his anus.[136]

4. DNA Testing

State or federal law can require incarcerated people to give DNA samples.[137] Forced DNA testing of people who are incarcerated generally does not violate the Fourth Amendment.[138] It is unclear if all incarcerated people can be forced to give DNA samples or if only incarcerated people convicted of certain types of crimes,[139] like sex offenses,[140] can be forced to do so. Some courts have found that laws requiring DNA sampling of all people convicted of felonies do not violate the Fourth Amendment because the state's interest is more important than the bodily intrusion.[141] See *JLM,* Chapter 11,

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[134] Isby v. Duckworth, No. 97-3705, 1999 U.S. App. LEXIS 7823, at *2–7 (7th Cir. Apr. 21, 1999) (*unpublished*).

[135] Somers v. Thurman, No. 96-55534, 1997 U.S. App. LEXIS 12272, at *25–26 (9th Cir. Mar. 25, 1997) (*unpublished*).

[136] Dockery v. Bass, No. 95-17250, 1997 U.S. App. LEXIS 35693, at *2, *7–8 (9th Cir. Dec. 17, 1997) (*unpublished*).

[137] *See, e.g.*, United States v. Weikert, 504 F.3d 1, 2–3 (1st Cir. 2007) (holding that requiring an incarcerated person on supervised release to give a blood sample did not violate the 4th Amendment); United States v. Kincade, 379 F.3d 813, 832, 839 (9th Cir. 2004) (holding that compulsory DNA profiling of specified federal offenders was reasonable under the totality of the circumstances, which included the probationer's reduced expectations of privacy, the minimal intrusion that occurs from blood sampling, and the significant societal interests furthered by the collection of DNA information from convicted offenders); Velasquez v. Woods, 329 F.3d 420, 421 (5th Cir. 2003) (*per curiam*) (noting that every circuit court which has considered whether statutes requiring collection of DNA samples from people convicted of felonies violate the 4th Amendment has held that they do not); State v. Martin, 955 A.2d 1144, 1145–1146, 184 Vt. 23, 27–28 (Vt. 2008) (upholding a state law requiring people convicted of nonviolent felonies to provide DNA samples).

[138] Groceman v. U.S. Dept. of Just., 354 F.3d 411, 413–414 (5th Cir. 2004) (*per curiam*) ("[A]lthough collection of DNA samples from incarcerated people implicates Fourth Amendment concerns, such collections are reasonable in light of an inmates diminished privacy rights, the minimal intrusion involved, and the legitimate government interest in using DNA to investigate crime. . . . [P]ersons incarcerated after conviction retain no constitutional privacy interest against their correct identification."); Padgett v. Donald, 401 F.3d 1273, 1275 (11th Cir. 2005) (finding that forced DNA sampling does not violate the 4th Amendment because incarcerated people's rights to privacy under the 4th Amendment are limited and the state has an interest in keeping track of people convicted of felonies).

[139] *See* Groceman v. U.S. Dept. of Just., 354 F.3d 411, 413 n.2 (*per curiam*) (5th Cir. 2004) (noting that in the Tenth and Second Circuits, DNA samples of incarcerated people must be taken in accordance with DNA collection statutes, which satisfies "the 'special needs' exception to the warrant requirement"; however, in the Fourth Circuit, incarcerated people have no 4th Amendment right to be free from DNA searches); Roe v. Marcotte, 193 F.3d 72, 81–82 (2d Cir. 1999) (upholding statute requiring people convicted of sex offenses to submit to collection of DNA samples, but disagreeing with argument that would have made the statute apply to people convicted of any offense). *But see* United States v. Amerson, 483 F.3d 73, 80–84, 89 (2d Cir. 2007) (holding DNA collection statute applied to non-violent probationers under the two-pronged special needs test used in the circuit when there was a strong governmental interest in rapidly and accurately solving crimes); Nicholas v. Goord, 430 F.3d 652, 655 n.2, 671 (2d Cir. 2005) (upholding statute requiring that people found guilty of assault, homicide, rape, incest, escape, attempted murder, kidnapping, arson, and burglary have their DNA collected and suggesting the statute may apply to all people convicted of felonies).

[140] *See, e.g.*, Boling v. Romer, 101 F.3d 1336, 1340 (10th Cir. 1996) (upholding a requirement that incarcerated people convicted of sexual assault provide DNA samples).

[141] United States v. Amerson, 483 F.3d 73, 80–84, 89 (2d Cir. 2007) (holding that under the two-pronged special needs test used in the circuit, the DNA collection statute applied to people on probation who had been convicted of non-violent offenses because there was a strong governmental interest and minimal intrusion into and invasion of the privacy of the people on probation); Padgett v. Ferrero, 294 F. Supp. 2d 1338, 1342 (N.D. Ga. 2003) (finding that felony convictions justified searches, including DNA sampling, thereby satisfying 4th Amendment's

"Using Post-Conviction DNA Testing to Attack Your Conviction or Sentence," and Chapter 36, "Special Considerations for Sex Offenders," for more information.

5. Statutory Privacy Rights

You may also have privacy rights under state statutes and regulations, in addition to your federal constitutional rights.[142] For example, New York State law requires prisons to give incarcerated people certain clothing. Prisons in New York must also follow specific procedures when giving incarcerated people urine tests or searching incarcerated people's religious items.

(a) Clothing

New York State law gives all incarcerated people the right to the same amount of "facility-issued clothing."[143] Look in your prison library for the New York DOCCS Directives (specific prison rules) for more information about clothing. Prison officials in New York *cannot* take clothing away as punishment.[144] But they can take clothing away if they think it is dangerous for you or for the prison by being a threat "to the safety, security or good order" of the facility.[145] If officials want to take away some clothing from you because they think it is dangerous for you to have, they must follow specific steps.[146] First, the chief administrative officer must put in writing that he approves a deprivation order, which is an order that takes away a specific item, privilege or service.[147] The order must include the reasons for the order.[148] The deprivation order must be reviewed within seven days.[149] If this review could affect your health, then the chief administrative officer must talk to the jail doctor or other qualified health staff, who must record in writing whether continuing the deprivation would compromise your health.[150] After every review, the chief administrative officer must put in writing whether the order will stop or continue and state the reasons for his decision.[151]

(b) Urine Tests

Forcing people to take urine tests or give samples of other bodily fluids is considered a "search" under the Fourth Amendment, and the procedures for urine tests are held to the same rules and

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requirement that the search be reasonable); United States v. Stegman, 295 F. Supp. 2d 542, 548–550 (D. Md. 2003) (finding that compelling a person to provide a DNA sample while on supervised release was not an unreasonable search or seizure).

[142] Incarcerated people should become familiar with the penal codes of their respective states, as well as the employee manual of their prisons, if possible. The employee manuals will tell you what procedures the guards must follow and may help you challenge the guards' behavior through internal prison grievance procedures.

[143] N.Y. COMP. CODES R. & REGS. tit. 9, § 7005.7 (2024). For men, this includes 1 shirt and 1 pair of pants. Women receive 1 shirt or blouse and 1 skirt, smock, dress, or pair of pants. Both men and women should receive 2 pairs of socks, 2 sets of underwear, 1 pair of shoes, and 1 sweater, sweatshirt, or jacket during cold weather. Incarcerated women are allowed to wear bras. N.Y. COMP. CODES R. & REGS. tit. 9, § 7005.7 (2024).

[144] *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 7075.5(a)–(b) (2024) (stating that prison officials cannot deny, restrict, or limit the provision of an essential service to an incarcerated person as a form of punishment and that the provision of an essential service to an incarcerated person can only be denied, restricted, or limited if providing it would threaten the safety or security of the facility or any individual); N.Y. COMP. CODES R. & REGS. tit. 9, § 7005.12 (2024) ("Any decision to deny, restrict or limit an inmate of any right, service, item or article, guaranteed an inmate by the provisions of this Part, shall be done in accordance with [N.Y. COMP. CODES R. & REGS. tit. 9, § 7075.5].").

[145] N.Y. COMP. CODES R. & REGS. tit. 9, §§ 7075.5(b), 7005.12 (2024).

[146] *See* N.Y. COMP. CODES R. & REGS. tit. 9, §§ 7075.5(b), 7005.12 (2024).

[147] N.Y. COMP. CODES R. & REGS. tit. 9, § 7075.5(b) (2024).

[148] N.Y. COMP. CODES R. & REGS. tit. 9, § 7075.5(c) (2024).

[149] N.Y. COMP. CODES R. & REGS. tit. 9, § 7075.5(c) (2024).

[150] N.Y. COMP. CODES R. & REGS. tit. 9, § 7075.5(c) (2024).

[151] N.Y. COMP. CODES R. & REGS. tit. 9, § 7075.5(c) (2024).

standards as other searches.[152] Prison officials may make incarcerated people give urine samples for drug testing either with reasonable cause or if the prison participates in a program designed to prevent selective enforcement of prison rules or harassment of incarcerated people (this means that prison officials may test you and other incarcerated people randomly).[153] New York State has regulations about privacy when you take a urinalysis test.[154] The rules have a specific procedure for urine tests. You will be pat frisked before giving the sample, and someone will watch you give the sample. The person who watches you must be from the security or medical staff, and the person has to be the same sex as you. You should be in a private place where no other incarcerated people or staff can see you.[155]

(c) Searches of Religious Items

In New York, religious items such as the medicine bag of a Native American incarcerated person can only be inspected in a way that respects its religious significance. However, a medicine bag may be scanned at any time with a metal or other electronic detector. If the prison official has a reason to believe that there may be contraband inside the medicine bag, the incarcerated person must hold the medicine bag open so that prison officials can look inside of it.[156] For more information, see *JLM*, Chapter 27, "Religious Freedom in Prison."

6. Departmental Directives and Privacy Rights

The New York DOCCS Directives have specific rules for each state prison. Look in your prison library for a copy of these directives. These directives have more rules for searches, which may be stricter than the court rules. For example, the directives say that only a primary care provider (PCP), like a medical doctor, can conduct body cavity searches.[157] The body cavity search must take place in an appropriate examining room. The official must use professional and hygienic (clean) techniques, and they must explain the procedure to you. The doctor must also give you a chance to give up contraband voluntarily. One corrections officer of your sex must be present to witness the exam.[158] These rules are meant to make sure that no one, including health officials, humiliates or harasses you.

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[152] Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 617, 109 S. Ct. 1402, 1413, 103 L. Ed. 639, 660 (1989) (holding that the Federal Railroad Administration's policies of drug testing by collecting and testing urine samples and samples of other bodily fluids are "searches" under the 4th Amendment).

[153] *See, e.g.*, Louis v. Dept. of Corr. Servs. of Neb., 437 F.3d 697, 700–701 (8th Cir. 2006) (holding that, in a 42 U.S.C. § 1983 action, prisons requiring urine tests do not need to allow incarcerated people to sign and seal their own urine specimens and do not have to conduct a confirmatory test where the test shows a positive result but the incarcerated person denies using drugs); Lucero v. Gunter, 17 F.3d 1347, 1350 (10th Cir. 1994) (upholding the random urine collection and testing of incarcerated people as a reasonable means of preventing the unauthorized use of narcotics); Forbes v. Trigg, 976 F.2d 308, 310, 314–315 (7th Cir. 1992) (upholding urinalysis of all incarcerated people in jobs that allowed them potential access to contraband from outsiders); Hurd v. Scribner, No. 06CV0412, 2007 U.S. Dist. LEXIS 32651, at *9, *15 (S.D. Cal. May 2, 2007) (*unpublished*) (upholding, in response to a habeas petition, discipline taken against an incarcerated person who refused a drug test); *see also* Thompson v. Souza, 111 F.3d 694, 702 (9th Cir. 1997) (noting that other courts have held that truly random urine tests are reasonable because they prevent correctional officials from harassing particular incarcerated people by subjecting them to repeated drug tests); Storms v. Coughlin, 600 F. Supp. 1214, 1226 (S.D.N.Y. 1984) (holding that the incarcerated people must be chosen for urine tests through a system of selection in which the incarcerated people to be tested are chosen blindly). *But see* Thompson v. Souza, 111 F.3d 694, 702–703 (9th Cir. 1997) (upholding nonrandom urine testing of a group of 124 incarcerated people).

[154] *See* N.Y. COMP. CODES R. & REGS. tit. 7, § 1020.4 (2024).

[155] *See* N.Y. COMP. CODES R. & REGS. tit. 7, § 1020.4 (2024) (stating the rules and procedure for urinalysis); *see also* State of New York, Department of Corrections and Community Supervision, Directive No. 4937, Urinalysis Testing § IV(D)(1)–(4) (2024).

[156] State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control of and Search for Contraband § IV(J) (2023).

[157] State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control of and Search for Contraband § IV(H)(4)(a) (2023).

[158] State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control of and Search for Contraband § IV(H)(4)(a) (2023).

If anyone does harass you, you may bring a complaint arguing that they violated the professional standards that are set out in the directives.

The New York Directives also say that when you are transferred from one DOCCS facility to another, you will be strip-frisked and given a metal detector search at the facility you are being transferred from, but you will not be strip-searched or strip-frisked at the facility you are going to. You may have to go through a metal detector search at the new facility, though. The same policy applies when you are transferred from one Special Housing Unit to another Special Housing Unit. However, whether you are being transferred to a new facility or a new Special Housing Unit, an officer may strip-search you at the receiving facility if an officer has "probable cause" to believe that you are carrying contraband.[159]

When you are strip-searched or strip-frisked, prison officials must make sure you have some privacy. In general, only the prison official doing the search should be there, although a supervisor may watch.[160] Other corrections officers should be present only if there are major disturbances or if it is likely that you will resist the search. Incarcerated people may be searched in groups if there is a major disturbance at the facility. The prison should limit traffic as much as possible where strip searches are conducted. Officers of the same sex as you must conduct your strip searches and strip frisks.[161]

A very important rule about strip searches in New York is that officers must always act professionally. They have to be aware of the sensitive nature of searches and must "conduct such searches in a manner least degrading to all involved."[162] Typically, if you cooperate in a non-body cavity search, the officer may not touch you, except to run fingers through your hair if necessary.[163] If you believe that a search is conducted improperly, you can use the New York Incarcerated Grievance Program or an Article 78 proceeding to seek a remedy.[164] If you believe the search also violated your constitutional rights, then you can use the legal remedies described in Part D of this Chapter. If you are incarcerated in another state, it is likely that there are similar regulations to protect your rights. For help finding the laws and regulations of the state where you are incarcerated, see *JLM*, Chapter 2, "Introduction to Legal Research."

7. Why You Should Not Resist an Illegal Body Search

If you are searched in a way that you believe is illegal or against a prison regulation, it is best to allow the search to take place. Prison officials can use force to make you obey orders, even if those orders may be illegal, so resisting is often not possible. Courts have held that incarcerated people must follow orders so that prison rules can be administered safely and in an orderly way.[165] Even if you believe

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[159] State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control of and Search for Contraband § IV(F)(2) (2023).

[160] State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control of and Search for Contraband § IV(G)(1)(a) (2023).

[161] State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control of and Search for Contraband § IV(G)(1)(b) (2023).

[162] State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control of and Search for Contraband § IV(G)(1)(c) (2023).

[163] State of New York, Department of Corrections and Community Supervision, Directive No. 4910, Control of and Search for Contraband § IV(G)(3)(a) (2023).

[164] For more information on incarcerated grievance procedures, see *JLM*, Chapter 15, "Incarcerated Grievance Procedures." For more information on Article 78 proceedings, see *JLM*, Chapter 22, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules."

[165] Griffin v. Comm'r of Pa. Prisons, No. 90-5284, 1991 U.S. Dist. LEXIS 17951, at *11 (E.D. Pa. Dec. 10, 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 incarcerated people follow orders."), *aff'd*, 961 F.2d 208 (3d Cir. 1992); *see also* Eccleston v. Oregon *ex rel.* Or. Dept. of Corr., 168 F. App'x 760, 761 (9th Cir. 2006) (*unpublished*) (finding that a prison official's use of a chemical agent on an incarcerated person who repeatedly refused to follow orders to leave his cell was not cruel and unusual punishment); Williams v. Delo, 49 F.3d 442, 446 (8th Cir. 1995) (finding that the incarcerated person's refusal to follow the orders of corrections officials posed a threat to institutional security).

that an order violates your constitutional rights, courts say that you do not have the right to resist the order.[166]

It is safest for you *not* to resist the prison official. This is because, if you resist, you will probably be disciplined and you could be injured. You can later file a lawsuit to help prevent future violations of your rights and to punish the official. Any disciplinary action taken against you for resisting the search will be added to your record, affecting your good-time credit and your chances of parole. If you resist a search and then bring a lawsuit, winning the suit may mean the court will clear your disciplinary record after finding the search violated prison rules.[167] However, that is not always the case. Resisting a search—even if it is obviously illegal—is likely to lead to a permanent mark on your disciplinary record, because courts rarely order a disciplinary record to be changed. A permanent mark for resisting an illegal search will probably never be cleared from your record.[168] Courts want incarcerated people to challenge violations of their rights in courts, instead of refusing to obey orders from prison officials.[169] Do not count on the courts to clear your record, especially if the order you disobey is not clearly against a prison's rules.

D. Legal Remedies

If you believe your rights have been violated, you **must** file an administrative grievance at your institution first.[170] For more information on grievance procedures, see Chapter 15 of the *JLM*, Chapter 15, "Incarcerated Grievance Procedures." If you do not go through the prison grievance process, you might lose your right to sue (and possibly your good-time credit).

If the grievance system does not help you, or if it does not help you enough, you can then file a lawsuit. The type of lawsuit available to you depends on where you are incarcerated:

- If you are incarcerated in *state* prison or a *local* jail, you can use 42 U.S.C. § 1983 (Section 1983).
    - If you are incarcerated in *New York*, you can also file petition under Article 78.
- If you are incarcerated in a *federal* prison, you can use what is called a *Bivens* action.

These options are described briefly below, but you should read other Chapters of the *JLM* for a detailed explanation of how to file each type of lawsuit. For information on Section 1983 and *Bivens*

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[166] Pressly v. Gregory, 831 F.2d 514, 518 n.3 (4th Cir. 1987) (citing Wright v. Bailey, 544 F.2d 737 (4th Cir. 1976) for the legal fact that you cannot resist arrest by stating that the arrest is illegal unless the illegality is clear at the time of the arrest); Jackson v. Allen, 376 F. Supp. 1393, 1394–1395 (E.D. Ark. 1974) (holding that, because of the discipline structure of prisons, incarcerated people do not have the right to resist an unconstitutional order or punishment unless resistance is necessary to prevent one's own permanent physical or mental damage or death). *But see* Purcell v. Pa. Dept. of Corr., No. 95-6720, 1998 U.S. Dist. LEXIS 105, at *26–27 (E.D. Pa. Jan. 9, 1998) (*unpublished*) (finding the incarcerated plaintiff could proceed with his action against prison officials, where he may have been injured because he followed an order that medical professionals previously led him to believe he did not need to obey).

[167] *See* Dunne v. Reid, 93 Misc. 2d 50, 51–52, 402 N.Y.S.2d 923, 924 (Sup. Ct. Dutchess County 1978) (ordering incarcerated person's disciplinary record from resisting search cleared after finding prison officials acted in violation of prison regulations when they tried to search the incarcerated person in front of other people, despite prison rules that said searches must respect incarcerated people's privacy).

[168] *See*, *e.g.*, Mahogany v. Stalder, 242 F. App'x 261, 263 (5th Cir. 2007) (*per curiam*) (*unpublished*) (dismissing incarcerated person's claim seeking restoration of good-time credits and removal of disciplinary proceedings from his record, despite allowing his § 1983 claim for "deprivation of civil rights" to proceed).

[169] *See* Rivera v. Smith, 63 N.Y.2d 501, 515, 472 N.E.2d 1015, 1022, 483 N.Y.S.2d 187, 194 (1984) ("[T]he recognition and enforcement even of constitutional rights may have to await resolution in administrative or judicial proceedings; self-help by the inmate cannot be recognized as an acceptable remedy."). *But see* Sanchez v. Scully, 143 Misc. 2d 889, 889–890, 542 N.Y.S.2d 920, 920 (Sup. Ct. Dutchess County 1989) (holding that, given the existence of unambiguous statutory language in support of incarcerated person's refusal to work in excess of eight hours per day, the record of the subsequent disciplinary proceeding should be expunged, or removed, from the person's record); Dunne v. Reid, 93 Misc. 2d 50, 51–52, 402 N.Y.S.2d 923, 924 (Sup. Ct. Dutchess County 1978) (finding a disciplinary action inappropriate where the incarcerated person resisted a search that violated the prison's own regulations).

[170] *See*, *e.g.*, Johnson v. Johnson, 385 F.3d 503, 515–523 (5th Cir. 2004) (describing in detail the requirement that an incarcerated person exhaust administrative remedies before filing a lawsuit).

actions, see *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law." For information on Article 78 petitions in New York, see *JLM*, Chapter 22, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules."

Section 1983 is a federal law that allows you to sue state officials who have violated your constitutional rights while acting "under color of state law," which means while acting with authority from the state.[171] You can sue federal officials in a similar suit, called a *Bivens* action.[172]

You can also use Section 1983 to sue local officials as long as you can show that they acted "under color of state law." But note that you can only sue municipalities (towns, cities, or counties) under 42 U.S.C. § 1983 if your injury happened because of an official municipal policy or custom.[173] To sue a city or a county, then, you will have to show that the "execution of [the] government's policy or custom . . . inflict[ed] the injury."[174] In other words, a lawsuit against a local government will only succeed if you can prove that your injury was a direct result of the local government's official express (written down or spoken) or implied policy.[175] Therefore, a local government is not at fault, or "liable," under Section 1983, "for an injury inflicted solely by its employees or agents" who were not following official local policy, even though the local officials may be individually liable under Section 1983.[176]

There have also been successful class actions challenging official municipal policies under 42 U.S.C. § 1983. Class actions are a type of lawsuit where many plaintiffs sue together for similar violations of their rights.[177] Most successful class action cases challenging prison search policies have been brought by non-violent, non-drug misdemeanor arrestees, not convicted incarcerated people.[178]

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[171] 42 U.S.C. § 1983.

[172] Incarcerated people can make constitutional claims against federal officials in federal court under 28 U.S.C. § 1331 by using *Bivens* actions. For more information on *Bivens* actions, see Section E(1) of *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law."

[173] *See*, *e.g.*, Williams v. Kaufman County, 352 F.3d 994, 1013–1014 (5th Cir. 2003) (holding that the municipality could be held liable for unlawful searches of detainees because the policy was authorized by the sheriff, the relevant policymaker).

[174] Irwin v. City of Hemet, 22 Cal. App. 4th 507, 525–527, 27 Cal. Rptr. 2d 433, 442–443 (Cal. Ct. App. 1994) (plaintiffs' allegation that the City's adoption of a policy or custom to not train its corrections officers in suicide screening and prevention caused their incarcerated family member to commit suicide was a factual issue that the lower court should have allowed to proceed to trial (citing Monell v. Dept. of Soc. Servs., 436 U.S. 658, 694, 98 S. Ct. 2018, 2037–2038, 56 L. Ed. 2d 611, 638 (1978))). For an example of such a municipal policy or custom, see Blihovde v. St. Croix County, 219 F.R.D. 607, 612–613 (W.D. Wis. 2003) (describing a county's strip-search policy, and concluding that the plaintiffs fairly alleged that the county-wide policy or custom of conducting strip searches could have been the cause of the plaintiff's injury).

[175] Blihovde v. St. Croix County, 219 F.R.D. 607, 618 (W.D. Wis. 2003) ("Even when there is no express policy, a municipality may be liable when there is a 'custom' of unconstitutional conduct." (citing Monell v. Dept. of Soc. Servs., 436 U.S. 658, 691, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611, 635 (1978))); *see also* Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 124–127 (2d Cir. 2004) (reviewing the law of municipal liability in a damages suit for excessive force).

[176] 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)).

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

[178] *See*, *e.g.*, Bynum v. District of Columbia, 217 F.R.D. 43, 45–50 (D.D.C. 2003) (certifying a § 1983 class action claiming 4th and 5th Amendment violations, where plaintiffs challenged a prison policy of conducting strip searches of incarcerated people returning from court with orders for their release, without any suspicion). *Bynum* later settled for $12 million and the District of Columbia agreed to "no longer strip search [detainees] who are entitled to release." Bynum v. Gov't of the Dist. of Columbia, 384 F. Supp. 2d 342, 358–359 (D.D.C. 2005); *see also* Tardiff v. Knox County, 365 F.3d 1, 5–7 (1st Cir. 2004) (affirming class certification of people arrested for non-violent, non-drug offenses who challenged policy of blanket, routine strip searches without reasonable suspicion); Blihovde v. St. Croix County, 219 F.R.D. 607, 612–621 (W.D. Wis. 2003) (affirming amended class definition in a § 1983 class action, alleging plaintiffs, who were all arrested for non-drug, non-violent misdemeanors, were subjected to strip searches without reasonable suspicion according to a county prison policy in violation of the 4th and 14th Amendments); Nilsen v. York County, 382 F. Supp. 2d 206, 209–213 (D. Me. 2005) (approving a $3.3 million settlement in a § 1983 class action over strip searches of non-drug, non-weapon, and non-violent arrestees

It is important to remember that different laws apply in state and federal prisons. If you are in a federal prison, it does not matter what state the prison is in. Federal prisons only use federal law. If you are in a state prison, you can use both state and federal laws. But, remember that each state creates its own laws. You must research the laws of your particular state and learn how incarcerated people file suits in your state's courts. Federal constitutional rights are protected whether you are in state or federal prison, but the way you present your case—what legal claims you make and how you make them—will differ.

E. Conclusion

In conclusion, although your rights against body searches and involuntary exposure of your body are substantially limited in prison, you still have important protections under the Fourth Amendment, Eighth Amendment, and certain state statutes and regulations. Whether your rights have been violated will depend largely on how reasonable a search was or how reasonable the policy leading to the involuntary exposure was. It will also depend on what kind of search or exposure happened. The more cases you can find with facts similar to your own situation where the prison was found to have violated the law, the better your chances of showing that your rights were violated.

at county jail where plaintiffs alleged that the strip searches were conducted pursuant to county jail policy without individualized reasonable suspicion, in violation of the 4th Amendment; the settlement also required the county to maintain a written policy prohibiting the challenged strip searches).