

CHAPTER 41

SPECIAL ISSUES OF INCARCERATED WOMEN*

A. Introduction

Men greatly outnumber women in American prisons and jails. However, women's incarceration has grown at twice the pace of men's incarceration in recent decades.¹ As of 2024, 190,600 women and girls are incarcerated in the United States.² Rates of incarceration for women vary significantly by region. Idaho has the highest female imprisonment rate at 127 per 100,000 women, while Massachusetts has the lowest at 6 per 100,000 women.³

There are some important differences between incarcerated men and women. Jails play a bigger role for incarcerated women than they do for men. While state prison systems hold twice as many people as jails, almost half of all incarcerated women are in local jails, and 60% of those women are incarcerated pre-trial and have not been convicted of a crime.⁴ Another difference is the type of crimes women are incarcerated for. Women are more likely than men to be in prison for drug and property offenses, while men are more likely to be in prison for violent crimes. In 2020, 25% of women in state prisons had been sentenced to drug-related offenses, compared to just 12% of the state male prison population.⁵ Furthermore, incarcerated women are three to four times more likely than incarcerated men to have experienced abuse, either as a child or as an adult.⁶ And, once incarcerated, women are more likely to experience mental health problems and serious psychological distress than men.⁷

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

This Chapter is divided into five parts. **Part B** discusses equal protection in programs and services. If you believe you do not have access to the same programs or services available to incarcerated men, this Part tells you about two different ways you can challenge that in court. **Part C** focuses on medical

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¹ Aleks Kajstura & Wendy Sawyer, *Women's Mass Incarceration: The Whole Pie 2024*, PRISON Policy INITIATIVE (Oct. 29, 2019), available at <https://www.prisonpolicy.org/reports/pie2024women.html> (last visited Mar. 26, 2024).

² Aleks Kajstura & Wendy Sawyer, *Women's Mass Incarceration: The Whole Pie 2024*, PRISON Policy INITIATIVE (Oct. 29, 2019), available at <https://www.prisonpolicy.org/reports/pie2024women.html> (last visited Mar. 26, 2024).

³ Niki Monazzam et al., *Fact Sheet: Incarcerated Women and Girls*, SENTENCING PROJECT, available at <https://www.sentencingproject.org/wp-content/uploads/2020/11/Incarcerated-Women-and-Girls.pdf> (last updated Mar. 2023) (last visited Oct. 5, 2023).

⁴ Aleks Kajstura & Wendy Sawyer, *Women's Mass Incarceration: The Whole Pie 2024*, PRISON Policy INITIATIVE (Oct. 29, 2019), available at <https://www.prisonpolicy.org/reports/pie2024women.html> (last visited Mar. 26, 2024).

⁵ Niki Monazzam et al., *Fact Sheet: Incarcerated Women and Girls*, SENT'G PROJECT, available at <https://www.sentencingproject.org/wp-content/uploads/2020/11/Incarcerated-Women-and-Girls.pdf> (last updated Mar. 2023) (last visited Oct. 5, 2023).

⁶ See *Words From Prison – Did You Know...?*, AMERICAN CIVIL LIBERTIES UNION (Jun. 12, 2006), available at <https://www.aclu.org/other/words-prison-did-you-know> (last visited Mar. 28, 2024) (citing Am. C.L. Union, Brennan Ctr. & Break the Chains, *Caught in the Net: The Impact of Drug Policies on Women and Families* (Mar. 15, 2005), available at <https://www.aclu.org/caught-net-impact-drug-policies-women-and-families> (last visited Oct. 5, 2023)).

⁷ Aleks Kajstura & Wendy Sawyer, *Women's Mass Incarceration: The Whole Pie 2024*, PRISON Policy INITIATIVE (Oct. 29, 2019), available at <https://www.prisonpolicy.org/reports/pie2024women.html> (last visited Mar. 26, 2024).

care for incarcerated women and is a supplement to *JLM*, Chapter 23, “Your Right to Adequate Medical Care.” This Part discusses the right to basic gynecological care, abortions, treatment for HIV, and resources and treatment for pregnant women. Please see *JLM*, Chapter 33, “Rights of Incarcerated Parents,” for more information about the rights of incarcerated parents. **Part D** focuses on privacy concerns, searches, sexual harassment, sexual assault, and rape. Your right to be free from assaults and illegal body searches is also described in *JLM*, Chapter 24, “Your Right to be Free from Assault by Prison Guards and Other Incarcerated People,” and Chapter 25, “Your Right to Be Free from Illegal Body Searches.” **Part E** discusses the growing popularity of alternative sentencing options, such as drug treatment programs. It explains why programs designed for men may not be as effective for women. Finally, **Part F** defines a form of sentencing adjustment called “clemency.” It includes a description of clemency proceedings. It also explains how you can petition for clemency as a battered (abused) woman. While Part F focuses on clemency for battered women, any person petitioning for clemency can use these procedures. Other possibilities for release are discussed in *JLM*, Chapter 39, “Temporary Release Programs in New York,” Chapter 35, “Getting out Early: Conditional & Early Release,” and Chapter 32, “Parole.”

B. Equal Protection and Programming

Many prison programs fail to address issues that are specific to incarcerated women because the majority of the prison population is usually male. However, being smaller in number is not a reason to be discriminated against. In many situations, incarcerated women have the right to seek programs and services like the ones offered to men.

If you feel that you have been unfairly discriminated against because of the programs and services available to you, there are two different types of legal action you can take. Which type you should use depends on the type of discrimination you are experiencing. If the discrimination has to do with vocational (job training) or educational programs offered in prison, you should bring a claim under a federal law called Title IX (pronounced “Title Nine”) of the Education Amendments Act of 1972.⁸ For all other cases, you can bring a claim under the Equal Protection Clause of the U.S. Constitution and the Equal Protection Clause in your state’s constitution.⁹ First, this Part will discuss equal protection claims. Then, it will discuss Title IX claims.

1. The Equal Protection Clause

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

1. Groups of incarcerated men and women are “similarly situated;”¹⁰

⁸ 20 U.S.C. § 1681.

⁹ *See, e.g.*, *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1043–1044 (S.D.N.Y. 1995) (holding that providing a special unit for deaf and hearing-impaired men but not a similar unit for deaf and hearing-impaired women violated equal protection); *West v. Va Dept. of Corr.*, 847 F. Supp. 402, 407–409 (W.D. Va. 1994) (holding that providing boot camp programs for men but not for women violated equal protection); *Casey v. Lewis*, 834 F. Supp. 1477, 1550–1552 (D. Ariz. 1993) (holding that inequalities in mental health treatment available to men and women violated equal protection); *McCoy v. Nev. Dept. of Prisons*, 776 F. Supp. 521, 523–524 (D. Nev. 1991) (plaintiffs showed enough evidence that their equal protection rights were violated where incarcerated men had access to a wider variety of recreational and educational programs than women, including training for larger a range of careers); *Canterino v. Wilson*, 546 F. Supp. 174, 210–212 (W.D. Ky. 1982), vacated and remanded on other grounds, 869 F.2d 948 (6th Cir. 1989) (failure to provide incarcerated women with parity in the offering of institutional jobs and vocational training programs violated equal protection).

¹⁰ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313, 320 (1985) (“The Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.”). This United States Supreme Court case involved zoning ordinances for a house for the mentally ill. The zoning ordinances were found to violate equal protection. The test from this

2. The groups are treated differently on the basis of gender; and
3. The difference in treatment is not “substantially related” to a legitimate government objective.¹¹

“Similarly situated” means that two groups share common features or are the same in all major ways *except for* their gender.¹² Courts have held that groups of incarcerated men and women are similarly situated in some circumstances.¹³ In other cases, however, courts have decided that incarcerated men and women are not similarly situated. Some of the reasons for this include the number of incarcerated people in their prison, the lengths of their sentences, and differences in security classifications.¹⁴ If you are able to show that your group is similarly situated to a group of incarcerated men, the next step is to look at the type of different treatment you receive. Incarcerated men and women do not need to be treated identically. The Constitution only requires that your treatment be “substantially equivalent” or that incarcerated men and women receive “parity” of treatment.¹⁵ In other words, you need to show that the difference in treatment that you are challenging is meaningful. For example, one court held that small differences in the grooming accessories made available to incarcerated men and women were not significant enough to amount to a constitutional violation.¹⁶

The last step is to look at the reason for the different treatment. Prisons are actually allowed to discriminate between similarly situated incarcerated men and women. They can do this if the different treatment is “substantially related” to important prison goals. These goals may include safety and security.¹⁷ For example, the Third Circuit found that a county jail’s policy of serving hot meals to incarcerated women in a restricted housing unit (RHU) while serving cold, bagged meals to incarcerated men in the RHU was “rationally connected” to a legitimate and neutral government objective.¹⁸ Before the policy, the jail gave hot meals to men in the RHU, but the men began to use the trays and utensils as weapons. The jail did not have the same problem with women in the RHU.¹⁹

case is used in cases involving equal protection challenges on the basis of gender in prisons. *See, e.g.,* *Betts v. McCaughy*, 827 F. Supp. 1400, 1405 (W.D. Wis. 1993); *McCoy v. Nev. Dep’t of Prisons*, 776 F. Supp. 521, 523 (D. Nev. 1991).

¹¹ *Roubideaux v. N.D. Dep’t of Corr. & Rehab.*, 570 F.3d 966, 974–975 (8th Cir. 2009).

¹² *Betts v. McCaughy*, 827 F. Supp. 1400, 1405 (W.D. Wis. 1993) *aff’d*, 19 F.3d 21 (7th Cir. 1994).

¹³ *See* *Sassman v. Brown*, 99 F. Supp. 3d 1223, 1241 (E.D. Cal. 2015) (incarcerated men who otherwise met the criteria for California’s Alternative Custody Program were similarly situated to the incarcerated women who met the criteria); *Woods v. Horton*, 84 Cal. Rptr. 3d 332, 344 (Cal. Ct. App. 2008) (incarcerated men who had experienced significant levels of domestic violence as victims were similarly situated to women for the purpose of the need for domestic violence programs).

¹⁴ *See* *Klinger v. Dept of Corr.*, 31 F.3d 727, 731–732 (8th Cir. 1994) (women incarcerated at an all-female prison were not similarly situated to men incarcerated at an all-male facility because of the differences in the sizes of the institutions, differences in the length of incarceration, and differences in security classification); *Pargo v. Elliott*, 894 F. Supp. 1243, 1261 (S.D. Iowa 1995) (incarcerated men and women were not similarly situated for the purposes of security and programming where the men were housed in different facilities by security classification and the women were housed together, served shorter sentences, and had special characteristics).

¹⁵ *Betts v. McCaughy*, 827 F. Supp. 1400, 1406 (W.D. Wis. 1993), *aff’d*, 19 F.3d 21 (7th Cir. 1994); *McCoy v. Nev. Dept. of Prisons*, 776 F. Supp. 521, 523 (D. Nev. 1991) (“courts have required that female prisoners be treated ‘in parity’ with male prisoners.”).

¹⁶ *Betts v. McCaughy*, 827 F. Supp. 1400, 1406 (W.D. Wis. 1993), *aff’d*, 19 F.3d 21 (7th Cir. 1994).

¹⁷ *Roubideaux v. N.D. Dep’t of Corr. & Rehab.*, 570 F.3d 966, 974–975 (8th Cir. 2009).

¹⁸ *Mathis v. Monza*, 530 F. App’x 124, 127–128 (3d Cir. 2013).

¹⁹ *Mathis v. Monza*, 530 F. App’x 124, 127–128 (3d Cir. 2013); *see also* *Roubideaux v. N.D. Dept of Corr. & Rehab.*, 570 F.3d 966, 974–975 (8th Cir. 2009) (incarcerated women challenged a statute under which, when there was insufficient space in state prisons, women were placed in county jails with limited prison programming, but men were not placed in those jails. The Court held that the statute was substantially related to the important governmental interest in providing adequate segregated housing for incarcerated women); *Davie v. Wingard*, 958 F. Supp. 1244, 1253 (S.D. Ohio 1997) (Differences in regulations governing hair length and styles for incarcerated men and women in the state prison system were justified by the much lower incidence of contraband concealment, escape, gang participation, and violence by incarcerated women compared to male prison population. Therefore,

Based on those facts, the court held the jail's decision to only serve hot meals to women was "rationally connected" to the legitimate government interest in safety and security.

For more information on how to make a claim under the Equal Protection Clause, read *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law," Part B(2)(c), "Fourteenth Amendment Claims: The Equal Protection Clause."

2. Title IX

If you feel that your institution does not provide the same vocational and educational programs that are available in the men's prisons, you can also bring a discrimination claim under Title IX of the Education Amendments of 1972.²⁰ Title IX is a federal law that prohibits federally-funded educational programs and activities from discriminating on the basis of sex. Specifically, the law says that no one should, "on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination" in educational activities or programs that receive money from the federal government.²¹ For example, if you know that the men's prison has a college program, but the women's prison does not, you might have a Title IX claim. Similarly, if you are aware that the men's prison has an athletics or sports program, but the women's prison does not, you might have a Title IX claim.

Title IX claims can sometimes be easier to win than Equal Protection claims. One reason for this is that in Title IX claims, you do not have to show that the two groups are "similarly situated." Courts have found that federal law already assumes that male and female participants in federally funded educational programs are similarly situated.²² Thus, they are entitled to the same opportunities and programs. Also, courts have held that Title IX holds prisons to a higher standard than the one required by the Equal Protection Clause. Under the Equal Protection Clause, prisons must treat similarly-situated incarcerated people with "parity" (discussed above), while Title IX requires "equality."²³

For Title IX claims, courts consider multiple factors when deciding whether the discrimination is legal. Whether the discrimination is "reasonably related" to a legitimate prison interest is only one of the factors courts consider when deciding whether it is legal.²⁴ Other factors include whether the prison has a legitimate security interest in providing very different educational opportunities to men than to women, as well as cost and management concerns.²⁵

For example, in one case, incarcerated women sued their prison because they could only choose from two vocational classes, while incarcerated men could choose from twelve. The prison officials argued that the difference in classes offered was due to a "legitimate penological interest" (a justifiable interest of the prison) because there were more people in the men's prison than there were in the women's prison. The court said that this by itself did not prevent the women's claim.²⁶ The court decided that the incarcerated women were entitled to equal opportunities to the incarcerated men. Equal opportunity was not defined as being entitled to the same number of classes. However, it was decided that women are entitled to the same diversity of classes as well as access to some of the classes available to men.²⁷

the different treatment was substantially related to the goal of promoting prison safety, security, and discipline.). *But see* *Sassman v. Brown*, 99 F. Supp. 3d 1223, 1243–1244 (E.D. Cal. 2015) (Excluding men from an early release program was *not* substantially related to the government interest of reducing recidivism for women because the state did not show why excluding men from the program was necessary to achieve this goal).

²⁰ 20 U.S.C. § 1681.

²¹ 20 U.S.C. § 1681(a).

²² *See* *Klinger v. Dep't of Corr.*, 107 F.3d 609, 614 (8th Cir. 1997).

²³ *Jeldness v. Pearce*, 30 F.3d 1220, 1228 (9th Cir. 1984).

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

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

²⁶ *Jeldness v. Pearce*, 30 F.3d 1220, 1224, 1230–1231 (9th Cir. 1984).

²⁷ *Jeldness v. Pearce*, 30 F.3d 1220, 1229 (9th Cir. 1984).

C. Adequate Medical Care

Both incarcerated men and women have the right to adequate medical care, as explained in *JLM*, Chapter 23, “Your Right to Adequate Medical Care.” This Part addresses medical needs specific to incarcerated women. Therefore, you should be sure to read Chapter 23 for any concerns you have regarding your right to medical care that may be relevant to both men and women.

Incarcerated women report suffering from physical problems, mental health problems, and disabilities at higher rates than men.²⁸ In a 2024 study, 76% of incarcerated women reported a past or current mental health problem, but only 43% received any professional mental health care since becoming incarcerated.²⁹ The prison environment does not always take into account women’s specific health needs. For example, prisons often do not provide accessible hygiene products during menstruation, adequate nutrition for pregnant women, or specialized care for women who are infected with diseases like HIV/AIDS.³⁰

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

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

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

3. Eighth Amendment Claim for Adequate Medical Care

You have a federal right under the Eighth Amendment to receive adequate medical care for your serious medical needs.³² For information on bringing a claim that your Eighth Amendment rights were

²⁸ Aleks Kajstura & Wendy Sawyer, *Women’s Mass Incarceration: The Whole Pie 2024*, PRISON Policy INITIATIVE (Oct. 29, 2019), available at <https://www.prisonpolicy.org/reports/pie2024women.html> (last visited Apr. 10, 2024).

²⁹ Aleks Kajstura & Wendy Sawyer, *Women’s Mass Incarceration: The Whole Pie 2024*, PRISON Policy INITIATIVE (Oct. 29, 2019), available at <https://www.prisonpolicy.org/reports/pie2024women.html> (last visited Apr. 10, 2024).

³⁰ U.N. OFFICE OF DRUGS & CRIME [UNODC] & WORLD HEALTH ORG. [WHO] REG’L OFFICE FOR EUROPE, WOMEN’S HEALTH IN PRISON: CORRECTING GENDER INEQUITIES IN PRISON HEALTH 21 (2009), available at https://www.unodc.org/documents/hiv-aids/WHO_EURO_UNODC_2009_Womens_health_in_prison_correcting_gender_inequity-EN.pdf (last visited Oct. 8, 2023).

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

³² The main case in this area is *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260

violated, see *JLM*, Chapter 16, “Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law.” Generally, to make an Eighth Amendment claim, you must show that:

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

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

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

Incarcerated women who are HIV-positive are entitled to additional gynecological care. In the lawsuit described in the previous paragraph, Bedford Hills was required to provide its incarcerated women with improved services. These services included access to physicians who were knowledgeable about the treatment of HIV/AIDS and more frequent gynecological examinations for incarcerated

(1976), in which the Supreme Court first held that deliberate indifference to the serious medical needs of an incarcerated person violates the Eighth Amendment. The Court in that case said that deliberate indifference to the serious medical needs of incarcerated people constitutes “the unnecessary and wanton infliction of pain,” or cruel and unusual punishment, which is prohibited by the Eighth Amendment.

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

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

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

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

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

³⁸ *Todaro v. Ward*, 431 F. Supp. 1129, 1131 (S.D.N.Y. 1977).

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

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

people with HIV/AIDS.⁴¹ In New York, DOCCS has a written policy on Pap smears for women with HIV. It requires that HIV-positive women have Pap tests every six months, no matter what the results are.⁴² In a report on reproductive justice in prisons, the Correctional Association of New York noted that the DOCCS policy on this issue differs from community standards.⁴³ According to the report, community standards require that HIV-positive women should have two Pap tests, six months apart, for the first year after their diagnosis. These tests should be followed by annual tests if the results are normal. They should be followed by tests at least every six months if they are not. DOCCS' written policy also does not specify that HIV-positive women with abnormal Pap smear results should be referred for a colposcopy (a cervical exam) to rule out more serious cervical disease.⁴⁴ For more information regarding your legal rights about HIV/AIDS in prison, see *JLM*, Chapter 26, "Infectious Diseases: AIDS, Hepatitis, Tuberculosis, MRSA, and COVID-19 in Prisons."

Although the Eighth Amendment requires you to show "deliberate indifference," state tort law often only requires you to show that the doctor or prison official was *negligent*.⁴⁵ Negligent medical care means that the care is below the standard that a reasonable medical provider would give. For help on how to research the specific requirement in your state, consult *JLM*, Chapter 2, "Introduction to Legal Research."

4. Abortion

Abortion law changed significantly in 2022 when the Supreme Court decided the case *Dobbs v. Jackson Women's Health Organization*.⁴⁶ Before *Dobbs* was decided, women had a constitutional right to choose whether to have an abortion under a 1973 Supreme Court decision called *Roe v. Wade*.⁴⁷ Post-*Dobbs*, *Roe* is now overruled, and the right to have an abortion is no longer protected by the U.S. Constitution.⁴⁸ This means that an individual's right to have an abortion now depends entirely on the laws of the state they are in. States may enact laws that restrict access to abortions if the restriction serves a "legitimate state interest," including preserving prenatal (pre-birth) life.⁴⁹ A state can even

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

⁴² Women in Prison Project, Correctional Association of N.Y., *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* 165, 219 (Feb. 2015), available at <https://static.prisonpolicy.org/scans/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf> (last visited Apr. 10, 2024).

⁴³ Women in Prison Project, Correctional Association of N.Y., *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* 165 (Feb. 2015), available at <https://static.prisonpolicy.org/scans/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf> (last visited Apr. 10, 2024).

⁴⁴ Women in Prison Project, Correctional Association of N.Y., *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* 165, 219 (Feb. 2015), available at <https://static.prisonpolicy.org/scans/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf> (last visited Apr. 10, 2024).

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

⁴⁶ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022). *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2279, 213 L. Ed. 2d 545, 600 (2022) (holding that the U.S. Constitution "does not confer a right to abortion").

⁴⁷ *Roe v. Wade*, 410 U.S. 113, 154, 93 S. Ct. 705, 727, 35 L. Ed. 2d 147, 178 (1973) (holding that the constitutional right to privacy includes the decision whether to have an abortion), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022).

⁴⁸ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2279, L. Ed. 2d 545, 600 (2022) (overruling *Roe v. Wade* and holding that the U.S. Constitution "does not confer a right to abortion").

⁴⁹ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284, L. Ed. 2d 545, 605–606 (2022) (holding that state laws regulating abortion are entitled to strong presumptions of validity and "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests").

enact a restriction that bans abortion completely.⁵⁰ Because *Dobbs* is a recent ruling, the future of abortion rights in some states is still uncertain. It is *extremely* important for you to check whether any laws or regulations referenced in this Subsection have changed since this edition of the *JLM* was published.

If you are pregnant and incarcerated in federal prison, there are still federal regulations in place that protect your right to have an abortion.⁵¹ These federal regulations require that prison officials offer you medical, religious, and social counseling before you have an abortion.⁵² You may accept or decline this counseling, and officials should allow you to make the final decision on whether or not to have an abortion.⁵³ Under current Bureau of Prisons policy, a federal prison must pay for all costs related to your abortion procedure if your pregnancy is caused by incest or rape or if your life would be endangered if you carried the pregnancy to term.⁵⁴ If your situation does not fall into one of these three categories, the prison is not required to help you cover any of the related costs.⁵⁵ Again, it is important to check whether these federal regulations and policies are still in place.

If you are pregnant and incarcerated in state prison, your rights will entirely depend on the abortion laws in your state. Appendix B of this Chapter includes a table of abortion access laws in each state as of May 2024. In New York, abortions are allowed when a doctor reasonably believes the fetus is not viable (not capable of surviving or developing), when the abortion is necessary to protect the mother's life or health, or when the abortion occurs in the first twenty-four weeks of pregnancy.⁵⁶ Medical professionals in New York must inform incarcerated pregnant women of their right to abortion services.⁵⁷

Some states that have not enacted post-*Dobbs* abortion restrictions, like California and New York, have laws that say that women who are incarcerated have the same right to an abortion as any other woman in the state.⁵⁸ In other states, there may be additional restrictions on incarcerated people seeking abortions. Post-*Dobbs* courts have not explicitly addressed whether the level of abortion access, if any, generally available under state law must also be made available to incarcerated women. The broad language of *Dobbs*, however, will probably leave each state to decide this question for itself.⁵⁹ You should look at your state laws and prison regulations, and remember that the laws are quickly changing.

⁵⁰ *Dobbs v. Jackson Women's Health Org.*, 143 S. Ct. 2228, 2284, L. Ed. 2d 545, 606 (2022) (holding that states may constitutionally "regulat[e] or prohibit[]" abortion).

⁵¹ 28 C.F.R. § 551.23(a) (2023) ("The [incarcerated person] has the responsibility to decide either to have an abortion or to bear the child.").

⁵² 28 C.F.R. § 551.23(b) (2023).

⁵³ 28 C.F.R. § 551.23(a)–(b) (2023).

⁵⁴ BUREAU OF PRISONS, P.S. 5200.07 CN-1, FEMALE OFFENDER MANUAL (2022) ("The Bureau assumes all costs associated with the abortion procedure only when the life of the mother would be endangered if the fetus is carried to term, or in the case of rape or incest.").

⁵⁵ BUREAU OF PRISONS, P.S. 5200.07 CN-1, FEMALE OFFENDER MANUAL (2022) ("In all cases [where the pregnancy does not endanger the mother's life or is not caused by rape or incest] non-Bureau funds must be used to pay for any abortion procedure, or else the planned abortion may not be performed.").

⁵⁶ N.Y. PUBLIC HEALTH LAW § 2599-bb (McKinney 2019).

⁵⁷ N.Y. CORRECTIONAL LAW § 611(4) (McKinney 2022).

⁵⁸ CAL. PENAL CODE § 4028(a) (West 2011); N.Y. COMP. CODES R. & REGS. tit. 14, § 27.6(c) (2020).

⁵⁹ *Dobbs v. Jackson Women's Health Org.*, 143 S. Ct. 2228, 2284, L. Ed. 2d 545, 606 (2022) (delegating the regulation of abortion to the states). *See also Jailed and Pregnant: What the Roe Repeal Means for Incarcerated People* (2022), JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH *available at* <https://publichealth.jhu.edu/2022/abortion-care-for-incarcerated-people-after-dobbs> (last visited Oct. 5, 2023) (discussing the absence of a legal solution for incarcerated individuals in states that prohibit abortion).

5. Pregnancy

Many women experience pregnancy while incarcerated, including 4% of women in state prisons, 3% of women in federal prisons, and about 5% of women in jails nationwide.⁶⁰ In New York State, DOCCS requires incarcerated women to take pregnancy tests when they first enter prison and when they are removed from a work release program. You can also ask for a pregnancy test at any other time during your incarceration.⁶¹

In New York State, a pregnant incarcerated person has the right to complete and thorough prenatal care, which includes medical examinations, HIV education, and advice about exercise, safety, and nutrition.⁶² Pregnant incarcerated people in New York are housed at Taconic Correctional Facility and Bedford Hills Correctional Facility. One report found that both facilities generally provide pregnant incarcerated people with access to adequate prenatal care, including prenatal education and vitamins. However, the report also noted problems, including long wait times for appointments, insufficient food, and inadequate dental care for pregnant women.⁶³ In New York state prisons, pregnant incarcerated people are not to be placed in Special Housing Units other than in exceptional circumstances.⁶⁴

Shortly before she is about to give birth, an incarcerated woman should be moved from prison to a hospital, institution, or clinic and provided with comfortable accommodations, maintenance, and medical care.⁶⁵ However, 11 out of 18 respondents in a survey by the Correctional Association of New York reported that nurses initially dismissed their symptoms of labor. These dismissals resulted in delays in obtaining medical care during labor.⁶⁶ A pregnant incarcerated person will be returned to prison or jail as soon after the birth of her child as the state of her health permits.⁶⁷ Bedford Hills is currently the only New York state prison with a nursery program. The program allows women who meet certain criteria to live in a special unit with their babies for up to one year or up to 18 months if the mother will be paroled within that period.⁶⁸

Federal prisons and most state prisons ban the use of shackles or leg irons on pregnant women while being transported to the hospital or during labor. New York has an anti-shackling law that bans the use of any restraints on incarcerated women during transportation to a hospital, throughout labor, delivery, and recovery after giving birth, other than in exceptional circumstances.⁶⁹ Despite these protections, however, news reports and other surveys have indicated that the rules are not being

⁶⁰ *Pregnancy in Prison Statistics (PIPS) Project*, ADVOC. & RES. ON REPROD. WELLNESS OF INCARCERATED PEOPLE (2016–2017), available at <https://arrwip.org/projects/pregnancy-in-prison-statistics-pips-project/> (last visited Oct 8, 2023).

⁶¹ Tamar Kraft-Stolar, *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons*, WOMEN IN PRISON PROJECT, CORRECTIONAL ASSOCIATION OF N.Y., 88 (Feb. 2015), available at <https://static.prisonpolicy.org/scans/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf> (last visited Apr. 9, 2024).

⁶² N.Y. COMP. CODE R. & REGS. tit. 9, § 7651.17(a) (2023).

⁶³ Tamar Kraft-Stolar, *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons*, WOMEN IN PRISON PROJECT, CORRECTIONAL ASSOCIATION OF N.Y. YORK, 97 (Feb. 2015), available at <https://static.prisonpolicy.org/scans/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf> (last visited Feb. 16, 2020).

⁶⁴ *NYCLU Lawsuit Secures Historic Reforms to Solitary Confinement*, N.Y. C.L. UNION (Feb. 19, 2014), available at <http://www.nyclu.org/news/nyclu-lawsuit-secures-historic-reforms-solitary-confinement> (last visited Apr. 9, 2024).

⁶⁵ N.Y. CORRECT. LAW § 611(1) (McKinney 2014).

⁶⁶ Tamar Kraft-Stolar, *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons*, WOMEN IN PRISON PROJECT, CORRECTIONAL ASSOCIATION OF N.Y., 110 (Feb. 2015), available at <https://static.prisonpolicy.org/scans/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf> (last visited Feb. 16, 2020).

⁶⁷ N.Y. CORRECT. LAW § 611(1) (McKinney 2014).

⁶⁸ N.Y. CORRECT. LAW § 611(1)–(2) (McKinney 2014).

⁶⁹ N.Y. CORRECT. LAW § 611(1) (McKinney 2014).

properly enforced. One report by the Correctional Association of New York found that 23 of the 27 women interviewed who had given birth between 2009 and 2013 had been shackled, in violation of the law.⁷⁰ A law passed in December 2015 extended the protection to all transportation throughout a woman's pregnancy and for eight weeks after the woman gives birth, other than in exceptional circumstances.⁷¹ The law also prohibits a correctional officer from being present during the birth unless requested by medical staff or the mother.⁷²

The following table reflects the shackling laws in all fifty states and the District of Columbia (D.C.) as of January 24:⁷³

Restrictions	States
Restricts restraints throughout pregnancy, labor, delivery, postpartum recovery, and transportation to a medical facility	California, Colorado, Connecticut, Illinois, Maine, Maryland, Minnesota, Nebraska, New Hampshire, New York, Ohio, Oklahoma, South Carolina, Utah, Tennessee (15 states)
Restricts restraints throughout labor and delivery	Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, D.C., Florida, Georgia, Hawaii, Idaho*, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas*, Utah, Vermont, Virginia, Washington, West Virginia (41 states and D.C.) <i>* Only restricts restraints during labor and delivery</i>
Gives medical personnel the authority to remove restraints	Arkansas, Arizona, California, Connecticut, Delaware, D.C., Hawaii, Idaho, Illinois, Louisiana, Maine, Maryland, Massachusetts, Missouri, Nebraska, New Hampshire, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Washington, West Virginia (24 states and D.C.)
Requires custody personnel to submit written documentation if restraints are used	Alabama, Arkansas, Arizona, Connecticut, Colorado, Delaware, D.C., Florida, Georgia, Hawaii, Idaho, Illinois, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Tennessee, Utah, Virginia, Vermont, Washington (32 states and D.C.)
No anti-shackling legislation	Alaska, Iowa, Kansas, Michigan, Montana, North Dakota, South Dakota, Wisconsin, Wyoming (9 states)

⁷⁰ Tamar Kraft-Stolar, *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons*, WOMEN IN PRISON PROJECT, CORRECTIONAL ASSOCIATION OF N.Y., , 6 (Feb. 2015), available at <https://static.prisonpolicy.org/scans/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf> (last visited Oct. 6, 2023).

⁷¹ N.Y. CORRECT. LAW § 611(1) (McKinney 2014); S. 983A, Reg. Sess. (N.Y. 2015). <https://legislation.nysenate.gov/pdf/bills/2015/S983A> (last visited Oct. 6, 2023).

⁷² N.Y. CORRECT. LAW § 611(1)(c) (McKinney 2014); S. 983A, Reg. Sess. (N.Y. 2015). <https://legislation.nysenate.gov/pdf/bills/2015/S983A> (last visited Oct. 6, 2023).

⁷³ Kao, K. Thomas et al., *Anti-Shackling Legislation and Resource Table*, ADVOC. & RSCH. ON REPROD. WELLNESS OF INCARCERATED PEOPLE (Jan. 2024), available at https://arrwip.org/wp-content/uploads/2024/02/ARRWIP-Anti-shackling-legislation-and-resource-table_-Jan2024-.pdf (last visited Apr. 10, 2024).

If you are incarcerated in a state where it is against the law to use shackles on women while they are in labor, and if this happens to you, you can sue the prison in state or federal court.⁷⁴ If you live in a state that does not currently have anti-shackling laws, you may still try to challenge this practice in federal court as a violation of the Eighth Amendment.

You may also have an Eighth Amendment claim if the prison is deliberately indifferent to your serious medical needs during your pregnancy. In other words, if they show a real lack of care towards you. In a case in Wisconsin, an incarcerated woman charged prison nurses with violating her Eighth Amendment rights by failing to bring her to the hospital when she was in labor.⁷⁵ The woman gave birth in her prison cell.⁷⁶ The court held that a reasonable jury could conclude that the nurses showed deliberate indifference toward the woman because the nurses ignored her request to go to the hospital and they “only examined [her] through the small tray slot in the cell door, rather than conducting a more comprehensive exam.”⁷⁷

Pregnant incarcerated people have also had some success using state tort law to claim that prisons were negligent (or careless) in treating their medical needs during pregnancy and delivery. (As discussed above, negligence is easier to prove than deliberate indifference, so tort law can be a better option than the Eighth Amendment in the context of medical treatment.) For example, in a Louisiana case, the court found a prison responsible for the wrongful death of a premature baby born to an incarcerated person because the prison was careless in its treatment of the incarcerated woman.⁷⁸ Prison officials did not follow the prison’s procedures. They failed to identify the problem despite complaints of bleeding and abdominal pain. They also did not bring the incarcerated person to a hospital until it was too late to prevent the premature birth.⁷⁹

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

D. Sexual Assault, Harassment, and Privacy Concerns

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

1. Privacy

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

⁷⁴ In 2012, a lawsuit against Cook County Jail in Illinois settled for \$4.1 million dollars after a group of pregnant women who were incarcerated at the jail sued. The women alleged that they were shackled during labor despite state laws that prevented shackling. Amy Fettig, *\$4.1 Million Settlement Puts Jails on Notice: Shackling Pregnant Women is Unlawful*, ACLU (May 24, 2012), available at <https://www.aclu.org/blog/41-million-settlement-puts-jails-notice-shackling-pregnant-women-unlawful> (last visited Oct. 6, 2023).

⁷⁵ Doe v. Gustavus, 294 F. Supp. 2d 1003, 1007 (E.D. Wisc. 2003).

⁷⁶ Doe v. Gustavus, 294 F. Supp. 2d 1003, 1007 (E.D. Wisc. 2003).

⁷⁷ Doe v. Gustavus, 294 F. Supp. 2d 1003, 1009 (E.D. Wisc. 2003).

⁷⁸ Calloway v. City of New Orleans, 524 So. 2d 182, 187 (La. Ct. App. 1988).

⁷⁹ Calloway v. City of New Orleans, 524 So. 2d 182, 187 (La. Ct. App. 1988).

(a) Cross-gender Pat-downs

Under the Fourth Amendment of the Constitution, you are guaranteed the right to be free from unreasonable searches and seizures.⁸⁰ A seizure is a capture of your person or property by force or an interference with your person or property by force. However, the Supreme Court has found that this right is severely limited in prison. It is limited because of the security concerns of prison and incarceration.⁸¹ Nonetheless, a few courts have recognized that random searches of incarcerated women by male guards may violate the Eighth Amendment. For example, incarcerated women sued the Washington Corrections Center for Women over the prison policy of random full-body pat-down searches by male guards.⁸² Many of these women had been severely sexually and physically abused by men in the past, and experienced severe trauma during these searches. As a result, the Court of Appeals for the Ninth Circuit found that these searches were “cruel and unusual” punishment in violation of the Eighth Amendment.⁸³ However, following the lead of the Supreme Court, all courts recognize limitations on incarcerated women’s right to privacy when it involves an emergency or another important prison security issue.⁸⁴ In New York, DOCCS policy prohibits male guards from pat-frisking incarcerated women unless there are “exigent circumstances.”⁸⁵ “Exigent circumstances” are any set of temporary and unforeseen circumstances that require immediate action to combat a threat to the security or institutional order of a facility.⁸⁶

In June 2012, as part of the Prison Rape Elimination Act (PREA), the Department of Justice issued National Standards to help prevent, reduce and punish prison rape, and sexual abuse between incarcerated people or between guards and incarcerated people. The National Standards include a ban on cross-gender pat-down searches of incarcerated women.⁸⁷ Since August 20, 2015 (or August 21, 2017 for a facility with fewer than 50 incarcerated people), the National Standards has prohibited adult prisons, jails, and community confinement facilities from permitting cross-gender pat-down searches of incarcerated women, absent exigent (urgent) circumstances.⁸⁸ Facilities are also banned from restricting incarcerated women’s access to regularly available programming or other out-of-cell opportunities in order to follow this provision.⁸⁹ For more information, please read *JLM*, Chapter 25, “Your Right to Be Free from Illegal Body Searches.”

⁸⁰ U.S. CONST. amend. IV.

⁸¹ *See Hudson v. Palmer*, 468 U.S. 517, 524, 104 S. Ct. 3194, 3198, 82 L. Ed. 2d 393, 400 (1984).

⁸² *Jordan v. Gardner*, 986 F.2d 1521, 1525–1526 (9th Cir. 1993).

⁸³ *Jordan v. Gardner*, 986 F.2d 1521, 1525–1526 (9th Cir. 1993).

⁸⁴ *See, e.g., Forts v. Ward*, 621 F.2d 1210, 1215–1218 (2d Cir. 1980) (holding that the privacy interests of incarcerated women did not extend to a protection against being viewed while sleeping by male guards so long as suitable sleepwear was provided); *Carlin v. Manu*, 72 F. Supp. 2d 1177, 1179–1180 (D. Or. 1999) (finding it was acceptable during an emergency removal of incarcerated women to a men’s prison that male guards watched as female guards strip searched the women, since the male guards were not touching the women, and it was a one-time event, as opposed to an indefinite infliction of pain).

⁸⁵ N.Y. DEP’T OF CORR. & CMTY. SUPERVISION, DIRECTIVE NO. 4910, CONTROL AND SEARCH OF CONTRABAND § III(B)(3)(b) (2019), *available at* <http://www.doccs.ny.gov/Directives/4910.pdf> (last visited Oct. 6, 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.

⁸⁶ N.Y. DEP’T OF CORR. & CMTY. SUPERVISION, DIRECTIVE NO. 4910, CONTROL AND SEARCH OF CONTRABAND § III(B)(3)(b) (2019), *available at* <http://www.doccs.ny.gov/Directives/4910.pdf> (last visited Oct. 6, 2023).

⁸⁷ 28 C.F.R. § 115.15 (2024).

⁸⁸ 28 C.F.R. § 115.15(b) (2024).

⁸⁹ 28 C.F.R. § 115.15(b) (2024).

(b) Involuntary Exposure

“Involuntary exposure” is when your naked or partly naked body is seen by guards of the opposite sex, such as when you are using showers or toilets. The Supreme Court in *Turner v. Safley* stated that prison regulations that restrict the rights of incarcerated people must be substantially related to some legitimate (justified) concern of the prison.⁹⁰ Thus, your privacy rights can be limited if the prison gives a reason that is substantially related to a legitimate prison policy. If you believe your right to be free from involuntary exposure is related to your religious beliefs, you should read Chapter 27, “Religious Freedom in Prison,” because there are different standards for claims involving religion.

One important prison policy is to treat male and female prison officials the same, as required by federal employment discrimination laws.⁹¹ This can make it difficult to challenge involuntary exposure situations. Prisons cannot treat male and female employees differently. Prisons cannot be required to assign only female workers to a position unless there is a legally recognized need for the position to be filled by a woman.⁹² Courts have occasionally upheld the designation of certain jobs as female-only jobs, usually where there is a strong privacy concern.⁹³ Courts have also upheld this designation where there has been a long, well-recorded history of abuse by male officers and other efforts to address the problem have failed.⁹⁴ Some courts have recognized that all incarcerated people have a right to be free from unnecessary viewing in the nude or while performing private bodily functions by guards of the opposite sex. A few courts have been particularly sensitive to the privacy interests of incarcerated women. These courts have required that they be able to cover their windows when undressing or using the toilet.⁹⁵ But if there is no history of abuse or strong privacy concern, courts may decide that the

⁹⁰ See, e.g., *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 566 U.S. 318, 322, 132 S. Ct. 1510, 1511, 182 L. Ed. 2d 566, 569 (2012) (detailing what constitutes a legitimate interest for search and seizures of a pre-trial detainee); *Turner v. Safley*, 482 U.S. 78, 87, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 78 (1987).

⁹¹ Title VII of the U.S. Code prohibits denying employment, promotions, or raises based on sex, and the hiring of only female employees for female correctional facilities has been seen as a violation of this law. 42 U.S.C. § 2000e-2(a)-(d) (2012). See, e.g., *Breiner v. Nevada Dep’t of Corr.*, 610 F.3d 1202, 1216 (9th Cir. 2010) (holding that policy of hiring only female correctional lieutenants at women’s prison violated Title VII); *Forts v. Ward*, 621 F.2d 1210, 1216 (2d Cir. 1980) (finding that that male prison guards could not be excluded from night shifts in a women’s prison because other measures to ensure women’s privacy were available).

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

⁹³ See *Teamsters Local Union No. 117 v. Wash. Dep’t of Corr.*, 789 F.3d 979, 990 (9th Cir. 2015) (concluding that policy rationales of protecting incarcerated women from sexual misconduct by male deputies, maintaining jail security, and protecting the privacy of incarcerated women were all reasonably necessary to the essence of prison administration justifying the designation of certain positions as female-only); *Mills v. City of Barbourville*, 389 F.3d 568, 579 (6th Cir. 2004) (“As to jail employees of the opposite gender viewing prison inmates or detainees, ... a prison policy forcing prisoners to be searched by members of the opposite sex or to be exposed to regular surveillance by officers of the opposite sex while naked...would provide the basis of a claim on which relief could be granted.”); *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (recognizing the right of incarcerated people to bodily privacy “because most people have ‘a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.’”) (quoting *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981)).

⁹⁴ *Teamsters Local Union No. 117 v. Wash. Dep’t of Corr.*, 789 F.3d 979, 991 (9th Cir. 2015) (policy saying that certain jobs were female-only was adopted in the face of documented allegations of abuse); *Everson v. Mich. Dep’t of Corr.*, 391 F.3d 737, 762 (6th Cir. 2004) (finding that officers in female prison housing units must be women because the prison adequately demonstrated that this policy would enhance security, decrease the likelihood of sexual abuse, protect the privacy rights of the women incarcerated at the prison, and that there were no reasonable alternatives to this plan); *Robino v. Iranon*, 145 F.3d 1109, 1111 (9th Cir. 1998) (finding that it was proper for male prison guards to be excluded in order to accommodate the privacy of incarcerated women and reduce risk of sexual conduct between guards and women incarcerated at the prison); *Jennings v. N.Y. State Office of Mental Health*, 786 F. Supp. 376, 387 (S.D.N.Y. 1992) (holding that gender was a genuine requirement to be a “treatment assistant” in a female ward, and therefore, the requirement that at least one woman be assigned to a female prison ward was permissible under the Civil Rights Act).

⁹⁵ See, e.g., *Sepulveda v. Ramirez*, 967 F.2d 1413, 1415 (9th Cir. 1992) (denying qualified immunity to a male

incarcerated person's interest in protecting bodily privacy is not as strong as the state's interest in offering equal employment opportunities for correctional officers.⁹⁶ For more information on your right to be free from involuntary exposure, see *JLM*, Chapter 25, "Your Right to Be Free From Illegal Body Searches."

(c) Body Searches

When deciding whether a prison search violates your right to be free from unreasonable searches, courts weigh the need for prison security against the privacy interests of the incarcerated people.⁹⁷ Then they decide which of these interests is more important in the particular case.⁹⁸ For example, one court held that when an incarcerated person is being moved from one area of a prison to another, the prison's need for a visual body cavity search to make sure the incarcerated person is not carrying drugs or weapons is more important than the need for privacy.⁹⁹ A "visual body cavity search" is when a prison officer inspects an incarcerated person's ears, nose, mouth, anus, or vagina to see if there are drugs, weapons, or other contraband.

Courts usually find that the prison's security concerns outweigh the incarcerated person's privacy interests.¹⁰⁰ In some cases, courts have found that non-medical personnel (prison officers) are allowed to conduct clothed body frisks (searches of the outer clothing of an incarcerated person),¹⁰¹ cell

parole officer who walked in on a female parolee urinating as part of a required drug test); *Forts v. Ward*, 621 F.2d 1210, 1214–1216 (2d Cir. 1980) (allowing incarcerated women to cover the window of their cells for privacy for 15-minute intervals).

⁹⁶ See, e.g., *Johnson v. Phelan*, 69 F.3d 144, 147–148 (7th Cir. 1995) (recognizing that "[a] warden must accommodate conflicting interests—the embarrassment of reticent prisoners and the entitlement of women to equal treatment in the workplace."), *overruled on other grounds by Henry v. Hulett*, 969 F.3d 769, 783 (7th Cir. 2020); *Grummett v. Rushen*, 779 F.2d 491, 495 (9th Cir. 1985) (finding that to restrict or disallow female guards from holding positions which involve occasional viewing of incarcerated men would require tremendous rearrangement of work schedules and possibly produce a risk to both internal security needs and equal employment opportunities for female guards).

⁹⁷ *Timm v. Gunter*, 917 F.2d 1093, 1099 (8th Cir. 1990) (holding that when a court reviews whether a prison violated an incarcerated person's constitutional rights, the court must consider whether the prison has legitimate institutional concerns that justify the restrictions or actions the plaintiff challenges).

⁹⁸ *Hudson v. Palmer*, 468 U.S. 517, 527, 104 S. Ct. 3194, 3200, 82 L. Ed. 2d 393, 403 (1984) ("[It would be] impossible to accomplish the prison objectives [of ensuring the safety of prisoners, staff, and visitors] if inmates retained a right of privacy in their cells."); *Padgett v. Donald*, 401 F.3d 1273, 1280 (11th Cir. 2005) (employing a balancing test, weighing the degree to which the search intrudes on an individual's privacy against the degree to which it promotes a legitimate governmental interest).

⁹⁹ See *Story v. Foote*, 782 F.3d 968, 971 (8th Cir. 2015) (holding that Story's allegation of a body-cavity search by itself does not state a claim for the violation of a clearly established right given what the Supreme Court and the circuit court have said about the strong institutional interests in maintaining security, and about the reasonableness of visual body-cavity inspections when detainees enter a facility); *Goff v. Nix*, 803 F.2d 358, 366–371 (8th Cir. 1986).

¹⁰⁰ See, e.g., *Calhoun v. Detella*, 319 F.3d 936, 939 (7th Cir. 2003) (stating that, while such strip searches may be unpleasant and humiliating, strip searches of incarcerated men by female officers would not violate the Eighth Amendment if done for a legitimate, penological purpose); *Timm v. Gunter*, 917 F.2d 1093, 1101 (8th Cir. 1990), *cert. denied*, 501 U.S. 1209, 111 S. Ct. 2807, 115 L. Ed. 2d 979 (holding that prisons are not required to provide same-gender pat-downs, and that prison administrators are entitled to find "the best balance among... . . . competing concerns . . ."); *Sroka v. Welcher*, 2016 U.S. Dist. LEXIS 7835, *15 (W.D.N.Y. Jan. 20, 2016) ("Although the privacy interests of an arrestee are generally greater than those of prison inmates, the practice of allowing a male officer to conduct a pat-down search of a female arrestee to insure that she is not armed is not, in and of itself, constitutionally unreasonable.");

¹⁰¹ See *Smith v. Fairman*, 678 F.2d 52, 54 (7th Cir. 1982) (holding female guards may conduct "pat down" searches without violating the privacy of incarcerated men); *Sroka v. Welcher*, 2016 U.S. Dist. LEXIS 7835, *15, (W.D.N.Y. Jan. 20, 2016) ("Although the privacy interests of an arrestee are generally greater than those of prison inmates, the practice of allowing a male officer to conduct a pat-down search of a female arrestee to insure that she is not armed is not, in and of itself, constitutionally unreasonable."); *Talman Caldwell v. Rubbo*, 1993 U.S. App. LEXIS 20412, *3 (4th Cir. 1993) ("Caldwell had no constitutional right to have the pat-down search performed by someone of her gender.");

searches,¹⁰² and visual body cavity or strip searches (searches where incarcerated people must take off their clothes and be visually inspected by a guard).¹⁰³ A court may rule a search unconstitutional if it is conducted under especially bad circumstances. For example, in one federal case, the court found that it was a violation of due process to force a female pre-trial detainee who was seven months pregnant to squat uncomfortably for two visual body cavity searches by untrained officers.¹⁰⁴

However, the test for a “digital body cavity search”—when a guard places his or her fingers into an incarcerated person’s nose, mouth, anus, or vagina—is stricter because it is more intrusive of your body than other types of searches.¹⁰⁵ To perform a digital body cavity search, prison officials must have a reasonable suspicion that is *specific* to the incarcerated person being searched. A reasonable suspicion could be that an incarcerated person has a weapon.¹⁰⁶ Courts have found that digital body cavity searches are unreasonable unless medical personnel perform them both in a private area and in a hygienic (clean) manner.¹⁰⁷ The presence of male officers might make a digital body search unreasonable for women who are incarcerated.¹⁰⁸ Similarly, medical personnel (physicians, nurses, or their assistants), *not* correctional personnel, must conduct body cavity searches. Body cavity searches involve putting a tool into a part of an incarcerated person’s body, or taking something out of a body cavity.¹⁰⁹

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

¹⁰² See *Hudson v. Palmer*, 468 U.S. 517, 525–526, 104 S. Ct. 3194, 3199, 82 L. Ed. 2d 393, 402–403 (holding that an incarcerated woman has no reasonable expectation of privacy in her cell); *Martin v. Lane*, 766 F. Supp. 641, 646 (applying *Hudson v. Palmer* to deny Fourth Amendment relief to an incarcerated person whose cell was searched during a lockdown); *Block v. Rutherford*, 468 U.S. 576, 589–591, 104 S. Ct. 3227, 3235, 82 L. Ed. 2d 438 (1984) (holding that security concerns justify regular “shakedown” searches of cells).

¹⁰³ See *Bell v. Wolfish*, 441 U.S. 520, 558, 99 S. Ct. 1861, 1884, 60 L. Ed. 2d 447, 481 (holding that visual body cavity searches of people in a pre-trial detention facility did not violate the Fourth Amendment, as it did not punish them prior to trial, and served the legitimate purpose of insuring prison security) (the gender of the guards assigned to conduct the searches is not mentioned in the case); *Wood v. Hancock Cnty. Sheriff’s Dept.*, 354 F.3d 57, 68–69 (1st Cir. 2003) (holding that, due to the security threats posed by contact visits, a blanket policy of strip searching incarcerated people after contact visits is constitutional); *Michenfelder v. Sumner*, 860 F.2d 328, 332–333 (9th Cir. 1988) (citing many cases for the rule that incarcerated people may be subject to cavity searches when entering and leaving cells, even when such searches are very frequent).

¹⁰⁴ *United States ex rel. Guy v. McCauley*, 385 F. Supp. 193, 198 (E.D. Wis. 1974) (finding that an incarcerated woman who was seven months pregnant was twice forced to bend over painfully by officers who were not medically trained, and that they did not conduct the search in a medical environment or use appropriate medical equipment).

¹⁰⁵ 28 C.F.R. § 552.11(d) (2024) defines a “digital or simple instrument search” as “inspection for contraband or any other foreign item in a body cavity of an inmate by use of fingers or simple instruments, such as an otoscope, tongue blade, short nasal speculum, and simple forceps.” These searches may only be conducted by designated qualified health personnel, upon approval by Warden or Acting Warden, if there is reasonable belief by the Warden or Acting Warden that a person is concealing contraband.

¹⁰⁶ See *Chapman v. Nichols*, 989 F.2d 393, 395–396 (10th Cir. 1993) (holding that blanket policy for strip searches of detainees was unconstitutional because strip searches should only be conducted on an individual basis, when necessary).

¹⁰⁷ See *Foster v. City of Oakland*, 621 F. Supp. 2d 779, 789 (N.D. Cal. 2008) (“[B]ody cavity searches of inmates [are] unreasonable where they were performed by inadequately trained medical assistants[.]”); see also *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 43 (1st Cir. 2009) (noting that physical rectal examinations of incarcerated people can be reasonable only when they are carried out by trained medical staff under sanitary conditions).

¹⁰⁸ See *Bonitz v. Fair*, 804 F.2d 164, 172–173 (1st Cir. 1986), *overruled in part* by *Unwin v. Campbell*, 863 F.2d 124 (1st Cir. 1988) (pointing to the presence of male officers as one reason why the search of incarcerated women was unreasonable).

¹⁰⁹ See *DaVee v. Mathis*, 812 S.W.2d 816, 825–826 (Mo. Ct. App. 1991) (concluding that searches involving physical intrusion and removal of foreign objects must be conducted by medical personnel, but purely visual searches that do not involve physical contact do not require medical personnel).

2. Sexual Harassment

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

No one, including incarcerated people, should ever feel forced to engage in sexual activity with abusive staff who promise better treatment or threaten disciplinary action.¹¹⁰ You have the right to be free from any unwanted sexual attention. If an officer acts inappropriately towards you in a sexual manner, it may be considered cruel and unusual punishment in violation of your Eighth Amendment rights.

To qualify as a violation of the Eighth Amendment, the behavior must be serious enough, and the officer must have been “deliberately indifferent.” “Deliberate indifference” means that an officer ignored a risk to your health or safety that they either knew about or that is so obvious they should have known about it.¹¹¹ Because sexually abusive officers are the ones creating the risk to your health or safety, they naturally know about it.¹¹² It is sometimes harder to prove that the behavior is serious enough to make out a claim. For some courts, the fewer times abuse has occurred, the more severe it must have been. And the less severe it was, the more times it must have occurred.¹¹³

If you cannot bring an Eighth Amendment claim against the prison official who harassed you, you may be able to bring an Eighth Amendment claim against supervisory officials for failing to protect you from unwanted sexual conduct. To do this, you have to show that supervisors were “deliberately indifferent” towards your abuse (meaning that they knew about the harassment, or it was so obvious they should have known about it, and did nothing).¹¹⁴ You also have to show that the act violated “evolving standards of decency” (in other words, the act violated the level of physical contact that is acceptable in this day and age).¹¹⁵ Some courts have found that certain extreme cases of sexual groping and touching do violate “evolving standards of decency.”¹¹⁶ If your case is similar, you might be able to make an Eighth Amendment claim against the supervisors.

¹¹⁰ HUMAN RIGHTS WATCH, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* (1996), available at http://www.hrw.org/legacy/reports/1996/Us1.htm#N_880 (last visited Oct. 8, 2023).

¹¹¹ *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994); *Wilson v. Seiter*, 501 U.S. 294, 298–299, 111 S. Ct. 2321, 2324, 115 L. Ed. 2d 271, 278 (1991).

¹¹² *Boddie v. Schneider*, 105 F.3d 857, 861 (2d Cir. 1997) (“Because sexual abuse by a corrections officer may constitute serious harm inflicted by an officer with a sufficiently culpable state of mind, allegations of such abuse are cognizable as Eighth Amendment Claims.”); *Giron v. Corrections Corporation of America*, 191 F.3d 1281, 1290 (10th Cir. 1999).

¹¹³ *Crawford v. Cuomo*, 796 F.3d 252, 257 (2d Cir. 2015) (finding that “severe or repetitive sexual abuse” of an incarcerated person by a prison officer can be “objectively sufficiently serious’ enough to constitute an Eighth Amendment violation.”) (quoting *Boddie v. Schneider*, 105 F.3d 857, 861 (2d Cir. 1997)); *Boddie v. Schneider*, 105 F.3d 857, 861 (2d Cir. 1997) (requiring severe or repeated sexual abuse for Eighth Amendment violation). *But see Morrison v. Cortright*, 397 F. Supp. 2d 424, 425 (W.D.N.Y. 2005) (male correctional officer running finger between buttocks and pressing against male plaintiff during strip frisk was not sufficiently serious to be a violation of the Eighth Amendment); *Davis v. Castleberry*, 364 F. Supp. 2d 319, 321 (W.D.N.Y. 2005) (male correctional officer grabbing an incarcerated man’s penis during a pat frisk failed to state a claim under 18 U.S.C. § 1983); *Montero v. Crusie*, 153 F. Supp. 2d 368, 373, 375 (S.D.N.Y. 2001) (allegations that a male officer squeezed the male plaintiff’s genitalia and made sexual propositions during pat frisks and offered privileges in exchange for sexual favors was not sufficiently serious to be a violation of the Eighth Amendment).

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

¹¹⁵ *Hudson v. McMillian*, 503 U.S. 1, 8, 117 L. Ed. 2d 156, 167, 112 S. Ct. 995, 1000 (1992) (“The objective component of an Eighth Amendment claim is therefore contextual and responsive to ‘contemporary standards of decency.’”) (quoting *Estelle v. Gamble*, 429 U.S.C. 97, 103, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976)).

¹¹⁶ *See Rodriguez v. McClenning*, 399 F. Supp. 2d 228, 237–238 (S.D.N.Y. 2005) (concluding that an incarcerated man properly stated a claim for a violation of his Eighth Amendment rights where he alleged that a correctional officer groped him, relying on trend toward statutory prohibition of sexual contact between prison employees and

Usually, to bring an Eighth Amendment claim in federal court, you must have exhausted (used up) your administrative remedies. However, under the Prison Rape Elimination Act's National Standards, DOCCS has modified its exhaustion requirements, making it easier to bring sexual abuse cases. If you want to bring a legal claim against the person who sexually abused or harassed you, you no longer need to file a grievance and appeal it to Central Office.¹¹⁷ Instead, you can report the incident to (1) facility staff; (2) Central Office staff in writing; (3) to an outside agency that has agreed to receive and forward reports of abuse; *or* (4) to the Office of Special Investigations.¹¹⁸ You can also satisfy the exhaustion requirement if another person reports, as long as you confirm the report.¹¹⁹ After taking any of these steps, you are able to submit your claim to court. You have to complete those steps and submit your claim within the statute of limitations. The statute of limitations for an Eighth Amendment claim is usually three years. For more information on how to make an Eighth Amendment claim, consult *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law."

3. Sexual Assault and Rape

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

The rate of female sexual assault varies dramatically between prisons. The highest reported rate currently shows that one in four women are assaulted during their time in prison.¹²⁰ While a prison official is permitted to touch you for security reasons, like during a legal search, he or she is never allowed to touch you in a sexual way. Under federal law, it is illegal for a prison official with "custodial, supervisory, or disciplinary authority" to engage in any type of sexual conduct with incarcerated people.¹²¹ In federal prisons, it is also a felony for prison officers to coerce an incarcerated person into sexual activity by using violence or the threat of violence, or to have sex with an incarcerated person after making her unconscious with drugs or alcohol.¹²² Almost all states also have laws that make sex between incarcerated people and prison officers illegal.¹²³ Check your state's laws to see what kind of protections you are offered.

Even consensual sex between an incarcerated person and a prison official can be a violation of the Eighth Amendment or a crime under state law.¹²⁴ In New York, sexual intercourse between an

incarcerated people); *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000) ("Rape, coerced sodomy, unsolicited touching of women prisoners' vaginas, breasts and buttocks by prison employees are 'simply not part of the penalty that criminal offenders pay for their offenses against society.'") (quoting *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994)).

¹¹⁷ State of New York, Department of Corrections and Community Supervision Directive No. 4040, Inmate Grievance Policy § 701.3 (2016).

¹¹⁸ State of New York, Department of Corrections and Community Supervision Directive No. 4040, Inmate Grievance Policy § 701.3 (2016).

¹¹⁹ State of New York, Department of Corrections and Community Supervision Directive No. 4040, Inmate Grievance Policy § 701.3 (2016).

¹²⁰ JUST DETENTION INTERNATIONAL, *The Basics about Sexual Abuse in U.S. Detention*, 1 (Jan. 2009), available at <https://www.prearesourcecenter.org/sites/default/files/library/22-jdi-usdetentionbasics.pdf> (last visited Oct. 8, 2023) (quoting Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Reported by Women in Three Midwestern Prisons*, 39 J. SEX RES. 217, 220 (2002)).

¹²¹ 18 U.S.C. § 2243(b)(2).

¹²² 18 U.S.C. § 2241.

¹²³ See, e.g., N.Y. PENAL LAW § 130.05(3)(e) (McKinney 2020); ARIZ. REV. STAT. ANN. § 13-1419 (2020); CAL. PENAL CODE § 289.6 (West 2022); CONN. GEN. STAT. ANN. § 53a-73a (West 2012); MASS. GEN. LAWS ANN. ch. 268, § 21A (West 1999). For a full list of all states criminalizing corrections officers' sexual contact with incarcerated people as of August 2015, see *Crawford v. Cuomo*, 796 F.3d 252, 259 n.6 (2d Cir. 2015) (only two states have not criminalized officers' sexual contact with incarcerated people).

¹²⁴ See, e.g., *Carrigan v. Davis*, 70 F. Supp. 2d 448, 452-453 (D. Del. 1999) ("[A]s a matter of law, an act of vaginal intercourse and/or fellatio between a prison inmate and a prison guard, whether consensual or not, is a

employee of the New York State Department of Correctional Services and an incarcerated person—even with the incarcerated person’s consent—is considered rape.¹²⁵ The reason for this policy is that prison officials may attempt to abuse their position of authority to get sexual favors from incarcerated people.

Prison officials may also be liable for the acts of another incarcerated person under the Eighth Amendment. The officer will only be liable for sexual assault committed by another person incarcerated at your facility when the officer knew that you faced a substantial risk of serious harm, but did nothing to protect you.¹²⁶ For example, if prison officials knew that you were going to be sexually assaulted by another incarcerated person and did not try to prevent the assault, that could be a violation of your Eighth Amendment rights.

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

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

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

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

1. Collect any semen, other body fluids, and hair;
2. Look for clothing fibers and evidence from the scene, such as grass or soil; and
3. Take clippings of your fingernails to examine any residue from your attacker.¹²⁷

You should also ask the nurse or health professional to take pictures of any injuries that occurred during the attack (bruises, hand marks, cuts, burns, etc.). You have the right to skip any step of the

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

¹²⁵ N.Y. PENAL LAW § 130.05(3)(e)–(f) (McKinney 2020); N.Y. Penal Law § 130.25 (McKinney 2020).

¹²⁶ *Farmer v. Brennan*, 511 U.S. 825, 847, 114 S. Ct. 1970, 1084, 128 L. Ed. 2d 811, 832 (1994) (holding that a prison official may be held liable under the Eighth Amendment because he had knowledge that a transgender person incarcerated at the prison faced a substantial risk of serious harm and subsequently disregarded the risk); *see also* *Winton v. Bd. of Comm’rs*, 88 F. Supp. 2d 1247, 1252–1253 (N.D. Okla. 2000) (denying a defendant institution’s motion for summary judgment because there was evidence that prison officials both knew there was substantial risk of serious harm from other people incarcerated at the prison, and did nothing to protect the plaintiff from it).

¹²⁷ RAINN, *What is a Sexual Assault Forensic Exam?*, available at <https://www.rainn.org/articles/rape-kit> (last visited Oct. 8, 2023).

exam if it makes you feel too uncomfortable. However, bear in mind that a rape kit increases the likelihood of prosecution.¹²⁸

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

It is important to see a doctor again within a week or two to receive your blood test results and to treat any injuries. Emotional care is also very important. Many rape survivors will experience Rape Trauma Syndrome (RTS). RTS is a collection of emotional responses to the extreme stress of the sexual assault. Some survivors openly display their emotions. Others may appear calm and detached. Sleeping and eating patterns may change and nightmares are common.¹²⁹ It is important for you to seek and continue counseling and support groups for as long as you need them. Your prison should provide free emergency and ongoing medical and mental health services (like counseling) if you experience rape or sexual assault while incarcerated.¹³⁰ You should also know that many mental health providers employed by corrections departments must report any abuse revealed to them. So, if you want to discuss your abuse without reporting it, you should ask your counselor about his reporting obligations before sharing information.

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

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

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

First, you should file a report through your prison's internal grievance procedures. If the prison administration does not remedy the situation, you may want to consider bringing civil charges. For more information on filing a grievance, see *JLM*, Chapter 15, "Incarcerated Grievance Procedures."

If you decide to bring a lawsuit in a civil court, the Prison Litigation Reform Act (PLRA) will apply to you. Usually, this Act means that you cannot bring a civil lawsuit for any mental or emotional injury suffered in prison unless you can show some kind of physical injury as well.¹³¹ However, the Violence Against Women Act has changed this requirement. It does not require you to show evidence of physical

¹²⁸ RAINN, *What is a Sexual Assault Forensic Exam?*, available at <https://www.rainn.org/articles/rape-kit> (last visited Oct. 8, 2023).

¹²⁹ KING COUNTY SEXUAL ASSAULT RESOURCE CENTER, *Rape Trauma Syndrome*, available at https://www.kcsarc.org/wp-content/uploads/2021/10/Rape-Trauma-Syndrome_2021.09.28.pdf (last visited Oct. 8, 2023).

¹³⁰ 28 C.F.R. 115.382 (2024) (requiring access to emergency medical and mental health services); 28 C.F.R. 115.383 (2024) (requiring access to ongoing medical and mental health services).

¹³¹ Prison Litigation Reform Act of 1995, 110 Stat. 1321, § 803(d) (1996). See Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," for more information on the PLRA.

injury.¹³² Also, the Second Circuit has held that sexual assaults that happen during “intrusive body searches” meet the physical injury requirement of the PLRA.¹³³

Courts have found that a prison official’s sexual assault of an incarcerated person violates the Eighth Amendment. It is “cruel and unusual punishment[]”¹³⁴ and violates the “evolving standards of decency that mark the progress of a maturing society.”¹³⁵ Here, “evolving standards of decency” refers to conduct that violates the standards of conduct considered acceptable today.¹³⁶ The Supreme Court stated that, “being violently assaulted in prison is not ‘part of the penalty that criminal offenders pay for their offenses against society.’”¹³⁷ In one case, the Second Circuit held that intentional contact by a correctional officer with an incarcerated person’s genitalia or other intimate area violates the Eighth Amendment if it serves no “penological purpose” and is undertaken with the intention to gratify the officer’s sexual desire or humiliate the victim.¹³⁸ The Court referred to the national standards and the criminalization of sexual conduct by correctional officers. The Court said, “sexual abuse of prisoners, once passively accepted by society, deeply offends today’s standards of decency.”¹³⁹

As described in the “Sexual Harassment” Section above, there are two parts to bringing an Eighth Amendment claim against prison supervisors. First, you have to show that there was a substantial risk of serious harm to your safety.¹⁴⁰ Second, you must show that the prison supervisors knew about the situation and yet did nothing about it. For more information on how to bring an Eighth Amendment claim, see *JLM*, Chapter 16, “Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law.”

E. Drug Treatment Programs

The crackdown on drugs has been a major cause of the female prison population growth. As of March 2024, roughly 20% of incarcerated people in the United States were incarcerated for a drug offense.¹⁴¹ Furthermore, drug offenses accounted for 91% of the increase in the number of women sentenced to prison from 1986 to 1995. This trend is partly due to New York’s harsh Rockefeller Drug Laws. These laws gave judges little choice in sentencing for drug offenses. However, in 2004, New York reformed the state’s old drug laws by adopting the Drug Law Reform Act (DLRA).¹⁴² If you were sentenced under the old laws, you may be allowed to apply for re-sentencing.¹⁴³

If you are in prison for a drug-related offense, you might have access to various alternative sentencing programs. You may have access even if you are already in prison. One of these options is

¹³² The Violence Against Women Act, 34 U.S.C. 12361.

¹³³ *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999) (holding that allegations of sexual assault, if true, “qualify as physical injuries”); *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000) (“A sexual assault on an inmate by a guard—regardless of the gender of the guard or of the prisoner—is deeply ‘offensive to human dignity.’... ‘Being violently assaulted in prison is simply not “part of the penalty that criminal offenders pay for their offenses against society”’ (internal citations omitted)).

¹³⁴ U.S. CONST. amend. VIII.

¹³⁵ *See, e.g., Hudson v. McMillian*, 503 U.S. 1, 8, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992); *Ullery v. Bradley*, 949 F.3d 1282, 1290–1291 (10th Cir. 2020) (holding that a prison guard’s sexual assault of an incarcerated person clearly offended society’s standards of decency).

¹³⁶ *See Crawford v. Cuomo*, 796 F.3d 252, 256 (2d Cir. 2015).

¹³⁷ *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 101 S. Ct. 2392, 69 L. Ed. 2d 59 (1981)).

¹³⁸ *Crawford v. Cuomo*, 796 F.3d 252, 254 (2d Cir. 2015).

¹³⁹ *Crawford v. Cuomo*, 796 F.3d 252, 254 (2d Cir. 2015).

¹⁴⁰ *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994).

¹⁴¹ Aleks Kajstura & Wendy Sawyer, *Women’s Mass Incarceration: The Whole Pie 2024*, Prison Policy Initiative (Oct. 29, 2019), available at <https://www.prisonpolicy.org/reports/pie2024women.html> (last visited Mar. 26, 2024).

¹⁴² 2004 N.Y. Sess. Laws 1474 (A. 11895, S. 7802) (McKinney).

¹⁴³ *Rivera v. New York*, No. 11-CV-6185 MAT, 2012 U.S. Dist. LEXIS 54661, at *6 (W.D.N.Y. Apr. 18, 2012).

the “drug court.”¹⁴⁴ In this type of program, judges, prosecutors, and defense attorneys take part in the treatment and rehabilitation of the offenders.¹⁴⁵ Judges keep track of the treatment and progress of offenders and the offenders follow a plan that includes detoxification (coming off drugs), counseling, education, vocational (job training) courses, group meetings, and urine testing.¹⁴⁶ In 2023, there were over 4,000 drug courts operating nationwide.¹⁴⁷

Another alternative sentence that might be right for you is a “boot camp.” A boot camp is a military-style program that attempts to “instill discipline and self-respect in participants.”¹⁴⁸ However, due to budgetary constraints and doubts as to their ability to rehabilitate people who have been convicted of a crime, these programs are increasingly rare. Their availability to women is also rare.¹⁴⁹ Even if you are in a regular correctional facility, your institution should have drug treatment programs available for you. For example, the Federal Bureau of Prisons (BOP) offers drug treatment plans to all incarcerated people who qualify, before their release from custody.¹⁵⁰

F. Clemency

“Clemency” is the power of a public official to lessen the sentence of a criminal defendant. Clemency exists to protect incarcerated people from sentences that are too harsh without reason.

It is very hard to get clemency. But you should file a petition if you think have a good reason to receive it. In thirty-five states, including New York, the governor grants clemency.¹⁵¹ In other states, either an advisory board or the governor and advisory board together makes the decision.¹⁵² Non-violent offenders have the best chance of getting clemency. But women who are in jail for killing their abusive spouses or taking other actions to defend themselves may also have a chance. Note that if you are currently seeking clemency for a death sentence, you have a right to a lawyer.¹⁵³

There are four main types of clemency: pardon, commutation, remission, and reprieve. Pardons and commutations are the most common forms of clemency.

1. **Pardon** attempts to clear a person’s name of a crime entirely and removes some or all consequences of the conviction.

¹⁴⁴ See Kara Stinson, *Letting Time Serve You: Boot Camps and Alternative Sentencing for Female Offenders*, 39 BRANDEIS L. J. 847, 857 (2001).

¹⁴⁵ See Kara Stinson, *Letting Time Serve You: Boot Camps and Alternative Sentencing for Female Offenders*, 39 BRANDEIS L. J. 847, 857 (2001).

¹⁴⁶ See Kara Stinson, *Letting Time Serve You: Boot Camps and Alternative Sentencing for Female Offenders*, 39 BRANDEIS L. J. 847, 857 (2001).

¹⁴⁷ National Drug Court Resource Center, “Drug Court Review,” 4 (Fall 2023).

¹⁴⁸ See Kara Stinson, *Letting Time Serve You: Boot Camps and Alternative Sentencing for Female Offenders*, 39 BRANDEIS L.J. 847, 853 (2001); *Practice Profile: Adult Bootcamps*, NATIONAL INSTITUTE OF JUSTICE, available at <https://www.crimesolutions.gov/PracticeDetails.aspx?ID=5> (last visited Oct. 8, 2023).

¹⁴⁹ See Richard Willing, *U.S. Prisons to End Boot Camp Programs*, USA TODAY (Feb. 2005), available at http://usatoday30.usatoday.com/news/nation/2005-02-03-boot-camps_x.htm (last visited Oct. 8, 2023).

¹⁵⁰ *Substance Abuse Treatment*, FEDERAL BUREAU OF PRISONS, available at https://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp (last visited Oct. 8, 2023).

¹⁵¹ See, e.g., *Apply for Clemency*, N.Y. STATE, available at <https://www.ny.gov/services/apply-clemency> (last visited Oct. 8, 2023); *Clemency – Commutations & Pardons*, STATE OF CALIFORNIA, available at <https://www.gov.ca.gov/clemency/> (last visited Oct. 8, 2023).

¹⁵² See, e.g., *Clemency Applications*, COMMONWEALTH OF PENNSYLVANIA, available at <https://www.bop.pa.gov/application-process/Pages/clemency.aspx> (last visited Oct. 8, 2023); *Executive Clemency Overview*, COMMONWEALTH OF MASSACHUSETTS, available at <https://www.mass.gov/service-details/executive-clemency-overview> (last visited Oct. 8, 2023). For a complete list of all states’ different types of clemency authority, see *50-State Comparison: Pardon Policy & Practice*, RESTORATION OF RIGHTS PROJECT, available at <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2/> (last visited Oct. 8, 2023).

¹⁵³ *Harbison v. Bell*, 556 U.S. 180, 188, 129 S. Ct. 1481, 1487, 173 L. Ed. 2d 347, 357 (2009).

2. **Commutation** does not attempt to clear the person's name of the crime. Instead, it changes the sentence to be less severe.
3. **Remission** does not attempt to clear the person's name of the crime. Instead, it reduces the fines or other penalties to be less severe.
4. **Reprieve** postpones a scheduled execution.

This Part focuses on clemency for battered (or abused) women, but the procedures discussed below apply to any clemency petition. This Part particularly focuses on the clemency process in New York. **If you are not in New York, you should look up your state's rules on clemency.**¹⁵⁴ For more information on pardons, commutations, and other forms of early release, see *JLM*, Chapter 35, "Getting Out Early: Conditional and Early Release." For further information on clemency for battered women nationwide, contact the National Clearinghouse for the Defense of Battered Women, which accepts collect calls from incarcerated battered women (see Appendix A).

1. How to Request Clemency

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

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

or

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

If possible, you should also scan and email a copy of your application and supporting documents to PardonsAndCommutations@doccs.ny.gov.

You should send all supporting materials within thirty days of sending the application. Applications are usually considered in the order that they are received. If your petition is not granted, you can re-apply a year after you find out unless you have been authorized to do so sooner in the letter informing you of the unfavorable decision.¹⁵⁵ Whether your application is approved or denied, you will be informed of the decision by letter from the Clemency Bureau.

New York partners with several legal organizations to provide pro bono legal assistance for people seeking clemency. While you do not need an attorney to apply for clemency, you should ask about this service at your New York facility because an attorney will help you improve your application and present the best possible case. For more information on the clemency process in the state of New York, see "Guidelines for Review of Executive Clemency Applications," which is on file in the law library of each New York correctional facility.¹⁵⁶

¹⁵⁴ To find your state's requirements for commutation, go to the Criminal Justice Policy Foundation, *available at* <http://www.cjpf.org/state-clemency> (last visited Oct. 8, 2023), and click "Select your State."

¹⁵⁵ Criminal Justice Policy Foundation, *New York Applicable Form of Executive Clemency* (June 2014), *available at* <http://www.cjpf.org/clemency-ny> (last visited Oct. 8, 2023).

¹⁵⁶ State of New York, Department of Corrections and Community Supervision, *Community Supervision Handbook: Questions and Answers Concerning Parole Release and Community Supervision* (July 2017), *available at* https://doccs.ny.gov/system/files/documents/2019/05/Community_Supervision_Handbook.pdf (last visited Oct. 8, 2023). For instructions on how to apply for clemency in New York, you can also visit <https://www.ny.gov/services/apply-clemency> (last visited Oct. 8, 2023).

2. Writing Your Petition

(a) Tips for Organizing Your Petition

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

For example:¹⁵⁷

DATE	NATURE OF THE ABUSE	DOCUMENT
7/1/15	Dan found on top of Paula with his hands around her neck.	Smith Affidavit, Exhibit 1
11/23/15	Dan beats Paula so badly that she has contusions all over her body.	Cook County Hospital Records, Exhibit 2
10/3/16	Crisis Center overhears abuse and calls police.	Support Service Records, Exhibit 4
4/4/17	Dan violates restraining order. He is arrested for punching hand through window.	Police Report, Exhibit 6

An “affidavit” is a statement taken under oath or affirmed by a notary public or commissioner of oaths. An “exhibit” is a document or another object used as evidence in court.

You should describe the strongest part of your petition at the beginning, in the first paragraph. You may wish to include any special circumstances that affect your case or significant achievements you have accomplished in prison. For example, one woman who submitted a petition for clemency graduated summa cum laude from Western Michigan University while in prison.¹⁵⁸ Another woman’s sentencing judge specifically stated that he hoped the Parole Board would commute her sentence.¹⁵⁹ Put helpful facts like this at the beginning. Do not hide important facts like these in the middle of the petition.

(b) What to Include in Your Petition

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

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

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

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

¹⁵⁷ Michigan Women’s Justice and Clemency Project, *Clemency Manual, Chapter VII*, UMICH (2008), available at http://www.umich.edu/~clemency/clemency_mnl/ch7.html (last visited Oct. 8, 2023).

¹⁵⁸ Michigan Women’s Justice and Clemency Project, *Clemency Manual, Chapter VII*, UMICH (2008), available at http://www.umich.edu/~clemency/clemency_mnl/ch7.html (last visited Oct. 8, 2023).

¹⁵⁹ Michigan Women’s Justice and Clemency Project, *Clemency Manual, Chapter VII*, UMICH (2008), available at http://www.umich.edu/~clemency/clemency_mnl/ch7.html (last visited Oct. 8, 2023).

Finally, describe why the Governor should grant you a special exception (the “plea for justice or mercy”). Clemency is extraordinary relief, and you should remind the Governor that only they have the power to grant it.

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

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

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

(c) Using Evidence to Support Your Petition

You should include evidence to support everything you state in your claim. This evidence may include letters of support, police records, and affidavits from family and friends.¹⁶⁰ You should label them as “exhibits” at the back of your petition. When using affidavits or letters, state whether the authors of those affidavits or letters testified at your criminal trial. Because you may have difficulty getting all of these documents while in prison, try to have a close friend or family member help you in gathering this information and putting together your petition. Here are some basic types of evidence to consider:

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

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

¹⁶⁰ Michigan Women’s Justice and Clemency Project, *Clemency Manual, Chapter VII*, UMich (2008), available at http://www.umich.edu/~clemency/clemency_mnl/ch7.html (last visited Oct. 8, 2023).

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

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

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

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

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

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

(d) Obtaining your DOCCS file, case record, parole file, case file, and criminal history

In order to get a copy of your DOCCS file, write to the inmate records coordinator of your facility. Include your name, DOCCS number, where you would like the records to be sent, and a list of the

documents you want to receive. If the documents are being sent to someone other than you, you must authorize their release.

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

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

You should also get a copy of your case file. Your case file includes police reports, hearing transcripts, and other useful information from your trial. Ask your attorney for copies of these documents and transcripts. You may need to call the criminal courthouse to get copies if your attorney does not have complete transcripts.

For your criminal history, you can send a written request to:

Record Review Unit
New York State Division of Criminal Justice Services
Alfred E. Smith Building
80 South Swan Street
Albany, NY 12210.

You should include your name, date of birth, social security number, and department identification number, and send the request in a facility envelope, if possible. You can also ask them to *RUSH* processing of your file if you need the information quickly. Otherwise, it can take eight weeks or longer to receive your rap sheet. You also have a right to get a copy of pre-sentencing reports.¹⁶¹ To get them, send a written request to the above address, addressed "To Whom It May Concern," with your name, birth date, indictment/information/complaint number, the sentencing court, the address to which you would like the information sent, and a signed release authorizing another person to receive the information, if necessary.

G. Conclusion

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

¹⁶¹ N.Y. CRIM. PROC. LAW § 390.50(2)(a) (McKinney 2018).

APPENDIX A

CONTACTS FOR FURTHER ASSISTANCE

Resources in New York

Battered Women:

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

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

Discharge Planning & Work Release:

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

Health Care:

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

Sexual Harassment:

Prisoners' Legal Services
 Ithaca Office
 114 Prospect St.
 Ithaca, NY 14850
 (607) 273-2283

Prisoner's Legal Services
 Albany Office
 41 State Street, Suite M112
 Albany, NY 12207
 (518) 438-8046

Women's Program Services:

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

General Questions:

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

Hour Children
 36-11 12th Street
 Long Island City, NY 11106
 (718) 433-4724

National Resources Outside of New York:

Battered Women:

National Clearinghouse for the Defense of Battered Women
 540 Fairview Ave N Suite 208
 St. Paul, MN 55104
 1-800-903-0111 ext. 3
 (Accepts collect calls from incarcerated battered women)

National Coalition Against Domestic Violence
 1-800-799-SAFE (1-800-799-7233)

Sexual Assault and Rape:

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

General Information:

National Women's Law Center
 1350 I Street NW, Suite 700
 Washington, DC 20005
 (202) 588-5180

APPENDIX B

ABORTION PROTECTION BY STATE AS OF MAY 2024

This Table shows the level of abortion protection provided by each state as of May 15, 2024.¹⁶² States are classified from most restrictive to most protective.

State	Details
Alabama	Most Restrictive – Alabama is enforcing a pre- <i>Roe</i> total abortion ban. All abortions are illegal unless medically necessary to avoid a “serious health risk” to the pregnant patient. There are no exceptions for rape, incest, or human trafficking.
Alaska	Protective – Alaska’s state constitution protects the right to abortion at all stages of pregnancy.
Arizona	Very Restrictive – A 1864 state law bans abortion, but the Arizona Supreme Court recently ruled that the state cannot enforce the ban until at least September 26, 2024. Other state laws protect the right to abortion up to 15 weeks of pregnancy. The future of abortion protection in Arizona is uncertain.
Arkansas	Most Restrictive – Abortion is completely banned unless medically necessary to save the pregnant patient’s life.
California	Very Protective – In 2022, California voters passed an amendment to the state constitution that explicitly protects abortion and contraceptive rights. Abortion is banned at viability (generally 24–26 weeks).
Colorado	Protective – In 2022, Colorado passed a law that recognizes abortion as a fundamental right.
Connecticut	Protective – Abortion is banned at viability (generally 24–26 weeks).
Delaware	Some Restrictions and Protections – State law protects the right to abortion up to viability (generally 24–26 weeks). State Medicaid coverage of abortion care is mostly banned.
D.C.	Protective – Abortion is protected at all stages of pregnancy, but Medicaid coverage is banned except in limited circumstances.
Florida	Most Restrictive – Abortion is banned at 6 weeks and later. Mailing abortion pills is banned and other restrictions are in place.
Georgia	Very Restrictive – Abortion is banned at 6 weeks and later. Only physicians can provide abortions and there is a mandatory 24-hour waiting period.
Hawaii	Protective – Abortion is banned at viability (generally 24–26 weeks). State Medicaid covers abortions and any qualified healthcare professional can provide abortions.

¹⁶² GUTTMACHER INST., *Interactive Map: US Abortion Policies and Access After Roe*, available at <https://states.guttmacher.org/policies/> (last visited May 16, 2024); CTR. FOR REPRODUCTIVE RIGHTS, *After Roe Fell: Abortion Laws by State*, available at <https://reproductiverights.org/maps/abortion-laws-by-state/> (last visited May 16, 2024).

State	Details
Idaho	Most Restrictive – Abortion is completely banned unless medically necessary to save the pregnant patient’s life. There is an exception for rape and incest in the first trimester with police report documentation.
Illinois	Protective – Abortion is banned at viability (generally 24–26 weeks). State Medicaid covers abortions.
Indiana	Most Restrictive – Abortion is completely banned unless medically necessary to protect the pregnant patient’s health or life.
Iowa	Restrictive – Abortion is banned at 22 weeks. Pregnant patients must make two visits with a mandatory 24-hour waiting period and are forced to get an ultrasound.
Kansas	Restrictive – Abortion is banned at 22 weeks. State Medicaid coverage of abortion is banned.
Kentucky	Most Restrictive – Abortion is completely banned unless medically necessary to save the pregnant patient’s life or prevent serious risk to their health.
Louisiana	Most Restrictive – Abortion is completely banned unless medically necessary to save the pregnant patient’s life or prevent serious risk to their health.
Maine	Protective – Abortion is banned at viability (generally 24–26 weeks). State Medicaid covers abortions.
Maryland	Very Protective – Abortion is protected at all stages of pregnancy.
Massachusetts	Protective – Abortion is banned at 24 weeks. State Medicaid covers abortions.
Michigan	Protective – Michigan recognize a state constitutional right to abortion at all stages of pregnancy. Insurance coverage is banned except in very limited circumstances.
Minnesota	Very Protective – Abortion is protected at all stages of pregnancy. State Medicaid covers abortions and any qualified health care professional can provide an abortion.
Mississippi	Most Restrictive – Abortion is completely banned unless medically necessary to save the pregnant patient’s life. There is an exception for rape and incest that has been reported to law enforcement.
Missouri	Most Restrictive – Abortions are completely banned except “in cases of medical emergency.”
Montana	Protective – Abortion is banned at viability (generally 24–26 weeks). State Medicaid covers abortions.
Nebraska	Very Restrictive – Abortion is banned at 12 weeks, unless medically necessary to save the pregnant patient’s life or prevent serious risk to their health. There is an exception for rape and incest.

State	Details
Nevada	Some Restrictions and Protections – Abortion is banned at 24 weeks. Only physicians can provide abortions.
New Hampshire	Some Restrictions and Protections – Abortion is banned at 24 weeks. State Medicaid coverage of abortions is banned except in very limited circumstances.
New Jersey	Very Protective – Abortion is protected at all stages of pregnancy and covered by state Medicaid.
New Mexico	Very Protective – Abortion is protected at all stages of pregnancy and covered by state Medicaid.
New York	Very Protective – Abortion is banned at viability (generally 24–26 weeks) and is covered by state Medicaid.
North Carolina	Very Restrictive – Abortion is banned at 12 weeks. In cases of rape and incest, abortion is banned at 20 weeks. In the case of a “life-limiting fetal abnormality,” abortion is banned at 24 weeks.
North Dakota	Most Restrictive – Abortion is completely banned unless medically necessary to save the pregnant patient’s life or to preserve their physical health. There is an exception for rape and incest up to 6 weeks of pregnancy.
Ohio	Restrictive – Abortion is banned at 22 weeks. Ohio lawmakers are working to enforce a more restrictive 6-week ban, but are currently prevented by the courts from doing so.
Oklahoma	Most Restrictive – Abortion is completely banned. The Oklahoma Supreme Court recently recognized the right to an abortion if medically necessary to save the pregnant patient’s life.
Oregon	Most Protective – Oregon has some of the strongest abortion access laws in the country. There are no major restrictions on the right to abortion.
Pennsylvania	Restrictive – Abortion is banned at 24 weeks. The current governor is supportive of abortion rights, but other state laws make accessing abortion care difficult.
Rhode Island	Some Restrictions and Protections – Abortion is banned at viability (24–26 weeks). Regulations are in place that are designed to shut down abortion clinics.
South Carolina	Most Restrictive – Abortion is banned at 6 weeks, unless medically necessary to protect the pregnant patient’s life or to prevent serious risk to their health. There is an exception for rape and incest up to 12 weeks.
South Dakota	Most Restrictive – Abortion is completely banned unless medically necessary to save the pregnant patient’s life. Providing an illegal abortion is a felony.
Tennessee	Most Restrictive – Abortion is completely banned unless medically necessary to prevent the pregnant patient’s death or a serious risk of “substantial and irreversible impairment of a major bodily function.”

State	Details
Texas	Most Restrictive – Abortion is completely banned unless the pregnant patient has a life-threatening condition and is at risk of death or “substantial impairment of a major bodily function.”
Utah	Very Restrictive – Abortion is banned at 18 weeks. The courts are deciding whether Utah will be allowed to enforce its trigger ban, which makes all abortions illegal.
Vermont	Most Protective – Abortion is protected at all stages of pregnancy by law and the state constitution.
Virginia	Restrictive – Abortion is banned starting at the third trimester. There are no laws protecting the right to abortion.
Washington	Protective – Abortion is banned at viability (generally 24–26 weeks) and is covered by state Medicaid.
West Virginia	Most Restrictive – Abortion is completely banned unless medically necessary to save the pregnant patient’s life. There is an exception for rape and incest reported to law enforcement up to 8 weeks.
Wisconsin	Restrictive – Abortion is banned at 22 weeks. Pregnant patients must make two visits with a mandatory 24-hour waiting period and are forced to get an ultrasound.
Wyoming	Restrictive – Abortion is banned at viability (generally 24–26 weeks). The state is trying to enforce a total ban, which is being litigated in courts.