

the jailhouse

6TH  
EDITION, 2021

# lawyer's handbook

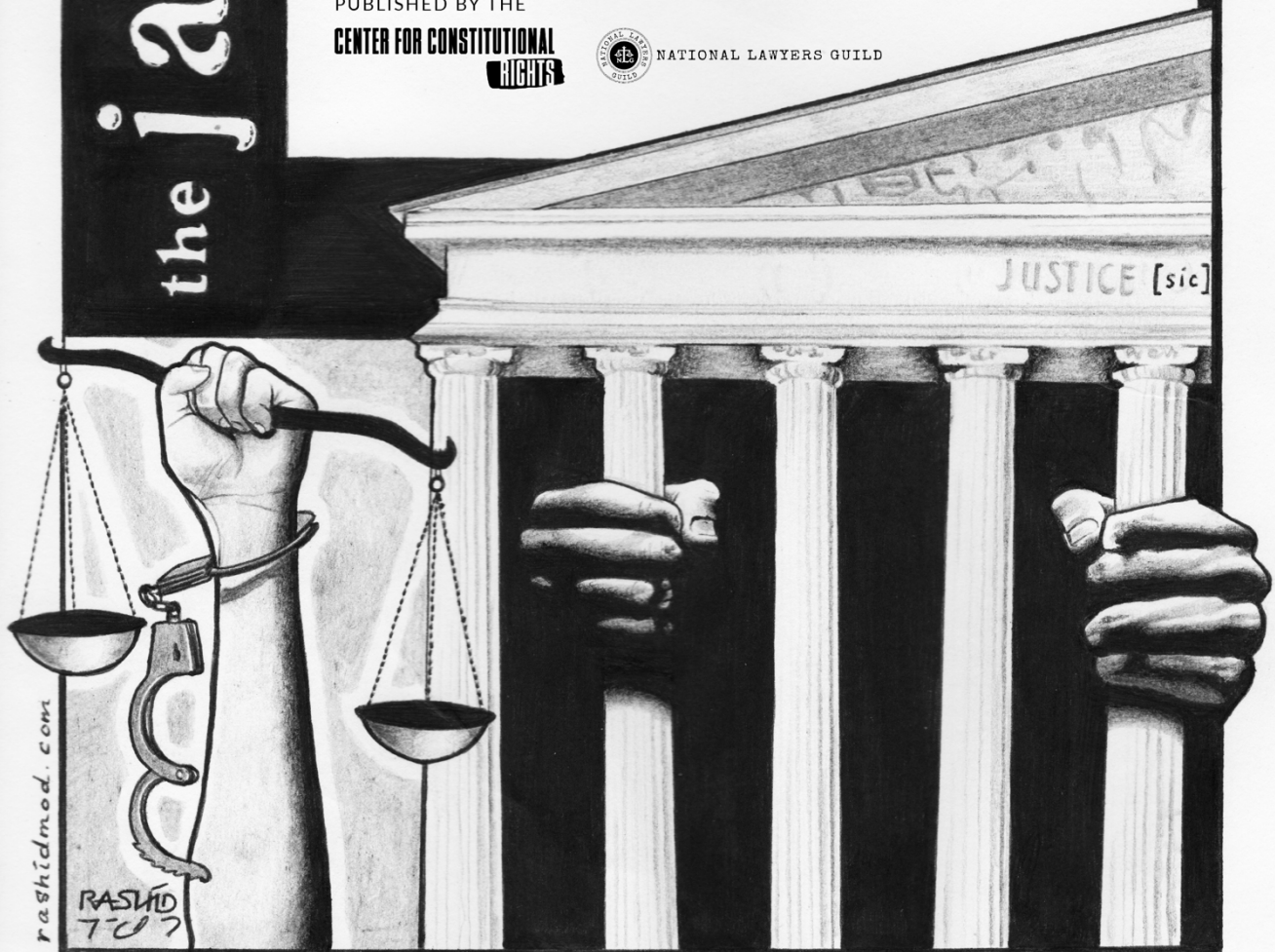
HOW TO BRING A FEDERAL LAWSUIT  
TO CHALLENGE VIOLATIONS OF  
YOUR RIGHTS IN PRISON

PUBLISHED BY THE

CENTER FOR CONSTITUTIONAL  
RIGHTS



NATIONAL LAWYERS GUILD



# NOTE FROM THE EDITORS

This handbook is a free resource for people in prison who wish to file a federal lawsuit addressing poor conditions in prison or abuse by prison staff.

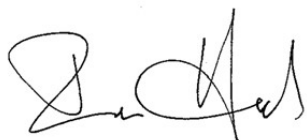
It also contains limited general information about the United States legal system. This handbook is available for free to anyone: prisoners, families, friends, activists, lawyers and others.

We hope that you find this handbook helpful, and that it provides some aid in protecting your rights behind bars. Know that those of us on the outside are humbled and inspired by the incredible work so many of you do to protect your rights and dignity while inside. As you work your way through a legal system that is often frustrating and unfair, know that you are not alone in your struggles for justice.

Good luck!



Rachel Meeropol



Ian Head



Chinyere Ezie

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**The original writers and editors of the handbook** (formerly the *NLG Jailhouse Lawyers Manual*), Brian Glick, the Prison Law Collective, the Jailhouse Manual Collective, and Angus Love. Special thanks to **Carey Shenkman** for his work on the 2021 revision and to **Paul Redd**, **John Boston**, and **Alexander Reinert** for their review of this edition.

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**The dozens of volunteers** who have come to the Center for Constitutional Rights and National Lawyers Guild offices every week since 2006 to mail handbooks to people inside prison, especially **Merry Neisner**, **Torie Atkinson**, **Dena Weiss**, **Miriam Edwin**, **Magaly Pena**, **Damian Van Denburgh**, **Nora Chanko**, **Perri Fagin**, **Clare Spitzer**, and **Daniel McGowan**. Additional thanks to all those who contributed to the new State Appendix, along with **Alice S.** and **Daniel L.** who contributed to Appendix J.

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#### LEGAL DISCLAIMER:

*This handbook was written by Center for Constitutional Rights staff. The information included in the handbook is not intended as legal advice or representation, and you should not rely upon it as such. We cannot guarantee the accuracy of this information nor can we guarantee that all the law and rules inside are current, as the law changes frequently.*

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# CHAPTER ONE:

## How to Use the JLH

### A.

#### What Is This Handbook?

This Handbook explains how a person in prison or detention can start a lawsuit in federal court to fight against mistreatment and bad conditions. As a result of the fact that most prisoners are in state prisons, we focus on those. However, people in federal prisons and city or county jails will be able to use the Handbook too.

We, the authors of the Handbook, do not assume that a lawsuit is the only way to challenge abuse in prison or that it is always the best way. We believe that a lawsuit can sometimes be one useful weapon in the struggle to change prisons and the society that makes prisons the way they are.

The Handbook discusses only some of the legal problems which prisoners face—conditions inside prison and the way you are treated by prison staff. The Handbook does not deal with how you got to prison or how you can get out of prison. It does not explain how to conduct a legal defense against criminal charges or a defense against disciplinary measures for something you supposedly did in prison.

#### Chapter One: Table of Contents

Section A.....	What Is This Handbook?
Section B.....	How to Use This Handbook
Section C.....	Who Can Use This Handbook
Section D.....	Why to Try and Get a Lawyer
Section E.....	Short History of Section 1983 and the Struggle for Prisoner's Rights
Section F.....	The Uses and Limits of Legal Action

#### The Importance of “Section 1983”

A prisoner can file several different kinds of cases about conditions and treatment in prison. This Handbook is mostly about only one kind of legal action: a lawsuit in federal court based on federal law. For prisoners in state prison, this type of lawsuit is known as a “Section 1983” suit. It takes its name from Section 1983 of Title 42 of the *United States Code*. The U.S. Congress passed Section 1983 to allow people to sue in federal court when a state or local official violates their federal rights. If you are in state prison, you can bring a Section 1983 suit to challenge certain types of poor treatment. Chapter Three of this Handbook explains in detail which kinds of problems you can sue for using Section 1983.

### B.

#### How to Use This Handbook

The Handbook is organized into six chapters and several appendices:

- > This is **Chapter One**, which gives you an introduction to the Handbook. Sections C through E of this chapter indicate the limits of this Handbook and explain how to try to get a lawyer. Sections F and G give a short history of Section 1983 and discuss its use and limits in political struggles in and outside prison.
- > **Chapter Two** discusses the different types of lawsuits available to prisoners and summarizes an important federal law that limits prisoners' access to the courts, called the Prison Litigation Reform Act.
- > **Chapter Three** summarizes many of your constitutional rights in prison.
- > **Chapter Four** explains how to structure your lawsuit, including what kind of relief you can sue for, and who to sue.
- > **Chapter Five** gives the basic instructions for starting a federal lawsuit and seeking immediate help from the court—what legal papers to file, when, where, and how. It also provides templates and examples of important legal documents.
- > **Chapter Six** discusses the first things that will happen after you start your suit. It helps you respond to a “motion to dismiss” your suit or a “motion for summary judgment” against you. It also tells you what to do if prison officials win these motions. It explains how to use “pretrial discovery” to get information and materials from prison officials.
- > **Chapter Seven** gives some basic information about the U.S. legal system. It also explains how to find laws and court decisions in a law library and how to refer to them in legal papers.

- > **The Appendices** are additional parts of the Handbook that provide extra information. The appendices to the Handbook provide materials for you to use when you prepare your suit and after you file it. Appendix A contains a glossary of legal terms. Appendix B is a sample complaint in a prison case. Appendices C and D contain forms for basic legal papers. You will also find helpful forms and sample papers within Chapters Four and Five. Appendix E contains information about administrative grievance procedures, PREA Rules, and LGBTQ+ policies applicable in certain states. Appendix F has a few of the important sections of the Prison Litigation Reform Act, and Appendix G includes the Model Questionnaire for United Nations Special Rapporteur on Torture, and Appendix H contains the *Universal Declaration of Human Rights*. Appendix I lists possible sources of further legal support. Appendix J contains some tips from working journalists on how to approach media outlets if you want to publicize your case or your story. Appendix K lists other legal materials you can read to keep up to date and learn details which are not included in this manual. Appendix L lists free book programs for prisoners, and Appendix M includes a list of addresses of federal district courts for your reference. Appendix N gives the text of the first fifteen amendments to the U.S. Constitution.

We strongly recommend that you read the whole handbook before you start trying to file your case.

## C.

### Who Can Use This Handbook

Most of the prisoners in the country are in state prison, but prisoners in other sorts of prisons or detention centers can use this book too.

#### 1. Prisoners in Every State Can Use This Handbook

Section 1983 provides a way for state prisoners to assert their rights under the United States Constitution. Every state prisoner in the country, no matter what state or territory they are in, has the same rights. However, different courts interpret these rights differently. For example, a federal court in New York may come to one conclusion about an issue, while a federal court in Tennessee may reach a totally different conclusion about the same issue.

#### First Steps:

**1. Know Your Rights!** Ask yourself: have my federal rights been violated? If you have experienced one of the following, the answer may be yes:

- > Guard or prisoner brutality or harassment
- > Unsafe cell or prison conditions
- > Censorship, or extremely limited mail, phone, or visitation privileges
- > Inadequate medical care
- > Interference with practicing your religion
- > Inadequate food
- > Racial, sexual, or ethnic discrimination
- > Placement in isolation without a hearing

**2. Exhaust the Prison Grievance System!** Use all the steps in the prison complaint or grievance system and write up your concerns in detail. Appeal it all the way and save your paperwork. You **MUST** do this before filing a suit.

**3. Try to Get Help!** Consider trying to hire a lawyer or talking to a jailhouse lawyer and be sure to request a *pro se* Section 1983 packet from your prison law library or the district court.

States also have their own laws, and their own constitutions. State courts, rather than federal courts, have the last word on what the state constitution means. This means that in some cases, you might have more success in state court than in federal court. You can read more about this possibility in the next chapter.

Unfortunately, we don't have the time or the space to tell you about the differences in the law from state to state. So, while using this Handbook, you should also try to check state law using the resources listed in Appendix K. You can also check the books available in your prison and contact the National Lawyers Guild or any other lawyers, law students or political groups you know of that support prisoners' struggles.

#### 2. Prisoners in Federal Prison Can Use This Handbook

If you are in federal prison, this Handbook will also be helpful. Federal prisoners have basically the same federal rights as state prisoners. Where things are different for people in federal prison, we have tried to make a note of it for you.

The major difference is that federal prisoners cannot use Section 1983 to sue about bad conditions and mistreatment in federal prison. Instead, you have a couple of options. For some violations of your constitutional rights, you can use a case called *Bivens v. Six Unknown*



*Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The *Bivens* case allows people in prison to sue over some Eighth Amendment violations and maybe other constitutional violations as well. When you bring a lawsuit using *Bivens*, it is called a “*Bivens* action.”

Federal prisoners can also use a federal law called the *Federal Tort Claims Act (FTCA)* to sue the United States directly for your mistreatment. Both *Bivens* and FTCA suits are explained in more detail in Chapter Two. The bottom line is that federal and state prisoners have mostly the same rights, but they will need to use slightly different procedures when filing a case.

### 3. Prisoners in City or County Jails Can Use This Handbook

People serving sentences in jail have the same rights under Section 1983 and the U.S. Constitution as people in prison. Usually these are city jails, but they can be run by any kind of municipality. A “municipality” is a city, town, county, or other kind of local government.

People in jail waiting for trial are called “pretrial detainees,” and sometimes have more protection under the Constitution than convicted prisoners. Chapter Three, Section J discusses some of the ways in which pretrial detainees are treated differently than convicted prisoners. However, you can still use most of the cases and procedures in this Handbook to bring your Section 1983 claim. Where things are different for people in jails, we have tried to make note of it for you.

### 4. Prisoners in Private Prisons Can Use This Handbook

As you know, most prisons are run by the state or the federal government, which means that the guards who work there are state or federal employees. A private prison, on the other hand, is operated by a for-profit corporation, which employs private individuals as guards.

If you are one of the hundreds of thousands of prisoners currently incarcerated in a private prison, most of the information in this Handbook also applies to you. The ability of state prisoners in private prisons to sue under Section 1983 is discussed in Chapter Two, Section A. In some cases it is actually easier to sue private prison guards because they cannot claim “qualified immunity.” You will learn about “qualified immunity” in Chapter 4, Section D.

## How Do I Use This Handbook?

This is the Jailhouse Lawyers Handbook. Sometimes it will be referred to as the “JLH” or the “Handbook.” It is divided into seven chapters, which are also divided into different sections. Each section has a letter, like “A” or “B.” Some sections are divided into parts, which each have a number, like “1” or “2.”

Sometimes we will tell you to look at a chapter and a section to find more information. This might sound confusing at first but when you are looking for specific things, it will make using this Handbook much easier.

We have tried to make this Handbook as easy to read as possible. But there may be words that you find confusing. At the end of the Handbook, in Appendix A, we have listed many of these words and their meanings in the Glossary. If you are having trouble understanding any parts of this Handbook, you may want to seek out the Jailhouse Lawyers in your prison. Jailhouse Lawyers are prisoners who have educated themselves on the legal system, and one of them may be able to help you with your suit.

In many places in this Handbook, we refer to a past legal suit to prove a specific point. It will appear in italics, and with numbers after it, like this:

*Smith v. City of New York*, 311 U.S. 288 (1994)

This is called a “citation.” It means that a court decided the case of *Smith v. City of New York* in a way that is helpful or relevant to a point we are trying to make. Look at the places where we use citations as examples to help with your own legal research and writing. Chapter Seven explains how to find and use cases and the meaning of citations.

## D.

### Why to Try and Get a Lawyer

Unfortunately, not that many lawyers represent prisoners, so you may have trouble finding one. You have a right to sue without a lawyer. This is called suing “*pro se*,” which means “in one’s own behalf.” Filing a lawsuit *pro se* is very difficult. Thousands of lawsuits are filed by prisoners every year, and most of these suits are lost before they even go to trial. We do not want to discourage you from turning to the court system, but encourage you to do everything you can to try to get a lawyer to help you, before you decide to file *pro se*.

## Why So Much Latin?

"*Pro Se*" is one of several Latin phrases you will see in this Handbook. The use of Latin in the law is unfortunate, because it makes it hard for people who aren't trained as lawyers to understand a lot of important legal procedures. We have avoided Latin phrases whenever possible. When we have included them, it is because you will see these phrases in the papers filed by lawyers for the other side, and you may want to use them yourself. Whenever we use Latin phrases, we have put them in italics, like *pro se*. Check the glossary at Appendix A for any words, Latin or otherwise, that you don't understand.

A lawyer is also very helpful after your suit has been filed. They can interview witnesses and discuss the case with the judge in court while you are confined in prison. A lawyer also has access to a better library and more familiarity with legal forms and procedures. And despite all the legal research and time you spend on your case, many judges are more likely to take a lawyer seriously than someone filing *pro se*.

If you feel, after reading Chapter Three, that you have a basis for a lawsuit, try to find a good lawyer to represent you. You can look in the phone book to find a lawyer or to get the address for the "bar association" in your state. A bar association is a group that many lawyers belong to. You can ask the bar association to give you the names of some lawyers who take prison cases. Some prisoners' rights organizations can sometimes help you find a lawyer.

You probably will not be able to pay the several thousand dollars or more which you would need to hire a lawyer. But there are other ways you might be able to get a lawyer to take your case.

> If you have a good chance of winning a substantial amount of money (explained in Chapter Four, Section C), a lawyer might take your case on a "contingency fee" basis. This means you agree to pay the lawyer a portion of your money damages if you win (usually between 30-40%), but the lawyer gets nothing if you lose. This kind of arrangement is used in many suits involving car accidents and other personal injury cases outside of prison. In prison, it may be appropriate if you have been severely injured by guard brutality or due to unsafe prison conditions.

> If you don't expect to win money from your suit, a lawyer who represents you in some types of cases can get paid by the government if you win your case. These fees are authorized by the United States Code, Title 42, Section 1988. However, the Prison Litigation Reform Act of 1996 (called the "PLRA" and discussed in Chapter Two, Section E) added new rules that restrict the court's ability to award fees to your lawyer. These new provisions may make it harder to find a lawyer who is willing to represent you.

> If you can't find a lawyer to represent you from the start, you can file the suit yourself and ask the court to "appoint" a lawyer for you. This means the court will recruit a lawyer

to take your case. Unlike in a criminal case, you have no absolute right to a free attorney in a civil case about prison abuse. This means that a judge is not required by law to make a lawyer take your Section 1983 case, but they can do so if they choose to and are able to find a willing lawyer. You will learn how to ask the judge to get you a lawyer in Chapter Five, Section C, Part 3 of this Handbook.

> A judge can appoint a lawyer as soon as you file your suit. But it is much more likely that they will only appoint a lawyer for you if you successfully get your case moving forward and convince the judge that you have a chance of winning. This means that the judge may wait until after they rule on the prison officials' motions to dismiss your complaint or motion for summary judgment. Chapters Five and Six of this Handbook will help you prepare your basic legal papers and respond to a motion to dismiss or a motion for summary judgment.

Even if you have a lawyer from the start, this Handbook is still useful to help you understand what they are doing.

Be sure your lawyer explains the choices you have at each stage of the case. Remember that they are working for you. This means that they should answer your letters and return your phone calls within a reasonable amount of time. Don't be afraid to ask your lawyer questions. If you don't understand what is happening in your case, ask your lawyer to explain it to you. Don't ever let your lawyer force decisions on you or do things you don't want.

## E.

### A Short History of Section 1983 and the Struggle for Prisoners' Rights

As you read in Sections A and C, most prisoners who decide to challenge abuse or mistreatment in prison will do so through a federal law, 42 U.S.C. § 1983, usually just known as "Section 1983." Section 1983 is a way for any individual (not just a prisoner) to challenge something done by a state employee or local government employee. The part of the law you need to understand reads as follows:

*Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...*

Section A of Chapter Two will explain what this means in detail, but we will give you some background information here. Section 1983 was passed by the United States Congress over 150 years ago. Section 1983 was originally known as Section 1 of the *Ku Klux Klan Act of 1871*. Section 1983 does not mention race, and it can be used by people of any color, but it was originally passed specifically to help Black people enforce the new constitutional rights they won after the Civil War—specifically, the 13th, 14th and 15th Amendments to the U.S. Constitution. Those amendments made slavery illegal, established the right to “due process of law” and equal protection of the laws, and guaranteed every male citizen the right to vote. Although these amendments became law, white racist judges in the state courts refused to enforce these laws, especially when Black people had their rights violated by other state or local government officials. The U.S. Congress passed Section 1983 to allow people to sue in federal court when a state or local official violated their federal rights.

Soon after Section 1983 became law, however, Northern big businessmen joined forces with Southern plantation owners to take back the limited freedom that Black people had won. Federal judges found excuses to undermine Section 1983 along with most of the other civil rights bills passed by Congress. Although the purpose of Section 1983 was to bypass the racist state courts, federal judges ruled that most lawsuits had to go back to those same state courts. Their rulings remained law until Black people began to regain their political strength through the civil rights movement of the 1960s.

In the 1960s, a series of very good Supreme Court cases reversed this trend and transformed Section 1983 into an extremely valuable tool for state prisoners. People in prison soon began to file more and more federal suits challenging prison abuses. A few favorable decisions were won, dealing mainly with freedom of religion, guard brutality, and a prisoner’s right to take legal action without interference from prison staff. But many judges still continued to believe that the courts should let prison officials make the rules, no matter what those officials did.

This way of thinking is called the “hands-off doctrine,” because judges keep their “hands off” prison administration.

The next big breakthrough for prisoners did not come until the early 1970s. Black people only began to win legal rights when they organized together politically, and labor unions only achieved legal recognition after they won important strikes. In the same way, prisoners did not begin to win many important court decisions until the prison movement grew strong.

Powerful, racially united strikes and rebellions shook Folsom Prison, San Quentin, Attica, and other prisons throughout the country during the early 1970s. These rebellions brought the terrible conditions of prisons into the public eye and had some positive effects on the way federal courts dealt with prisoners. Prisoners won important federal court rulings on living conditions, access to the media, and procedures and methods of discipline.

Unfortunately, the federal courts did not stay receptive to prisoners’ struggles for long. In 1996, Congress passed and President Clinton signed into law the Prison Litigation Reform Act (PLRA). The PLRA is very anti-prisoner and works to limit prisoners’ access to the federal courts. Why would Congress pass such a bad law? Many people say Congress believed a story that was told to them by states tired of spending money to defend themselves against prisoner lawsuits. In this story, prisoners file mountains of unimportant lawsuits because they have time on their hands and enjoy harassing the government. The obvious truth—that prisoners file a lot of lawsuits because they are subjected to a lot of unjust treatment—was ignored.

The PLRA makes filing a complaint much more costly, time-consuming, and risky to prisoners. Many prisoners’ rights organizations have tried to get parts of the PLRA struck down as unconstitutional, but so far this effort has been unsuccessful. You will find specific information about the individual parts of the PLRA in later chapters of this Handbook. Some of the most important sections of the PLRA are included in Appendix F at the end of this book.

History has taught us that convincing the courts to issue new rulings to improve day-to-day life in prisons and change oppressive laws like the PLRA requires not only litigation, but also the creation and maintenance of a prisoners’ rights movement both inside and outside of the prison walls.

## F. The Uses and Limits of Legal Action

Only a strong prison movement can win and enforce significant legal victories. But the prison movement can also use court action to help build its political strength. A well-publicized lawsuit can educate people outside about the conditions in prison. The struggle to enforce a court order can play an important part in political organizing inside and outside prison. Good court rulings backed up by a strong movement can convince prison staff to hold back so that conditions inside are a little less brutal, and prisoners have a little more freedom to read, write, and talk.

Still, the value of any lawsuit is limited. It may take several years from starting the suit to win a final decision that you can enforce. There may be complex trial procedures, appeals, and delays in complying with a court order. Prison officials may be allowed to follow only the technical words of a court decision while continuing their illegal behavior another way. Judges may ignore law which obviously is in your favor because they are afraid of appearing “soft on criminals,” or because they think prisoners threaten their own position in society. Even the most liberal, well-meaning judges will only try to change the way prison officials exercise their power. No judge will seriously

address the staff's basic control over your life while in prison.

To make fundamental changes in prison, you can't rely on lawsuits alone. It is important to connect your suit to the larger struggle. Write press releases that explain your suit and what it shows about prison and about the reality of America. Send the releases to newspapers, radio and TV stations, and legislators. Keep in touch throughout the suit with outside groups that support prisoners' struggles. Look at Appendix J for tips we collected from journalists on how to approach media and groups that may be able to help you.

You may also want to discuss your suit with other prisoners and involve them in it even if they can't participate officially. Remember that a lawsuit is most valuable as one weapon in the ongoing struggle to change prisons and the society which makes prisons the way they are.

Of course, all this is easy for us to say, because we are not inside. All too often, jailhouse lawyers and activists face retaliation from guards due to their organizing and lawsuits. Chapter Three, Section G, Part 4 explains some legal options if you face retaliation. However, while the law may be able to stop abuse from happening in the future, and it can compensate you for your injuries, the law cannot guarantee that you will not be harmed. Only you know the risks that you are willing to take.

Finally, you should know that those of us who fight this struggle from the outside are filled with awe and respect at the courage of those of you who fight it, in so many different ways, on the inside.

*"Jailhouse lawyers aren't simply, or even mainly, jailhouse lawyers. They are sons, daughters, uncles, nieces, parents, sometimes teachers, grandparents, and occasionally writers. In short, they are part of a wider, broader, deeper social fabric."*



**- Mumia Abu-Jamal**  
Award-winning journalist, author, and jailhouse lawyer,  
from his 2009 book "Jailhouse Lawyers."

# CHAPTER TWO:

## Overview of Types of Lawsuits and the Prison Litigation Reform Act

This chapter describes the different types of lawsuits you can bring to challenge conditions or treatment in prison or detention, including Section 1983 actions, state law actions, the *Federal Tort Claims Act* and *Bivens* actions. We also discuss international law and explain the impact of the Prison Litigation Reform Act (PLRA).

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### A.

#### Section 1983 Lawsuits

Section 1983 lawsuits provide a way for people in state prisons or local jails to get relief from unconstitutional treatment or conditions. The main way to understand what kind of lawsuit you can bring under Section 1983 is to look at the words of that law:

*“Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...”*

Some of the words are perfectly clear. Others have meanings that you might not expect, based on years of interpretation by judges. In this section we will explore what the words themselves and judges’ opinions from past lawsuits tell us about what kind of suit is allowed under Section 1983.

Although Section 1983 was designed especially to help Black people, anyone can use it, regardless of race. The law

refers to “any citizen of the United States or any other person within the jurisdiction thereof.” This means that you can file a Section 1983 action even if you are not a United States citizen. *Martinez v. City of Los Angeles*, 141 F.3d 1373 (9th Cir. 1998). All you need is to have been “within the jurisdiction” when your rights were violated. “Within the jurisdiction” just means you were physically present in the United States.

Not every harm you suffer or every violation of your rights is covered by Section 1983. There are two requirements. First, Section 1983 applies to the “deprivation of any rights, privileges, or immunities secured by the Constitution and laws.” This means that the violations you are suing about must violate your federal rights. Federal rights are those given by the U.S. Constitution, Amendments to the Constitution, and laws passed by the U.S. Congress. They are explained in part 1, below. Second, Section 1983 also says “under color of any statute, ordinance, regulation, custom or usage, of any State or Territory.” Courts have developed a shorthand for this phrase. They call it “under color of state law.” This means that the violation of your rights must have been done by a state or local official. This requirement is explained in part 2 below.

#### 1. Violations of Your Federal Rights

Section 1983 won’t help you with all the ways in which prison officials mistreat prisoners. You need to show that the way a prison official treated you violates the U.S. Constitution or a law passed by the U.S. Congress.

Prisoners most commonly use Section 1983 to enforce rights guaranteed by the U.S. Constitution. These are called “constitutional rights.” Your constitutional rights are explained in Chapter Three.

You can also use Section 1983 to enforce rights in federal laws, or “statutes.” But most federal laws which apply to prisoners provide their own cause of action, which you can use without reference to Section 1983. For example, the *Americans with Disabilities Act*, or the “ADA” can be found at 42 U.S.C. §§ 12101 – 12213. The ADA prevents discrimination against people with disabilities, including prisoners. If you have any sort of physical or mental disability, you can file an ADA lawsuit without making reference to Section 1983.

Another federal statute that may be useful to prisoners is the *Religious Land Use and Institutionalized Persons Act*, or “RLUIPA,” which was passed by Congress in 2000. 42 U.S.C. § 2000cc-1(a). RLUIPA protects prisoners’ rights to exercise their religion and may be used by any prisoner, whether in federal or state prison or in jail. A second federal statute protecting the religious rights of prisoners is the *Religious Freedom Reformation Act*, or “RFRA.” 42

U.S.C. § 2000bb-1(c). RFRA can only be used by prisoners in federal prison. It is not available to prisoners in state prison. Religious freedom is a constitutional right protected by the First Amendment, but RLUIPA and RFRA provide even more protection than the First Amendment. Chapter Three, Section B explains the protection provided by each of these laws. Like ADA claims, these claims can be brought in a Section 1983 suit, or on their own.

Prisoners can use Section 1983 to sue about conditions or treatment in prison. You cannot use Section 1983 to challenge the reason you are in prison, how long you are in prison, or to obtain immediate or speedier release from prison. If you want to challenge your trial, your conviction, or your sentence, you need to use a completely different type of action, called a writ of habeas corpus. This handbook will not help you with that kind of case, but some of the resources listed in Appendix K explain how to do it.

## 2. “Under Color of State Law”

Section 1983 only allows you to sue for actions taken “under color of state law.” This usually means that your rights must have been violated by a state or local official. This includes people who work for the state, city, county, or other local governments. If you are in a state prison, anything done to you by a prison guard, prison doctor, or prison administrator (like the warden) is an action “under color of state law.”

The “under color of state law” requirement does not mean that the action has to have been legal under state law. This is very important, and was decided in a case called *Monroe v. Pape*, 365 U.S. 167 (1961). All you need to show is that the person you sue was working for the prison system or some other part of state or city government at the time of the acts you’re suing about.

The decision in *Monroe v. Pape* that state government officials can be sued under Section 1983 was expanded in a case called *Monell v. New York City Dep’t of Social Services*, 436 U.S. 658 (1978). In that case, the Supreme Court allowed for Section 1983 claims against municipal and city governments.

In a Section 1983 suit, you can sue over a one-time action that violated your rights. For example, you can sue if a guard beats you. You can also sue over a pattern or practice of certain acts, like if guards routinely look away and fail to act when prisoners fight with each other. Finally, you can also sue over an official prison policy. For example, you could sue if the prison has a policy that allows Catholic prisoners to pray together but doesn’t allow the same thing for Muslim prisoners.

You can’t use Section 1983 to sue federal employees over their actions because they act under color of federal law, not state law. You can sometimes use something called a “*Bivens*” action to sue in federal court when a federal official violates your constitutional rights, but this type of case is limited. *Bivens* actions are explained in Section D of this chapter.

You also can’t use Section 1983 to sue a private citizen who acted without any connection to the government or any governmental power. For example, if another prisoner assaults you, you cannot use Section 1983 to sue that prisoner, because they do not work for the government. You could, however, use Section 1983 to sue a guard for failing to protect you from the assault.

You can sometimes use Section 1983 to sue private citizens who are working for a state or local government. A person can exercise power from the government even if they don’t actually work for the state directly. You can use Section 1983 to sue a private citizen, such as a doctor, who mistreats you while they are working with or for prison officials. In a case called *West v. Atkins*, 487 U.S. 42 (1988), the Supreme Court held that a private doctor with whom the state contracts to provide treatment to a prisoner can be sued using Section 1983. And in *Richardson v. McKnight*, 521 U.S. 399 (1997) the Supreme Court ruled that private prison guards sued under Section 1983 are not entitled to the defense of qualified immunity.

When using Section 1983 against non-state officials, most courts will look at whether the individual is performing a traditional state function so that it looks just like the guard is acting “under color of state law.” One case that discusses this in detail is *Skelton v. PriCor, Inc.*, 963 F.2d 100 (6th Cir. 1991). In *Skelton*, a private prison employee wouldn’t let a prisoner go to the law library or have a bible. The Sixth Circuit ruled that the private prison guard’s action was “under color of state law” and allowed the prisoner to sue using Section 1983. Another helpful case is *Giron v. Corrections Corporation of America*, 14 F. Supp. 2d 1245 (D.N.M. 1998). In that case a woman was raped by a guard at a private prison. The court held that the guard was “performing a traditional state function” by working at the prison, so his actions were “under color of state law.”

### The Parties in a Lawsuit

- ✓ **“Plaintiff”** is the person who starts a lawsuit. If you sue a guard over prison abuse, you are a plaintiff.
- ✓ **“Defendant”** is the person who you sue. If you sue a prison doctor, guard, and a supervisor, they are all defendants.

## B.

### State Court Cases

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Section 1983 allows people in state prisons to bring federal claims in federal court. But people in state prisons can also bring 1983 claims and other claims in state court.

One reason you might want to sue in state court, rather than federal court, is the Prison Litigation Reform Act, or “PLRA.” The PLRA is a federal law that makes it difficult for a prisoner to file a federal lawsuit by imposing all sorts of procedural hurdles and requirements. We explain the PLRA in Section E of this Chapter. States have laws similar to the PLRA, but some provisions vary. It is important to find out about the PLRA-like statute in your state.

A good thing about state court is that you may also be able to enforce rights that you don’t have in federal court. For example, a state “tort” claim is an entirely different way to address poor prison conditions. A “tort” is an injury or wrong of some sort. The advantage of suing in state court is that some conduct by prison guards may be considered a “tort” but may not be so bad as to be considered a constitutional violation.

For example, you will learn in Chapter Three that the Eighth Amendment prohibits “cruel and unusual punishment” and entitles prisoners to medical care that is not so poor as to amount to such punishment. For a constitutional medical care claim (described in detail in the Chapter Three) a prisoner needs to prove that they had a serious medical need and that the guard or doctor in question acted recklessly in failing to provide medical care. On the other hand, you can sue a prison doctor for the state tort of medical negligence if they mess up in your treatment, whether that mistake was reckless or not. Common torts are listed in Section C, Part 2 of this Chapter, under the heading, “Types of Torts.”

Another type of state claim is a claim based on your state’s constitution. Some state constitutions provide more rights than the federal constitution.

Sometimes a prisoner’s suit will include claims based on state law as well as federal law. You can do this in a Section 1983 suit if the action you are suing about violates both state and federal law. But it is tricky to try this without an experienced lawyer, and usually it won’t make a very big difference. You can’t use Section 1983 to sue about an action that only violates state law. It is also important to know that if you bring federal claims in state court, your case may be “removed” to federal court by the defendants.

Historically, federal judges were more sympathetic to prisoners than state judges. However, the PLRA has made federal court a much less friendly place for prisoners. Sadly, that does not mean that you will necessarily get fair treatment in state court. Many state court judges are elected, rather than appointed, so they may avoid ruling

for prisoners because it might hurt their chances of getting reelected.

## C.

### Federal Torts Claims Act (FTCA)

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If you are a federal prisoner, or a pretrial or immigration detainee in a federal facility, your best chance for relief may be a claim under the *Federal Tort Claims Act* (“FTCA”) because Section 1983 cases are for state prisoners only.

Usually, you cannot sue the United States itself. The FTCA is an exception to this general rule. The FTCA allows federal prisoners and immigration or pretrial detainees in federal jails or facilities to file lawsuits against the United States when a federal employee has injured them.

The most important FTCA provisions are in Title 28 of the United States Code, sections 1346(b), 1402(b), 2401(b) and 2671-2680. When we reference Title 28 in this chapter, it will look like this: “28 U.S.C. § 2679(d)(2)” where “28 U.S.C.” means “Title 28 of the United States Code,” and the numbers and letters after it refer to a specific section in the code.

#### FTCA Claims and Qualified Immunity

One of the good things about an FTCA claim is that the United States does not have “qualified immunity.” “Qualified immunity” is described in Chapter Four. For both *Bivens* and Section 1983 claims, the qualified immunity defense makes it hard to win money damages from government officials.

The FTCA only allows you to sue over the “torts” described in Section B of this chapter. You’ll find examples of torts in the following section. The FTCA provides a way to sue the U.S. in federal court for torts committed by a federal employee. 28 U.S.C. § 1346(b).

You do not have to be a U.S. citizen to obtain relief under the FTCA. There are, however, many more FTCA cases that have been brought by citizen prisoners than noncitizen detainees.

FTCA actions must be brought in federal court, not state court. However, the federal court will use state tort law. Since torts are different from state to state, make sure that the tort you’re suing over exists under the law of the state where you are in prison or jail.

#### 1. Who You Can Sue

When you bring a lawsuit using the FTCA, you will name the “United States” as the defendant. You cannot name the specific federal employee who hurt you, or an agency such as the “Bureau of Prisons.” Although you will name the

United States as the defendant in your FTCA suit, you will discuss the actions of a specific federal employee.

The FTCA only allows you to sue over actions by federal officials or employees. This means you can't sue over the actions of a state or local law enforcement agent. You also can't sue about an independent contractor under the FTCA unless federal employees directly supervised the day-to-day activities of the contractors. Figuring out whether someone is a contractor or federal employee can be tricky, but you should look to the standard set out in the Supreme Court case, *United States v. Orleans*, 425 U.S. 807 (1976). Most courts decide the question by looking at facts like who owned the tools used by the contractor and who paid the salary, worker's compensation, and insurance of the employee. In one good case, a prisoner succeeded in an FTCA case arising from a fever outbreak at a prison owned by the Bureau of Prisons but operated by a private prison company. The United States defended the case by arguing that the private contractor—not the United States—was responsible. The Ninth Circuit Court of Appeals disagreed, saying that the Bureau of Prisons had a duty to warn prisoners about the risks of valley fever. *Edison v. United States*, 822 F.3d 510 (9th Cir. 2016).

The FTCA is most useful for people held in federal immigration detention centers, or federal jails or prisons. But if you are a federal detainee injured in a state, county, or local jail you may also be able to bring a claim against the United States under the FTCA for negligently housing you in an unsafe non-federal facility. You should argue that the United States has a duty to use reasonable care in ensuring the safety of federal detainees no matter where they are housed. The law is not settled in this area, but you should carefully read a Supreme Court decision, *Logue v. U.S.*, 412 U.S. 521 (1973) which held that the federal government was not responsible for the suicide of a federal prisoner who was negligently confined in a municipal jail because the municipal employees were federal contractors, not federal employees. Probably, you will only be able to succeed on this theory if a federal employee knew or should have known you were being put into an unsafe situation. One example is *Cline v. United States Department of Justice*, 525 F. Supp. 825 (D.S.D. 1981), a good case in which the court allowed a claim by a federal prisoner held in a county jail after U.S. Marshals placed him into a situation they knew was unsafe.

The FTCA requires that the government employee whose acts you are complaining of was acting within the "course and scope of employment." The meaning of this requirement is also a matter of state law, so you will have to figure out what the law is in your state. Under the law in some states, this requirement is relatively easy to meet. For example, in California the court asks whether the risk of this kind of tort is generally foreseeable given the enterprise. *Perry v. County of Fresno*, 215 Cal.App.4th 94 (2013). In other words, the court will consider whether the type of injury you are complaining about is something that happens often in a prison.

But in other states, the standard can be difficult to meet. In *Shirley v. United States*, 232 F. App'x. 419 (5th Cir. 2007), for example, a federal prisoner filed an FTCA claim after she was sexually assaulted by a correctional officer. The Court dismissed her case because under Texas law, an employee only acts under the scope of employment when they act to further the employer's business.

At least one court has gotten around this requirement altogether. In *Bolton v. United States*, 347 F. Supp. 2d 1218 (N. D. Fla. 2004), the court held that it doesn't matter if a guard is acting in the scope of their employment, as long as they are acting "under color of federal law." Under this theory, all that matters is that the person who hurt you or acted wrongfully is a federal employee.

## 2. Administrative Exhaustion

Before you can raise an FTCA claim, first you must present the claim to the appropriate federal agency, such as the Federal Bureau of Prisons (BOP) or Immigration & Customs Enforcement (ICE), and you have to do that within two years of the action that leads to the injury. 28 U.S.C. § 2675(a). If you are in a federal prison, your claim needs to be submitted to the Bureau of Prisons at 320 First Street, NW, Washington, D.C. 20534.

Use Government Standard Form 95 to make the administrative claim. A copy of this form is included in Appendix C. If this form is unavailable, you can write a letter specifying that you are making an administrative claim. Your administrative request must include a specific dollar amount requested for damages and the facts supporting your claim. Make sure you sign the form and include all the detail you can. You must include enough information to allow the agency to investigate your claim.

In very rare cases, the agency could respond by accepting your claim and giving you money without you having to sue.

If your administrative claim is denied, you have six months from the date the agency denies your claim to file a FTCA lawsuit in federal court under 28 U.S.C. § 2401(b) and 28 U.S.C. § 2675(a).

If the agency doesn't respond to your administrative claim within six months you may "deem" the claim denied under 28 U.S.C. § 2675(a) and file your suit. You must state in your complaint that you have completed the administrative claim process, or if you file a suit under the "deeming provision" of the FTCA, state that you meet the exhaustion requirement because the government did not respond to your administrative claim within six months.

## 3. Types of Torts

Under the FTCA and state law, you can sue for negligence or for intentional torts like assault, battery, false arrest, abuse of process, and intentional infliction of emotional distress. These common torts are explained below.

You can sue on almost any tort that exists under state law. There are a few exceptions. You can't bring a libel or



slander case under the FTCA and you can't sue if the government mishandles, detains, or loses your belongings. However, you can file an administrative claim for damage or loss to personal property under 31 U.S.C. § 3723(a)(1).

#### a. Negligence

A government employee is negligent when they “fail to use reasonable care.” Since people have different ideas about what is reasonable, courts ask what a “reasonably prudent person” would do in a similar situation.

There are four things you need to show in a negligence claim: duty, breach, causation, and damages. “Damages” are usually the easy part—you just have to show you have been hurt in some way. But “duty” is harder. Correctional officials do not have a duty to provide a “risk-free” environment. They do, however, have a duty to keep prisoners safe and protect them from unreasonable risks. To prove negligence, the employee must have “breached” (failed in) this duty to keep you safe. Lastly, the harm that you suffered must have been caused by the actions of the federal employee, not some other person or event.

You can use the FTCA to challenge any kind of negligence by a detention center or federal prison employee, including the negligent denial of medical care or an officer's failure to protect a detainee from another detainee. Prisoners often bring negligence claims against prison doctors and nurses for medical malpractice. For example, in *Jones v. United States*, 91 F.3d 623 (3d Cir. 1996), the court found the prison breached a duty to a prisoner who had a stroke after prison officials withheld his medication. And in *Plummer v. United States*, 580 F.2d 72 (3d Cir. 1978), prisoners successfully made a negligence claim based on exposure to tuberculosis.

Sometimes, a court will find that the federal employee did not breach their duty of care. For example, the Seventh Circuit denied William Dunne's FTCA claim for injuries he suffered when he slipped and fell three times on ice during recreational time at a prison. The court held that the accumulation of snow or ice where Dunne fell was so small that an official using ordinary care could not reasonably be expected to know about it. *Dunne v. United States*, 989 F.2d 502 (7th Cir. 1993).

What if you are injured by another prisoner? An important Supreme Court case on this topic is *United States v. Muniz*, 374 U.S. 150 (1963). Muniz, one of the plaintiffs in the case, was beaten unconscious by other prisoners after a guard locked him in a dormitory. The prisoner argued that the prison officials were negligent in failing to provide enough guards to prevent the assault. The court said that this type of claim is appropriate under the FTCA, but found against the prisoner because the officials followed prison regulations and could not have reasonably prevented the assault.

If a prison official has violated a federal or state statute, you can use it to strengthen your FTCA claim. You can argue that the statute defines or creates a duty, which was breached by the official. For example, one court found that

the Bureau of Prisons breached a duty to let a prisoner make phone calls to his attorney based on the language from the Code of Federal Regulations. *Yosuf v. United States*, 642 F.Supp. 415 (M.D.Pa. 1986).

#### b. Intentional Torts - Assault and Battery

Assault and battery often go together, but they are two separate torts. An assault is when someone does something that makes you fear they are about to harm you. It is a threat. If that threat becomes a touch, like if a guard hits, kicks, or beats you, that is a battery. A battery is any “offensive touch or contact” where some kind of force is applied.

You can use the FTCA to sue a government employee who assaults or batters you. While the exact standard in each state is different, courts will generally look at whether the use of forces was justified under the circumstances.

#### c. False Imprisonment

You may have a claim for false imprisonment if you are imprisoned longer than your sentence or held in SHU longer than the time of your punishment for a disciplinary offense. For example, under New York law there are four elements to a false imprisonment claim (1) the defendant intended to confine you, (2) you were aware of the confinement, (3) you did not consent to the confinement, and (4) the confinement was not otherwise privileged. In *Gittens v. New York*, 504 N.Y.S.2d 969 (Ct. Cl. 1986), a New York court held the plaintiff had a claim for false imprisonment because he was held in SHU for nine days beyond the last day of the penalty imposed, and the only reason given was “investigation.” It is important to note that the prisoner in that case got no process whatsoever. You would most likely not be able to succeed with a claim like this if you got any process related to your extra time in the SHU.

#### d. Intentional Infliction of Emotional Distress

Another tort is Intentional Infliction of Emotional Distress or IIED. This tort arises when someone purposefully does something outrageous that makes you feel very upset. Under the law of most States, an IIED claim requires a showing that: (1) the defendant acted in a way that is extreme or outrageous for the purpose of causing emotional distress; (2) the plaintiff actually suffered severe or extreme emotional distress; and (3) the defendant's conduct caused the emotional distress.

The conduct really must be outrageous and extreme. One successful example of an IIED claim is *Schmidt v. Odell*, 64 F. Supp. 2d 1014 (D. Kan. 1999), where a prisoner who had both legs amputated was not given a wheelchair or other accommodation by the jail, and thus had to crawl around on the floor.

### **4. Damages in FTCA Suits**

Damages (money you can get from a lawsuit) are explained in Chapter Four. For now, just note that under the FTCA, you can sue the United States for actual (money) damages

to compensate you for your injury. You cannot get punitive damages from the United States under the FTCA. Usually, you can't get more money than the amount of damages you asked for in your administrative claim. One exception is if your injuries have gotten a lot worse since the time you filed your administrative claim. state tort law ultimately determines how high your damages can be.

## 5. The Discretionary Function Exception

The United States often defends against FTCA claims based on the “discretionary function exception.” When an employee has the freedom to act on their own judgment, rather than just follow a rule, they are said to have performed a “discretionary function or duty” and their actions cannot make the United States liable under the FTCA. This is true even if they abused their discretion. 28 U.S.C. § 2680[a]. This is in contrast to when an employee is just implementing a policy or prison regulation. Unfortunately, courts have interpreted the discretionary function exception very broadly.

In *Berkovitz v. United States*, 486 U.S. 531 (1988), the Supreme Court laid out a test to help figure out whether an action is discretionary or not. First, you should ask if the employee exercised “judgment” or “choice” in doing what they did. If they just implemented a policy or regulation of the prison, they didn't exercise their own judgment and the act is not discretionary. The Tenth Circuit, for example, said that a doctor's decisions about how to medically treat a patient at an Air Force base are not discretionary. *Jackson v. Kelly*, 557 F.2d 735 (10th Cir. 1977).

On the other hand, if the employee did make their own choice, the act probably was “discretionary” and subject to the exception. For example, a prisoner who sued a Tennessee prison for losing his property when they transferred him lost his case on the discretionary function exception. The court said the warden exercised his discretion in making the arrangements for the prisoner's transfer. *Ashley v. United States*, 37 F. Supp. 2d 1027 (W.D. Tenn. 1997). The widow of a murdered federal prisoner ran into the same problem when she tried to argue the prison negligently understaffed the area of the prison where her husband was killed. The court said that the decision about how many officers to station in a given compound was discretionary. *Garza v. United States*, 413 F. Supp. 23 (W.D. Okla. 1975).

A good case to read where a prisoner was able to overcome the discretionary function exception is *Keller v. United States*, 771 F.3d 1021 (7th Cir. 2014). In that case, a mentally ill person in a federal prison was placed in general population and brutally attacked. His illness prevented him from defending himself. The prisoner sued the prison for negligence, and the Seventh Circuit said that the discretionary function exception didn't apply to negligent behavior. The court said that “carelessness would not be covered by the discretionary function exception, as it involves no element of choice or judgment grounded in public policy considerations.”

## D.

## Bivens Actions and Federal Injunctions

FTCA claims can only be brought for torts, not constitutional violations. If a federal prisoner wants to make a constitutional claim for money damages, they must do so through a “*Bivens* action.” The name comes from a lawsuit, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), in which the Supreme Court established the right to bring a lawsuit for money damages against individual law enforcement officials, acting under color of federal law, for violations of constitutional rights. You might notice that this sounds very similar to the language in Section 1983. The key difference is that Section 1983 applies to state actors, while *Bivens* applies to federal actors. If you are an immigration detainee in the custody of ICE, a federal agency, or a federal prisoner in the custody of the Bureau of Prisons, in most situations, you will be relying on *Bivens* and not on Section 1983.

There are two main elements to a *Bivens* action: (1) a federal actor and (2) unconstitutional acts by that person that are properly the subjects of a *Bivens* Claim. This section discusses each of those elements in turn.

If a federal prisoner is not seeking money damages, but instead wants to change a prison policy, or stop ongoing illegal action, the prisoner can file a case for an “injunction” in federal court under 28 U.S.C. 1331. These federal injunctions are also described below.

### 1. Who is acting under color of federal law?

Who should you name as the defendant in your lawsuit? In other words, who should you sue? First, it is important to know that *Bivens* provides a right of action against individuals only, and not against federal agencies, private corporations, or private contractors. This means you must name actual people as the defendants in your lawsuit, not the prison or the Bureau of Prisons.

When it comes to immigration detention, it can sometimes be tricky to determine whether or not someone is acting under federal law, because immigrants can be detained in a variety of different types of facilities, including facilities run by private corporations. However, no matter what kind of facility you are detained in, you are in the custody of ICE, a federal agency.

> If you are in a Bureau of Prisons prison, all of the prison personnel you have contact with are acting under federal law.

> If you are in a federal detention center, all of the prison personnel you have contact with are acting under federal law for the purpose of *Bivens*.

> If you are in a private facility or a state, county, or other local facility that has a contract with ICE to hold immigration detainees, you may be able to sue an ICE official who oversees conditions at your facility, but you cannot bring a *Bivens* suit against the facility itself, the private guards, or the state guards, but you can sue the state guards under Section 1983.

If you can't figure out whether the person you want to sue is a state actor or a federal actor, you can bring your lawsuit under both *Bivens* and Section 1983, and the Judge will decide which approach is appropriate.

## 2. Unconstitutional Acts by Federal Officials Subject to *Bivens* Claims

In general, the same constitutional standards that apply in Section 1983 actions apply in *Bivens* actions. We explain those constitutional standards Chapter Three. Where there are differences, we have tried to highlight them throughout.

But *Bivens* actions are much harder to bring than Section 1983 claims. That is because, unlike a Section 1983 lawsuit, *Bivens* actions are not available to challenge every unconstitutional thing that happens in prison. Ever since a Supreme Court case called *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), prisoners have had a much harder time succeeding with *Bivens* Claims.

If you bring a *Bivens* Claim, the court will first ask whether your claim arises in a “familiar *Bivens* context.” If what happened to you is the same as (or very similar to) what has happened to other prisoners in *Bivens* cases courts have allowed in the past, then your case arises in a familiar *Bivens* context, and you will be allowed to move forward. However, if your case is different from previous *Bivens* cases, your case will be dismissed unless you persuade the court that *Bivens* should be expanded to cover the type of claim you are making.

One good case to read about where this issue arose is *Jerra v. United States*, No. 12-cv-01907, 2018 WL 1605563 (C.D. Ca. May 25, 2018). In that case, a court decided that a prisoner’s claims about excessive force and guard retaliation did not arise in a familiar *Bivens* context, but the court decided that an extension of *Bivens* was appropriate, so the case was allowed to move forward.

Most courts have recognized that prisoner claims about inadequate medical care (described in Chapter 3, Section F) do arise in a familiar *Bivens* context, because in 1980, the Supreme Court allowed one of these claims to go forward in a very important case called *Carlson v. Green*, 446 U.S. 14 (1980). However, since the *Ziglar* case in 2017, many courts have decided that other constitutional claims by prisoners require an expansion of *Bivens*, and many of those courts have decided not to extend it.

The question of whether or not a federal prisoner can bring a *Bivens* Claim is a very complicated and difficult area of the law which is changing every day, so you might want to ask the court to appoint a lawyer to help you brief the

issue. In a case called *Houck v. United States*, No. 16-CV-1396-JPG-DGW, 2018 WL 2129771, at \*2 (S.D. Ill. May 9, 2018) the Court granted a prisoner’s motion for recruitment of counsel on this ground, noting, “the analysis required by *Ziglar* is complex.” There is more information in Chapter 5, Section C, Part 3 on how to ask the court to assign you a free lawyer.

**PRACTICE TIP:** You can bring *Bivens* Claims and FTCA claims in the same lawsuit. And given how unclear *Bivens* law is right now, if you can bring an FTCA claim, it is probably a good idea to do so, and not rely on *Bivens* alone. If you prove your claims, however, you will only be able to recover money under one of the two causes of action.

## 3. Federal Injunctions

You may not always be interested in suing for damages. In some cases, you may just want to try to change a prison policy you believe is unconstitutional. Section 1983 allows these types of claims, called “injunctions” for prisoners in state or local custody. Injunctions are explained in Chapter Four, Section B.

Federal law also allows federal prisoners to bring these types of claims in federal court. 28 USC 1331 states that federal district courts have the power to hear “all civil actions arising under the Constitution, laws, or treaties of the United States.” The courts have taken this language to mean that federal courts can order federal prisons to stop acting in an unconstitutional way. You can bring a claim for an injunction in the same lawsuit as your FTCA and *Bivens* Claims.

	FTCA CLAIM	BIVENS CLAIM
<b>TYPE OF INJURY</b>	State Tort (examples: assault, battery, medical negligence)	Constitutional Violation
<b>WHO TO SUE</b>	The United States	The Guards who are responsible for what happened to you
<b>EXHAUSTION REQUIRED?</b>	Yes. Must file an administrative claim with BOP before suing	Yes. Must use prison’s administrative grievance system
<b>DAMAGES AVAILABLE?</b>	Yes, from the United States treasury	Yes, from the individual defendants
<b>QUALIFIED IMMUNITY APPLIES?</b>	No	Yes

# E.

## Brief Summary of the Prison Litigation Reform Act (PLRA)

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The PLRA is an anti-prisoner statute which became law in 1996 and has made it much harder for prisoners to gain relief in the federal courts. While you will learn more about the PLRA in the following chapters, this section provides a brief outline of its major parts, or “provisions,” so that you keep them in mind as you start to plan your lawsuit. The full text of several important sections of the PLRA are included in Appendix F. One important thing to keep in mind is that most of these provisions only apply to suits filed while you are in prison. If you want to sue for damages after you are released, you will not need to worry about these rules.

### 1. Injunctive Relief

18 U.S.C. § 3626 limits the “injunctive relief” (also called “prospective relief”) that is available in prison cases. Injunctive relief is a court order to make the prison do something differently or stop doing something altogether. For example, if the prison you are held in says you can only pray alone, and you file a suit asking that the prison change their policy to let you pray in a group, that is a case for injunctive relief. Injunctive relief and the changes in its availability under the PLRA are discussed in Chapter Four.

### 2. Exhaustion of Administrative Remedies

42 U.S.C. § 1997(e)(a) states that “[n]o action shall be brought with respect to prison conditions[...]by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”

This is known as the “exhaustion” requirement. It is very important. If you try to sue a prison official about anything they have done to you, the court will dismiss your case unless you have first used the administrative grievance system at your prison to raise the issue you want to sue over. You also have to appeal that grievance as far as possible. You will learn more about exhaustion in Chapter Five, Section A, Part 2.

### 3. Mental or Emotional Injury

The PLRA also states that “[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act.” 42 U.S.C.A. § 1997e(e).

Courts disagree about whether this allows you to sue for money damages for a constitutional violation that does not cause physical injury or involve sexual abuse. The different interpretations of this provision are explained in detail in Chapter Four, Section C, Part 2. If you are suing to change a prison policy, you do not need to worry about this provision.

### 4. Attorney’s Fees

Usually, if you win a Section 1983 case and you have an attorney, the defendants will have to pay your attorney for the work they did on your case. However, the PLRA limits the court’s ability to make the prison officials you sue pay for “attorney’s fees” if you win your case. While this will not affect you if you are suing without the assistance of an attorney, it is part of the reason why so few attorneys are willing to represent prisoners.

### 5. Screening, Dismissal, and Waiver of Reply

The PLRA allows for courts to dismiss a prisoner’s case very soon after filing if the judge decides the case is “frivolous,” “malicious,” does not state a claim, or seeks damages from a defendant with immunity. The court can do this before requiring the defendant to answer your complaint. This is discussed further in Chapter Six, Section B.

### 6. Filing Fees and the Three Strikes Provision

Courts charge everyone fees when they file a lawsuit. However, poor people are not required to pay all these fees up front. Under the PLRA, if you have had three prior lawsuits dismissed as “frivolous, malicious, or failing to state a claim for relief,” you may not proceed “*in forma pauperis*” (which means “as a poor person”) and will have to pay your fees up front. There is an exception for prisoners who are “in imminent danger of serious physical injury.” Chapter Five, Section C, Part 2 describes how to file “*in forma pauperis* papers” and provides more information about the three strikes provision.

# CHAPTER THREE:

## Your Rights in Prison

This chapter provides information about your rights in prison. We mostly focus on constitutional rights but provide some information about federal and state statutory rights as well. Sections A through G explain what types of actions violate prisoners' rights, and Sections H through K provide information for specific groups of prisoners, including women, transgender people, pretrial detainees and immigration detainees. Finally, Section L provides an introduction to international law protections for people in prison.

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### “The Rule” and “The Basics” Boxes

Throughout this chapter, you will see small text boxes entitled “the rule” and “the basics.” The “rule” boxes set forth the actual legal standard that a court will apply to consider your case. We have included these only in those places where there is a clear legal rule. The “basics” boxes are summaries of the practical impact of the law on common prison issues. They are not legal standards.

Be very careful to check for changes in the law when you use this chapter (and the rest of the JLH). This Handbook was completely revised and updated between 2018 and

2019. However, one of the exciting but frustrating things about the law is that it is constantly changing. New court decisions and laws will change the legal landscape significantly in the future.

It is important to make sure a case is still “good law,” which is known as “Shepardizing.” This is explained in Chapter Seven. You can also write to prisoners' rights and legal organizations listed in Appendix I for help. Groups which can't represent you may still be able to help with some research or advice.

The online version of this handbook has hyperlinks for some cases. These are accessible at the JLH website, and the links are included in case a relative or friend can print out relevant materials and mail them to you.

Some cases have legal citations to Lexis, which is a paid legal research service. Sometimes cases only have a Lexis citation and no other legal citation. Where possible, we have provided a free copy of the original opinions for these cases on the JLH website so you do not need to pay to access them. We have tried to make all that we can available. A relative or friend on the outside can access these in one place and have them printed and sent to you. It is an additional step, but it should make these cases more accessible to you than they would normally be. The website is: <http://jailhouselaw.org>

## A.

### Your First Amendment Right to Freedom of Speech and Association

**The Turner Rule:** Under the First Amendment, a prison regulation that stops you from speaking, expressing yourself, or interacting with other people must be reasonably related to a legitimate government interest. The court will consider whether the regulation leaves open other ways for you to express yourself, how the regulation impacts other prisoners and prison resources, and whether there are easy alternatives to the regulation that would not restrict your rights as much.

The First Amendment protects everybody's right to freedom of speech and association. Freedom of speech and association includes the right to read books and magazines, the right to call or write to your family and friends, the right to criticize the government or state officials, and much more. However, in prison those rights are restricted because of the prison's need for security and

administrative ease. Because of this, it is often very hard for a prisoner to win a First Amendment case.

Most prison First Amendment issues are governed by a legal standard developed in a case called *Turner v. Safley*, 482 U.S. 78 (1987). In *Turner*, prisoners in Missouri brought a class action lawsuit challenging a regulation that limited the ability of people in prison to marry or write letters to each other. The Supreme Court used the case to establish a four-part test for First Amendment claims. Under this test, a court decides whether prison policy or practice is constitutional by asking four questions:

## THE TURNER TEST

✓ **QUESTION 1:** Is the regulation reasonably related to a legitimate, neutral government interest? “Reasonably related” means that the rule is at least somewhat likely to do whatever it is intended to do. A rule banning a book on bomb-making is reasonably related to the prison’s goal of security. However, a rule banning all novels is not.

“Neutral government interest” means that the prison’s goal must not be related to dislike of a particular idea or group. Increasing prison security is a neutral and legitimate goal. Encouraging prisoners to practice a certain religion, to stop criticizing the prison administration, or to wear their hair a certain way are not neutral or legitimate goals. The prison can’t pick and choose certain books or ideas or people unless it has a “neutral” reason, like security, for doing so.

✓ **QUESTION 2:** Does the regulation leave open another way for you to exercise your constitutional rights? This means the prison can’t have a rule that keeps you from expressing yourself altogether. For example, prison officials can stop the media from conducting face-to-face interviews with people in prison as long as prisoners have other ways (like mail) to communicate with the media. *Pell v. Procunier* 417 U.S. 817 (1974).

✓ **QUESTION 3:** How does the regulation impact other prisoners, prison guards or officials, and prison resources? This question allows the court to consider how much it would cost in terms of money and staff time to change the regulation or practice in question. For example, one court held that it is constitutional to prevent prisoners from calling anyone whose number is not on their list of ten permitted numbers because it would take prison staff a long time to do the necessary background checks on additional numbers. *Pope v. Hightower*, 101 F.3d 1382 (11th Cir. 1996).

This question is not always just about money. It also requires the court to take into consideration whether changing the regulation would pose a risk to other prisoners or staff or create a “ripple effect” causing other problems in the prison. *Fraise v. Terhune*, 283 F.3d 506, 520 (3d Cir. 2002).

✓ **QUESTION 4:** Are there obvious, easy alternatives to the regulation that would not restrict your right to free expression? This part of the test allows a person in prison to suggest an easy way for the prison to achieve their goal without restricting prisoners’ rights. Not every suggestion will work. For example, one court held that it is constitutional to ban letters between two people in two different facilities after one of the two sent a threatening letter to the other’s Superintendent. The court ruled that monitoring this type of correspondence is not an obvious or easy alternative to banning it. *U.S. v. Felipe*, 148 F.3d 101 (2d Cir. 1998).

You will want to keep these four questions in mind as you read the following sections on the First Amendment.

## 1. Access to Reading Materials

✓ **The Basics:** Prison Officials can keep you from getting or reading books that they think are dangerous or pornographic. They can also make you get all books straight from the publisher.

The First Amendment protects your right to get reading material like books and magazines. This doesn’t mean that you can have any book you want. Your right is limited by the prison’s interest in maintaining order and security, and promoting rehabilitation. Until 1989, the Supreme Court required prisons to prove that banning material was necessary to meet government interests in prison order, security, and rehabilitation. This standard was from a case called *Procunier v. Martinez*, 416 U.S. 396 (1974), and it gave people in prison fairly strong protection of their right to get books. However, since then the Supreme Court has become much more conservative and has given prisons greater power to restrict your First Amendment rights. Now a prison can keep you from having magazines and books as long as it meets the *Turner* test, explained above. This change happened in an important Supreme Court case called *Thornburgh v. Abbott*, 490 U.S. 401 (1989). If you feel that your right to have reading materials is being violated, you should probably start your research by reading *Thornburgh v. Abbott*.

## Why Read Cases?

Sometimes in this Handbook we suggest that you read court cases. While we have tried to summarize the law for you, the cases we suggest will give you much more detailed information and will help you figure out whether you have a good legal claim. Chapter Seven explains how to find cases in the law library based on their “citation.” You can also ask the library clerk for help finding a case. Chapter Seven gives helpful tips on how to get the most out of reading a case.

Finally, Chapter Seven contains an explanation of the court systems and how cases are used as grounds for court decisions. Be sure to read it if you are going to do any legal research. Remember that federal courts in one state do not always follow decisions by federal courts in other states.

While the Turner standard is less favorable to prisoners, it still provides some protection. Prison officials need to justify their policies in some way. If they can't, the regulation may be struck down. Prisons can't just ban books and magazines randomly.

Courts also require prisons to follow fair procedures to ban a publication. A prison cannot maintain a list of excluded publications or decide that no materials from a particular organization will be allowed in. It must decide about each book or magazine on a case-by-case basis. This is true even if a prison official already knows that the book or magazine comes from an organization they don't approve of. *Williams v. Brimeyer*, 116 F.3d 351 (8th Cir. 1997). Some type of notice from the prison is usually required as well. For example, some prisons require the warden to tell you when they reject a book or magazine sent to you, and to give the publisher or sender a copy of the rejection letter. Courts may require that the prison have a procedure so that you, or the publisher or sender, can appeal the decision.

Prison officials cannot censor material just because it contains religious, philosophical, political, social, or unpopular content. They can only censor material if they believe it may cause disorder or violence, or hurt a prisoner's rehabilitation. In *Greybuffalo v. Kingston*, 581 F. Supp. 2d 1034 (W.D. Wisc. 2007) for example, a man in the Wisconsin Dept. of Corrections was punished for having a quote about freedom from a Native American chief in his cell, with the initials A.I.M. “A.I.M.” stands for the “American Indian Movement,” which is a civil rights movement dating back to the 1960s. The court ruled that it was unreasonable to think the material created any threat to prison security and found that the prison had violated Greybuffalo's First Amendment rights. However, cases like this are rare because the Turner standard gives prison wardens broad discretion. Most courts will believe a prison official who says that a book or magazine creates a threat to prison security. It is important to remember that sometimes decisions are inconsistent among different courts.

Courts have allowed prisons to ban reading materials that advocate racial superiority and violence against people of another race or religion. *Stefanow v. McFadden*, 103 F.3d 1466 (9th Cir. 1996); *Chriceol v. Phillips*, 169 F.3d 313 (5th Cir. 1999). One court allowed special inspection of a prisoner's mail after he received a book with a suspicious title, even though the book was just an economics textbook. *Duamutef v. Hollins*, 297 F.3d 108 (2d Cir. 2002). Another court decided that a prison could ban people from receiving the Physician's Desk Reference in the mail because it contains information about drugs, even though the same book was available in the prison library. *Munson v. Gaetz*, 673 F.3d 630 (7th Cir. 2012).

Prison officials are normally allowed to ban an entire offending publication, as opposed to just removing the sections in question. *Shabazz v. Parsons*, 127 F. 3d 1246 (10th Cir. 1997). However, this is not always the case. In 2011, Louisiana prisons were not allowed to ban a Nation of Islam newspaper when objectionable pages could be deleted. *Leonard v. Louisiana*, 449 Fed. Appx. 386 (5th Cir. 2011).

Prisons must also abide by the Fourteenth Amendment, which guarantees equal protection of the laws to all citizens. This means that, for example, a prison cannot ban access to materials targeted to an Black audience if they do not ban similar materials popular among white people. See Section C of this Chapter for more information on equal protection claims.

Lots of cases about access to reading material involve sexually explicit materials. Some courts have said that people in prison have a right to non-obscene, sexually explicit material that is commercially produced (as opposed to, for example, nude pictures of spouses or lovers). Other courts have allowed total bans on any publication portraying sexual activity or featuring frontal nudity. *Mauro v. Arpaio*, 188 F.3d 1054 (9th Cir. 1999). One court found that blurred or censored nude photos could be barred. *Woods v. Director's Review Comm.*, 2012 U.S. Dist. LEXIS 44805 (S.D. Tex. 2012). Bans on sexually explicit materials might go too far if they ban works of literature merely describing intercourse. In one case a court said a ban went too far when it removed works like *Ulysses* and *Lady Chatterley's Lover* from a prison library. *Couch v. Jabe*, 737 F. Supp. 2d 561 (W.D. Va. 2010).

As Section I Part 5 of this Chapter explains, bans on lesbian, gay, bisexual, transgender, queer, or intersex (“LGBTQ+”) reading material that is not sexually explicit can also be challenged. However, materials deemed a threat to security or order, or likely to provoke anti-LGBTQ violence, can be lawfully withheld. One example of a case like this is *Willson v. Buss*, 370 F. Supp. 2d 782, 783 (N.D. Ind. 2005). In that case a court upheld a ban on “blatantly homosexual” materials to minimize prisoner on prisoner violence.

## Requiring that Publications Come from Publishers

A prison can usually require that publications come directly from a publisher or bookstore, allegedly to limit smuggling and contraband. *Bell v. Wolfish*, 441 U.S. 520 (1979).

However, some courts have found these safety concerns only apply to hardcopy books, and found that access to newspapers, magazines, and paperback books should not be restricted. In *Hurd v. Williams*, 755 F.2d 306 (3d Cir. 1985), for example, a court held that the security problem presented by the binding of hardback books seems inapplicable to newspapers and potentially the binding of other paperback books. And in *Keenan v. Hall*, 135 F.3d 1318 (9th Cir. 1998) a court noted that in *Bell*, the Supreme Court relied on the fact that prisoners were allowed other reading material besides hardback books (e.g. magazines and softback books), such that the compelling security interest that justified the publisher-only rule for hardback books might not justify a ban on other reading materials

### Censorship of this Handbook

In Virginia and New Mexico, prison officials tried to ban people from receiving copies of this handbook. However, following lawsuits, these bans were struck down, and the Virginia DOC even agreed to put copies of the JLH in all of its prison law libraries. *White v. Dona Ana County Detention Center*, 2011 WL 13291138 (D. N.M. 2011) is one of these cases. A prisoner was denied *The Jailhouse Lawyer's Handbook* because prisoners were not allowed to receive books in the mail, but the district court held that the Turner test weighed in favor of the prisoner regarding: the prison's blanket prohibition on magazines and newspapers, mailed books, newsletters, mailed items without a return address, and on mailed items that include "copies".

If the JLH is banned from your prison, please write CCR or the NLG! Please include any documentation from prison officials notifying you or others at the prison that it has been banned. And THANK YOU to the people who brought this to our attention!

## 2. Free Expression of Political Beliefs

✓ **The Basics:** You can believe whatever you want, but the prison may be able to stop you from writing, talking, or organizing around your beliefs.

You have the right to your political beliefs. This means that prison officials may not punish you simply because they disagree with your political beliefs. *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971); *Sczerbaty v. Oswald*, 341 F. Supp. 571 (S.D.N.Y. 1972). However, the prison can limit your ability to express your beliefs. Any prison restriction on your right to express your beliefs must satisfy the Turner test.

Prison officials may be able to limit what you write and publish in prison, but not all of these limitations will pass the Turner standard. For example, the state of Pennsylvania had a prison rule that kept prisoners from carrying on businesses or professions in prison. The court found that the rule was not reasonably related to legitimate governmental interests when it kept Mumia Abu-Jamal from continuing his journalism career. *Abu-Jamal v. Price*, 154 F.3d 128 (3d Cir. 1998). The court relied on evidence that (1) the rule was enforced against Mumia, at least in part, because of the content of his writing, and not because of security concerns; (2) his writing did not create a greater burden within the prison than any other prisoner's writing; and (3) there were obvious, easy alternatives to the rule that would address security concerns. Another successful case is *Jordan v. Pugh*, 504 F. Supp. 2d 1109 (D. Co. 2007). In that case, a prisoner at the highest security federal prison in the country (ADX Florence) successfully challenged a Bureau of Prisons rule that said prisoners can't publish under a byline or act as reporters. The prison said the rule was important to keep a prisoner who published material from becoming a "big shot" at the prison and getting too much influence over other prisoners. However, the prisoner had a former warden testify as an expert for him. The expert convinced the court that this "big shot" theory had no actual support and had been abandoned by prison administrators. It was important under Turner that ADX Florence's rule was absolute—prisoners had no other way to publish articles.

However, regulations limiting prisoners from publishing their work may be constitutional in other situations. In a case called *Hendrix v. Evans*, 715 F. Supp. 897 (N.D. Ind. 1989), the court held that a prison could stop a prisoner from publishing leaflets to be distributed to the general public about a new law because prisoners still had other ways to inform the public about the issue, such as by individual letters.

Often the prison will rely on "security concerns" to justify censorship. In *Pittman v. Hutto*, 594 F.2d 407 (4th Cir. 1979), the court held that prison officials did not violate the constitution when they refused to allow publication of an issue of a magazine prepared by people in prison because they had a reasonable belief that the issue might disrupt prison order and security.

Some courts will examine the "security" reason more closely than others to see if it is real or just an excuse. For example, in *Castle v. Clymer*, 15 F. Supp. 2d 640 (E.D. Pa. 1998), the court held that prison officials violated the constitution when they transferred a prisoner in response to letters he had written to a journalist. The letters mentioned the prisoner's view that proposed prison regulations would lead to prison riots. The court found that because there was no security risk, the transfer was unreasonable.

Prison officials can ban petitions, like those asking for improvements in prison conditions, as long as prisoners have other ways to voice their complaints, like through the prison grievance system. *Duamutef v. O'Keefe*, 98 F.3d 22 (2d Cir. 1996). Officials can stop a prisoner from forming



an association or union of prisoners, because the courts have decided that it is reasonable to conclude that such organizing activity would threaten prison security. *Brooks v. Wainwright*, 439 F. Supp. 1335 (M.D. Fl. 1977). In one very important case, the Supreme Court upheld a prison's ban on union meetings, solicitation of other prisoners to join the union, and bulk mailings from the union to prisoners, as long as there were other ways for prisoners to complain to prison officials and for the union to communicate with prisoners. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977).

Finally, lots of times prisons describe organizing among people in prison as "gang activity" and courts are usually pretty deferential to those security concerns. In one case, a person in prison was punished for "gang activity" for having a handwritten copy of material from a book about the Black Panther Party, even though the book itself was checked out from the prison library. *Toston v. Thurmer*, 689 F.3d 828 (7th Cir. 2012).

When speech is directed outside the prison, restrictions may be easier to strike down. For example, after Mumia Abu-Jamal prerecorded a commencement speech for a college, Pennsylvania passed a law to prohibit similar speeches in the future, based on "revictimization." This is the idea that victims of personal injury crimes are harmed when people in prison exercise the right to free speech. A court said the law violated the First Amendment because it limited speech based on its content. *Abu-Jamal v. Kane*, 105 F. Supp. 3d 448 (M.D. Penn. 2015).

### 3. Limits on Censorship of Mail

✓ **The Basics:** The prison usually can't stop you from speaking your mind in your letters to people outside the prison. The prison can keep other people from writing you things it considers dangerous. Prison guards can read your letters and look in them to make sure there is no contraband.

The First Amendment protects your right to send and receive letters. Many years ago, prison officials were required to meet a strict test to justify their needs and interests before courts would allow them to interfere with mail. Today, the court still uses this test for mail prisoners send out of the prison but allows prison officials more control over mail that goes into the prison.

#### a. Outgoing Mail

✓ **The Rule:** The regulation must protect an "important or substantial interest" of the prison and be necessary and essential to achieving that interest.

In order to censor the letters you send to people outside prison, prison officials must be able to prove that the censorship is necessary to protect an "important or substantial" interest of the prison. Examples of important interests are: maintaining prison order, preventing criminal

activity, and preventing escapes. The prison officials must be able to show that their regulations are actually "necessary and essential" to achieving this important goal, not just that the regulation is intended to achieve that goal. The regulations cannot restrict your rights any more than is required to meet the goal. *Procnier v. Martinez*, 416 U.S. 396 (1974). This test is better for you than Turner, but unfortunately it only applies to outgoing mail.

Under the Martinez rule, a prison official cannot censor your mail just because it makes rude comments about the prison or prison staff. *Bressman v. Farrier*, 825 F. Supp. 231 (N.D. Iowa 1993). In one case, *Harrison v. Institutional Gang of Investigations*, No. C 07-3824, 2010 U.S. Dist. LEXIS 14944 (N.D. Cal. Feb. 22, 2010), Marcus Harrison sued Pelican Bay prison officials after they took his outgoing mail because it included information about the Black August Memorial, the New Afrikan Collective Think Tank, and the George Jackson University. The prison argued that the material was related to a prison gang called the Black Guerilla Family. Mr. Harrison won, and the court ruled that the prison had failed to make a substantial showing that the material was likely to incite violence or related to a prison gang.

However, some restrictions on outgoing mail are allowed. Courts have allowed bans on "letter kiting," which means including a letter from someone else with your letter or sending a letter to someone in an envelope with another prisoner's name. *Malsh v. Garcia*, 971 F. Supp 133 (S.D.N.Y. 1997). Some prisons and jails have imposed rules limiting prisoners to writing only postcards, as opposed to closed letters. In 2010 the ACLU brought a First Amendment challenge to this type of policy at the El Paso County Jail in Arizona, and the jail quickly agreed to change the rule. *Martinez v. Maketa*, No. 10-CV-02242, 2011 WL 2222129 (D. Co. June 7, 2011).

In one case, a court upheld a ban on gang symbols in outgoing mail on grounds of a governmental interest in rehabilitation. The court gave "substantial deference" to prison officials to decide what is a gang symbol. The court also said that the outgoing mail was not "constructive, wholesome contact" that would foster reintegration into society. *Koutnik v. Brown*, 456 F.3d 777 (7th Cir. 2006).

If a prisoner has used the mail in the past to attempt to commit a crime or harass someone, that may be an important factor. So for example, in *Hammer v. Saffle*, No. 91-7038, 1991 U.S. App. LEXIS 28730 (10th Cir. Nov. 29, 1991), the court upheld a prison rule limiting a prisoner to sending mail to people on an approved list after he was found to have used the mail to make death threats and extort money.

Courts usually allow guards to read or look in your outgoing mail, especially for contraband. Courts explain that looking in a letter does not violate the First Amendment, because it is different from censorship. *Altizer v. Deeds*, 191 F.3d 540 (4th Cir. 1999). Courts have said that a visual inspection is closely related to the legitimate interest of a prison in preventing prisoners from disseminating offensive or harmful materials. *Witherow v. Paff*, 52 F.3d 264 (9th Cir. 1995).

Courts have also generally upheld limitations on the amount of postage you can have at one time and the amount of free postage they will provide to prisoners who cannot afford it for non-legal mail. *Johnson v. Goord*, 445 F.3d 532 (2d Cir. 2006).

In one case, a court held that the First Amendment was not violated by a rule prohibiting solicitation of pen pals. The court accepted the prison's argument that bulk mailings to find pen pals could be used for scams. *Perry v. Sec'y, Fla. Dep't of Corr.*, 664 F.3d 1359 (11th Cir. 2011).

## b. Incoming Mail

✓ **The Rule:** The Turner test applies.

Censorship of incoming mail is governed by the Turner test. As you learned in Section A of this chapter, the Turner test requires that the regulation in question be "reasonably related" to a "legitimate" government interest. This means that while your rights are still protected to some extent, prisons can put a lot of restrictions on incoming mail. Courts have allowed restrictions on incoming packages on the grounds that they can easily hide contraband and looking through them would use up too many prison resources. *Weiler v. Purkett*, 137 F.3d 1047 (8th Cir. 1998). Items that by themselves are not a threat to prison security can also be taken by prison officials if they contain contraband. *Steffey v. Orman*, 461 F.3d 1218 (10th Cir. 2006). Courts have also allowed restrictions on mail between prisoners. *Turner v. Safley*, 482 U.S. 78 (1987).

A prison must follow special procedures to censor your mail. You should be notified if a letter addressed to you is returned to the sender. Your right to be notified is a "due process" right, recognized by *Procurier v. Martinez*. Due process rights are discussed later in this Chapter, in Sections D and G. The author of the letter sent to you should have an administrative avenue to challenge the censorship. The official who responds to the administrative challenge cannot be the person who originally censored the mail in question. In most places, the same rule applies to packages, not just letters. *Bonner v. Outlaw*, 552 F.3d 673 (8th Cir. 2009).

Some prisons and jails have imposed rules limiting prisoners to receiving only postcards (different from the outgoing-mail rule discussed above). Some courts have held that these policies are unconstitutional under Turner and serve no valid penological objectives. *Prison Legal News v. Columbia County*, 942 F. Supp. 2d 1068 (D. Or. 2013). But other courts have allowed postcard-only policies on the basis of reducing contraband. *Althouse v. Palm Beach County Sheriff's Office*, No. 12-80135-CIV-MARRA, 2013 U.S. Dist. LEXIS 18602 (S.D. Fla. Feb. 11, 2013). If you are challenging a postcard-only policy for incoming mail, thoroughly consider the Turner factors from Section A, and make sure the prison backs up any claims that a postcard-only policy is "rationally related" to enhanced security.

One delay or some other relatively short-term disruption in mail delivery that is not related to the content of your letters does not violate the First Amendment. *Sizemore v. Williford*, 829 F.2d 608 (7th Cir. 1987).

## c. Legal Mail

Special rules apply to mail between you and your attorney, and to mail you send to non-judicial government bodies or officials. This mail is called "privileged mail," "legal mail," or "special mail" and is protected by your constitutional right to seek legal counsel as well as by the "attorney-client privilege." The attorney-client privilege means that the things you write or say to your attorney, or they write or say to you, are secret.

Prisons officials cannot read your legal mail. But they can open it in your presence to inspect it for contraband. *Castillo v. Cook County Mail Room*, 990 F.2d 304 (7th Cir. 1993); *Bieregu v. Reno*, 59 F.3d 1445 (3d Cir. 1995). If they open it outside your presence, this may violate the First Amendment, because it chills your right to communicate confidentially with your lawyer. *Al-Amin v. Smith*, 511 F.3d 1317 (11th Cir. 2008), *Jones v. Brown*, 461 F.3d 353 (3d Cir. 2006).

Even if a prison restricts most of your correspondence with other prisoners, you may be allowed to send and get mail from a prisoner who is a jailhouse lawyer. For more information about this, read Section G about your right to access the court.

Different prisons have different procedures for marking incoming and outgoing legal and special mail. Often, incoming mail from an attorney must bear the address of a licensed attorney and be marked on the envelope as "legal mail." If not, it will not be treated as privileged. Some prisons place even more requirements on you and require you to request ahead of time that legal mail be opened only in your presence, and your attorney must have identified themselves to the prison in advance. *U.S. v. Stotts*, 925 F.2d 83 (4th Cir. 1991); *Boswell v. Mayor*, 169 F.3d 384 (6th Cir. 1999); *Gardner v. Howard*, 109 F.3d 427 (8th Cir. 1997).

## 4. Access to the Telephone

✓ **The Basics:** Most of the time, you have a right to make some phone calls, but the prison can limit the amount of calls you can make and can monitor those calls.

Your right to talk with friends and family on the telephone gets some protection under the First Amendment. However, courts do not all agree on how much telephone access prisoners must be allowed. Prisons may limit the number of calls you make. The prison can also limit how long you talk. Courts disagree on how strict these limits can be. Most courts agree that prison officials can restrict your telephone privileges in "a reasonable manner." *McMaster v. Pung*, 984 F.2d 948 (8th Cir. 1993).

There is no right to private telephone calls with family and friends. Some courts have said this is because people in prison do not have a reasonable expectation of privacy under the Fourth Amendment. *U.S. v. Balon*, 384 F.3d 38 (2d Cir. 2004). See Section E of this Chapter for more information about your privacy rights under the Fourth Amendment.

Other courts have held that prisoners who are told that they are being monitored consent to giving up their privacy. *U.S. v. Morin*, 437 F.3d 777 (8th Cir. 2006); *U.S. v. Footman*, 215 F.3d 145 (1st Cir. 2000). In other words, if there is a sign under the phone saying that “all calls are monitored” or it’s in the prison’s manual or its policies, it doesn’t violate your rights for the prison to listen in.

One exception is that prison officials cannot listen in on calls with your attorney. If there is a process in your prison for requesting an unmonitored legal call and the prison still monitors them, courts may find that your expectation of privacy has been violated. *Robinson v. Gunja*, 92 Fed. Appx 624 (10th Cir. 2004). However, if you don’t follow your prison’s procedure for making a legal call, and simply use the regular phone, some courts will conclude that you waived your attorney-client privilege by having the conversation after you were “told” of the monitoring by the sign or prison policies.

Prisons are generally allowed to place more severe restrictions on telephone access for prisoners who are confined to Special Housing Units for disciplinary reasons as long as they can show that these restrictions are reasonably related to legitimate security concerns about these prisoners. You can also lose telephone access as punishment for breaking prison rules.

In general, prisons are allowed to limit the number of different people whom you can call, and to require you to register the names of those people on a list to be approved by the prison. *Pope v. Hightower*, 101 F.3d 1382 (11th Cir. 1996); *Washington v. Reno*, 35 F.3d 1093 (6th Cir. 1994).

The prison can make you pay for your telephone calls. This can be a serious burden on prisoners and their family members, especially when states enter into private contracts with phone companies which force prisoners or their families to pay much more for their phone calls than what people pay outside of prison. Challenges to these types of contracts or to excessive telephone charges in general have not been successful. See *Arsberry v. Illinois*, 244 F.3d 558 (7th Cir. 2001); *Walton v. New York State Dept. of Correctional Services*, 869 N.Y.S.2d 661 (2008). But at least one court has held that this type of arrangement might violate prisoners’ (and their loves ones’) First Amendment rights. *Byrd v. Goord*, No. 00-cv-2135 U.S. Dist. LEXIS 18544 (S.D.N.Y. Aug. 29, 2005).

## 5. Access to the Internet

- ✓ **The Basics:** The Turner test applies to Internet communication. Prison Officials can keep you from accessing the Internet.

People in prison do not have a right to computers or Internet access. *Carmony v. County of Sacramento*, No. CIV S-05-1679, 2008 U.S. Dist. LEXIS 11137 (E.D. Cal. Feb. 14, 2008). The Bureau of Prisons has a system called the Trust Fund Limited Inmate Computer System (TRULINCS) which makes a form of e-mail available to prisoners. But even when a prison system allows e-mail generally, they can still restrict it without violating the First Amendment. In one unpublished decision, *Solan v. Zickefoose*, a person in prison was barred from using TRULINCS e-mail because he was a computer expert and was previously punished for misusing computers. The Third Circuit held that the restriction passed the Turner test because there were other alternatives to e-mail, like letters, visits, or the telephone. *Solan v. Zickefoose*, 530 Fed. Appx. 109 (3d Cir. 2013). Courts have also accepted arguments that surveillance of TRULINCS uses up resources so saving money is a reason to restrict e-mail access. *Gatch v. Walton*, No. 13-cv-1168-MJR, 2013 U.S. Dist. LEXIS 171940 (S.D. Ill. Dec. 5, 2013).

Some people in prison may try to tell people outside prison to post things on the Internet. An example would be telling someone to make a Facebook or Twitter post. Several states have laws banning this kind of indirect access to the Internet. Texas, for example, prevents prisoners from using any social media through a third party. Courts have taken different approaches to the question. One district court in Arizona held a third-party social media access law unconstitutional. *Canadian Coalition Against the Death Penalty v. Ryan*, 269 F. Supp. 2d 1199 (D. Ariz. 2003). There are not many cases on this issue.

Using social media like Facebook directly from prison can often lead to severe disciplinary actions and loss of privileges including loss of telephone, visitation, and good time. Those penalties can be just as severe if you use a third party to post online and your state bans this, so it is important to check whether your state bans third-party social media use before having someone post for you.

Some prisons ban people in prison from receiving printouts of Internet pages in the mail. In one case, *Clement v. Cal. Dep’t. of Corrections*, a prisoner at Pelican Bay State Prison successfully challenged a policy banning materials printed from the Internet. The prison defended the ban by claiming that printed Internet materials increased the burden of mail volume and could be used to send encoded messages. However, the Ninth Circuit held that those concerns were arbitrary. *Clement v. Cal. Dep’t of Corr.*, 364 F.3d 1148 (9th Cir. 2004). Other courts have held similarly. However, courts have also upheld such policies. *Starr v. Coulombe*, 368 Fed. Appx. 156 (1st Cir. 2009).

## 6. Your Right to Receive Visits from Family and Friends and to Maintain Relationships in Prison.

- ✓ **The Basics:** The prison can limit your visits in lots of ways, but probably can’t permanently ban you from getting visits.

If you are being denied visitation in prison, there are several different claims you can make. You can argue that denying you visits or restricting your visits violates your right to freedom of association under the First Amendment, your right to be free from cruel and unusual punishment under the Eighth Amendment, and your right to substantive due process under the Fifth and Fourteenth Amendments. Under each of these claims, the prison will probably respond by claiming that the restriction you challenge is related to maintaining order and security. If you bring your claim under the First Amendment or the due process clause, the court will look to the Turner test to see if the prison rule is valid. If you bring your claim under the Eighth Amendment, the court will look at the standard described in Section F of this Chapter. You can make all of these arguments in one case.

### **a. Access to Visits**

In 2003, the Supreme Court considered how much prisons can restrict visitation in a case called *Overton v. Bazzetta*, 539 U.S. 126 (2003). The case involved a Michigan Department of Corrections' rule that prohibited visits by kids other than a prisoner's sibling or child. The rule also said that former prisoners couldn't visit current prisoners. Lastly, the rule said that any prisoner who had two drug violations in prison would have all of their visitation privileges suspended for two years. A group of prisoners and their friends and family challenged the rule based on all of the First, Eighth, and Fourteenth Amendment theories mentioned earlier. The Court stated that the right to "intimate association" is not completely terminated by imprisonment and considered the regulations under the Turner standard. The Court decided that all of these prison rules were reasonably related to valid penological interests, so they passed the Turner test. The Court accepted the prison's explanation that allowing only children and siblings under the age of 18 protects minors from misconduct, reduces the number of visitors, and minimizes disruption by children. The prison rationalized preventing former prisoners from visiting as a way to maintain prison security and prevent future crime. It explained restricting visitation for prisoners with two drug violations as a way to discourage drug use. Such prisoners, the Court explained, are still able to write or call people, so they were not completely cut off from their friends and family. In considering the Eighth Amendment claim, the Court said that the two-year ban was "not a dramatic departure from accepted standards for conditions of confinement [and it did not] create inhumane prison conditions, deprive prisoners of basic necessities, or fail to protect their health or safety. Nor does it involve the infliction of pain or injury, or deliberate indifference to the risk that it might occur."

Under this precedent, it is hard to successfully challenge restrictions on visitation. In general, limitations on a prisoner's visitation rights are acceptable if the prison has valid "penological objectives such as rehabilitation and the maintenance of security and order." *Bellamy v. Bradley*, 729 F.2d 416, 420 (6th Cir. 1984). See also *Pitts v. Gramiak*, No. 5:14-CV-43-MTT-CHW, 2014 U.S. Dist. LEXIS 65400 (M.D. Ga. May 13, 2014); *Lynott v. Henderson*, 610 F.2d 340 (11th

Cir. 1980); *King v. Caruso*, 542 F. Supp. 2d 703 (E.D. Mich. 2008). The *Overton* case didn't overrule the old cases about visit restrictions, because most of the old cases also used the Turner standard, or something like it. But most courts don't look very critically at restrictions on visitation.

There are a few exceptions. Prisoners who are subject to complete bans on visits probably have the best chance of a successful challenge. In *Hallal v. Hopkins*, 947 F. Supp. 978 (S.D. Miss. 1995) for example, a prisoner and his wife filed a *pro se* lawsuit challenging conditions and policies at the Madison County Detention Center, including a complete ban on visits by children under twelve. The court ordered an evidentiary hearing to decide the factual basis for the ban, and whether it was justified by security needs. And in one recent case, *Ryerse v. Caruso*, No. 1:08-cv-516, 2009 U.S. Dist. LEXIS 82839 (W.D. Mich. July 20, 2009), a prisoner, his mother and his children sued over a prison policy that permanently denied him all visits after he was convicted of smuggling contraband into the prison. The Court allowed the case to move forward, citing the Supreme Court's statement in *Overton v. Bazzetta* that a permanent ban on all visitation might be unconstitutional.

Courts probably will allow a ban on visitation by minors if the prisoner's crime involved minors, *Morton v. Hall*, 455 F. Supp. 2d 1066 (C.D. Cal. 2006), and courts also allow transferring a person to a prison far from home or family, even though this makes visitation very difficult. *Olim v. Wakinekona*, 103 S. Ct. 1741 (1983). One court allowed temporary suspension of visits of minors after a person in prison had a sexual phone call with his wife when his child was on the phone (even though the prisoner claimed that he did not know). *Dunn v. Castro*, 621 F.3d 1196 (9th Cir. 2010). Also, prisons can require visitors to be pre-approved and can restrict the type of contact you have during a contact visit, like how close you can sit and when you can hug or kiss.

In another case, a person in prison was denied visitation privileges for two years after a guard claimed he saw the prisoner put something in his mouth and swallow. Even though a contraband search turned up nothing and he was not charged with a disciplinary offense, the court dismissed his case challenging the visitation ban. *Williams v. Ozmint*, 716 F.3d 801 (4th Cir. 2013).

### **Visitation Rights of LGBTQ+ People in Custody**

LGBTQ+ people can also bring challenges if they are subjected to more restrictive visitation policies than other people in custody. For more background, see Section I Part 1 of this Chapter.

### **Other Issues**

Many courts agree that a blanket policy of strip-searching prisoners after contact visits is constitutional. *Wood v. Hancock County Sheriff's Dept.*, 354 F.3d 57 (1st Cir. 2003). See Section E of this Chapter for more details about strip searches.

A new issue is the use of video visitation systems, which are now being used in over 500 prisons around the country. Where this technology is not yet in place, courts have not found that people in prison have a right to video

visitation. *Young v. Scott*, No: 2:16-cv-44-FtM-38MRM, 2017 U.S. Dist. LEXIS 135598 (M.D. Fla. Aug. 24, 2017).

The use of video conferencing has also made people worry that prisons might use it as an excuse to limit in-person visitation. We expect more cases about this issue in the future.

Some prisons are employing scanning technologies for prisoners and visitors. Challenges against the use of these technologies are unlikely to succeed, so long as the devices are used to achieve a government interest (such as finding contraband) and are minimally invasive and not used to harass. In one case, *Zboralski v. Sanders*, No. 06 C 3772, 2010 U.S. Dist. LEXIS 79362 (N.D. Ill. July 29, 2010), a visitor sued after receiving a 'Rapiscan' backscatter x-ray radiation device in order to visit her husband. The court found no Fourth Amendment violation because there was little intrusiveness and no evidence of harm by the search, weighed against an interest in screening visitors.

### **b. Caring for Your Child in Prison**

If you have children, being incarcerated almost always means being separated from them, and this is likely to impose a substantial burden on your relationship. There have not been many court cases about your right to care for your child while you are in prison. In general, states do not allow incarcerated mothers or fathers to care for their children, even infants. However, some states have tried to make parenting in prison easier.

No matter what state you are in, you can take steps to maintain your relationship with your child. If possible, you should privately arrange to have someone you know care for your children and plan visiting times. If a family member is willing but cannot afford to care for your child, they may be able to get assistance from the state. If your child is in foster care, state statutes often require the foster care agency to actively support your parental relationship by updating you on your child's development, allowing you to participate in planning for your child's future and health, and bringing your child to visit (unless the child lives in another state).

As a prisoner, however, you face the possibility that your parental rights could be "terminated." The federal *Adoption and Safe Families Act* requires the state to move to "terminate," or end, your parental rights if your child has been in foster care for 15 of the last 22 months. There are exceptions if the child is being cared for by a relative or there is a good reason why termination is not in the best interests of the child. 42 U.S.C. § 675(5)(E).

The Supreme Court held in *Santosky v. Kramer*, 455 U.S. 745 (1982), that in order to terminate your parental rights, the state must show that you are an unfit parent by "clear and convincing evidence." What it means to be an unfit parent varies from state to state, so you should check your state's statutes. Many states have held that the fact that you are in prison does not necessarily make you unfit. An example of some of these cases are: *In re R.I.S.*, 614 Pa. 275 (Pa. 2011); *In re Interest of Josiah T.*, 17 Neb. App. 919 (Neb. 2009); *B.C. v. Florida Dept. of Children & Families*, 887 So.2d 1046 (Fla.

2004); *In re Parental Rights of J.L.N.*, 118 Nev. 621 (Nev. 2002). However, states don't like long term foster care, so if your sentence is long (more than 5 years) you may be in danger of having your parental rights terminated unless you can find a private placement for your child.

You may want to write to the judge to request to be present at any court hearings regarding your child's care, including foster care status hearings and parental termination proceedings. Although in *Lassiter v. Department of Social Services of Durham County North Carolina*, 453 U.S. 927 (1981) the Supreme Court said there is no constitutional right to a lawyer at parental termination proceedings, most states do guarantee a lawyer, so you should request one. The American Bar Association maintains a list of right to counsel statutes. For some examples, you can read Texas Family Code Annotated § 107.013(a)(1); Arkansas Code Annotated § 9-27- 316(h)(1) (Supp. 2003); and *In re B.*, 285 N.E.2d 288 (N.Y. 1972).

To protect your parental rights, you should participate in planning for your child as much as possible, contact your child's caseworker frequently if your child is in foster care, make efforts to arrange visiting times, and keep a detailed record of all visits, phone calls, and letters between you and your child or related to your child's care.

You should also participate in any parenting classes or treatment programs at your facility that will help show that you will be able to be a good parent when you get out, especially if they are suggested by your child's caseworker. When you go to court, you can emphasize this participation to try to get the court to look beyond your crime.

## **B.** Your Right to Practice Your Religion

✓ **The Basics:** You have the right to practice your religion if it doesn't interfere with prison security.

Your freedom of religion is protected by the First and Fourteenth Amendments of the U.S. Constitution and by several federal statutes. There are five ways you can challenge a restriction on your religious freedom: the Free Exercise Clause and the Establishment Clause of the First Amendment, the Fourteenth Amendment, the *Religious Freedom Restoration Act* (RFRA) and the *Religious Land Use and Institutionalized Persons Act* (RLUIPA). They are each discussed below.

### **1. Free Exercise Clause**

✓ **The Rule:** Your Freedom to practice your religion under the free exercise clause can be limited based on the Turner Standard (described in Section A).

The first way to challenge violations of your right to religious activity is through the Free Exercise Clause of the First Amendment. The First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."

The second half of that sentence is known as the Free Exercise Clause, and it protects your right to practice your religion.

To make a free exercise claim you must be able to show the court that your belief is both religious and sincere. Different courts have different definitions of "religion," but they generally agree that your beliefs do not have to be associated with a traditional or even an established religion to be "religious." *Africa v. Commonwealth of Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981); *Love v. Reed*, 216 F.3d 682 (8th Cir. 2000). It is important to understand how "religion" is defined in your District or Circuit court before bringing your case.

Courts judge your religious "sincerity" by looking at how well you know the teachings of your religion and how closely you follow your religion's rules. However, you don't have to follow every single rule of your religion. And your belief doesn't have to be the same as everyone else's in your religion. *LaFevers v. Saffle*, 936 F.2d 1117 (10th Cir. 1991). Courts will usually listen to what a prison chaplain or clergy person says about your religious sincerity. *Montano v. Hedgepeth*, 120 F.3d 844 (8th Cir. 1997).

If a court determines that your belief is both religious and sincere, it will next apply the Turner test. This means that the court will balance your constitutional right to practice your religion against the prison's interests in order, security, and efficiency. Prison officials cannot prohibit you from practicing your religion without a reason. To win, you will have to show that a restriction is not "reasonably related to a penological interest," under the Turner test described in Section A. Courts often follow the decisions of prison officials, but any restriction on the free exercise of religion is still required to meet the four-part Turner test before it will be upheld. In *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), the Court applied the Turner test, and allowed a prison to limit worship services to specific days because prisoners were still offered other means of practicing their religion.

## 2. Establishment Clause

The first half of the First Amendment sentence quoted above is called the Establishment Clause, and it means that the government can't encourage people to be religious or choose one religion over another. Different Circuit Courts currently rely on two different legal tests in deciding whether a prison action or rule that endorses or supports a particular religion violates the constitution.

✓ **Test #1:** The prison rule or practice is OK if it is designed for a purpose that is not religious, does not have the main effect of advancing or setting back any religion and does not encourage excessive government entanglement with religion.

**OR**

✓ **Test #2:** The prison rule or practice is OK if it does not force you to support or participate in a religion.

Under both tests, you must first show that the prison or its officials acted in a way that endorsed, supported, or affiliated themselves in some way with a religion.

The first test was developed in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This test says that to be valid under the Constitution, a regulation or action 1) must be designed for a purpose that is not religious; 2) cannot have a main effect of advancing or setting back any religion; and 3) cannot encourage excessive government entanglement with religion.

The second test, developed in *Lee v. Weisman*, 505 U.S. 577 (1992), can be stated more simply: it prohibits the government from forcing you to support or participate in any religion.

> If you think you may have an establishment clause claim, the first thing you should do is research in your law library which test your Circuit court follows, and read a few cases applying that test.

**NOTE:** It is very rare to win an Establishment Clause case in prison, so you should probably try one or more of the other four options in this section along with it.

## Ways to Protect Your Religious Freedom

1. The Free Exercise Clause of the First Amendment protects your right to follow the practices of your religion, like eating kosher food, covering your hair, or praying at a certain time;
2. The Establishment Clause of the First Amendment keeps the government from encouraging you to follow a certain religion, or be religious;
3. The Fourteenth Amendment means that the government can't discriminate against you or treat you poorly because of your religion;
4. The *Religious Freedom Restoration Act* provides added protection for prisoners in federal custody; and
5. The *Religious Land Use and Institutionalized Persons Act* provides additional protection for all prisoners.

For each type of challenge, a court will balance your constitutional rights against the prisons' interest in security and administration.

### 3. Fourteenth Amendment Protection of Religion

Another source of protection for religious practice is the Fourteenth Amendment. It provides all individuals, including prisoners, with “equal protection under the law.” This means that a prison cannot make special rules or give special benefits to members of only one religion or group of religions without a reason. We talk about the legal standard to show discrimination in detail in Section C. You should read that section carefully if you think you might have a religious discrimination claim.

The prison can treat members of one religion differently if it has a reason that isn’t about the religion. *Benjamin v. Coughlin*, 905 F.2d 571 (2d Cir. 1990). For example, it is OK for a prison to provide better facilities and services to a religion with more followers. *Cruz v. Beto*, 405 U.S. 319 (1972). A prison can have full-time chaplains for religions with more followers and not for other, less popular religions. *Hartmann v. Cal. Dep’t of Corr. and Rehab.*, 707 F.3d 1114 (9th Cir. 2013).

### 4. Religious Freedom Restoration Act (RFRA) and Religious Land Use and Institutionalized Persons Act (RLUIPA)

In addition to the protections provided by the Constitution, there are two federal statutes that protect the religious rights of prisoners: *The Religious Freedom Restoration Act (RFRA)* and the *Religious Land Use and Institutionalized Persons Act (RLUIPA)*.

✓ **The Rule:** A prison or prison official can only substantially burden a prisoner’s exercise of religion if the regulation is in furtherance of a compelling government interest and the restriction is the least restrictive means of furthering that compelling interest.

Both the RFRA and RLUIPA provide prisoners with more protection of religious freedom than the First Amendment. Specifically, the RFRA states that the government can only “substantially burden a person’s exercise of religion” if two conditions are met. First, the government restriction must be “in furtherance of a compelling governmental interest.” Second, the government must prove that its restriction is the “least restrictive means of furthering that compelling interest.”

This is a much stricter test than the Turner standard discussed earlier in this chapter. However, the Supreme Court struck down the RFRA as it applies to state prisoners in a 1997 case, *City of Boerne v. Flores*, 521 U.S. 507 (1997). This means that you cannot use the RFRA if you are a state prisoner.

The Supreme Court did not overrule the RFRA as it applies to the federal government, and most courts have held that you can use it to sue federal agencies like the Federal Bureau of Prisons. If you are a federal prisoner and you think your right to practice your religion has been violated,

you can write a separate claim in your complaint under the *Religious Freedom Restoration Act*.

In 2000, Congress passed the *Religious Land Use and Institutionalized Persons Act (RLUIPA)*, to deal with the fact that state prisoners could no longer use the RFRA. The standard is the same. If a prison cannot show that their rule passes both parts of this test, a court will find that they have violated the RLUIPA.

The RLUIPA is different than the RFRA only in that it applies only to programs or activities that receive money from the federal government. This financial assistance gives Congress the right to pass laws that it might not otherwise be able to pass. In 2005, the U.S. Supreme Court found RLUIPA constitutional in *Cutter v. Wilkinson*, 544 U.S. 709 (2005). The Court held that facilities that accept federal funds cannot deny prisoners the necessary accommodations to engage in activities for the practice of their own religious beliefs.

All state correctional systems accept federal funding, so it is a good idea to bring a claim under RLUIPA if you believe that your right to exercise your religion has been unfairly restricted.

**NOTE:** While you can sue federal officials for money damages under RFRA, you cannot get money damages through a RLUIPA claim.

### 5. Common Issues Related to Religious Accommodations

The following are brief descriptions of the types of issues that often come up in cases about prisoners’ right to religious freedom.

> **Religious services and meetings with clergy:** You have the right to meet with a religious leader and to attend religious services of your faith. You may meet with a clergyperson of a particular faith even if you weren’t a member of that faith before entering prison. However, courts have allowed prisons to restrict your rights based on the prison’s interests in order, security, and efficiency. The bottom line is that while you are not entitled to unlimited meetings, you have a right to a “reasonable opportunity” to attend services or meet with a religious leader. Courts have upheld interruptions in religious participation as long as they were not “substantial.”

> **Personal grooming and hygiene:** The Supreme Court in 2015 held that a prison policy preventing a Muslim prisoner from growing a half-inch beard in accordance with his beliefs violated RLUIPA. *Holt v. Hobbs*, 135 S. Ct. 853 (2015). A short beard could not reasonably be used to hide contraband. Some courts have since gone further than Holt to allow four-inch facial hair. *Ali v. Stephens*, 822 F.3d 776 (5th Cir. 2016). But courts have also accepted limits on hair growth. The Eleventh Circuit upheld a policy preventing people in prison following Native American religion from keeping hair long and unshorn. The court found that a short-hair policy was the least-restrictive means of keeping costs

and risks down, including identification and contraband. *Knight v. Thompson*, 797 F.3d 934 (11th Cir. 2015). Usually a prison will say that its grooming policies serve interests in health and prisoner identification. However, if there is an alternative way to maintain those security concerns, some courts have found that the regulation might infringe on the prisoner's religious practice. *Benjamin v. Coughlin*, 905 F.2d 571 (2d Cir. 1990); *Smith v. Ozmint*, 578 F.3d 246 (4th Cir. 2009).

> **Headwear:** Prior to the passage of RLUIPA, which provides more protection than the First Amendment, courts generally accepted prison regulations restricting religious headwear in common areas. *Standing Deer v. Carlson*, 831 F.2d 1525 (9th Cir. 1987). However, under RLUIPA courts have upheld the right to wear religious headwear such as kufi despite prison objections based on contraband or costs. *Ali v. Stephens*, 822 F.3d 776 (5th Cir. 2016). You may challenge a headwear accommodation if it is not enforced equally against all religions. *Wilson v. Moore*, 270 F. Supp. 2d 1328 (N.D. Fla. 2003).

> **Special diets:** Special religious diets often raise issues of cost, and sometimes also raise questions related to the Establishment Clause, which prohibits endorsement of one religion above others. Prisons cannot make prisoners choose between religious practice and adequate nutrition. *Nelson v. Miller*, 570 F.3d 868 (9th Cir. 2009). Courts have often required prisons to accommodate prisoners' religious diets, but usually allow them to do so in a way that is least costly or difficult for them. *Ashelman v. Wawrzaszek*, 111 F.3d 674 (9th Cir. 1997); *Beerheide v. Suthers*, 286 F.3d 1179 (10th Cir. 2002); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1320 (10th Cir. 2010); *Makin v. Colorado Dept. of Corrections*, 183 F.3d 1205 (10th Cir. 1999). One court allowed a case to proceed on whether Native American prisoners had a right to buffalo meat and other traditional foods for a once-a-year powwow. *Haight v. Thompson*, 763 F.3d 554 (6th Cir. 2014). If there is an alternative way for a prisoner to exercise his dietary beliefs, like by choosing vegetarian options, courts will usually not find a violation. *Williams v. Morton*, 343 F.3d 212 (3d Cir. 2003). One court upheld the right not to drink water during religious fasting, in the case of a Muslim prisoner who was fasting during Ramadan but was punished for refusing a urine test. The court held that the prison had to move the urine test to non-fasting hours. *Holland v. Goord*, 758 F.3d 215 (2d Cir. 2014).

> **Name changes:** People who convert in prison may want to change their name. Prisoners have a First Amendment right to change their names for religious reasons, but prisons may require them to use both their old and new names. In *Hakim v. Hicks*, 223 F.3d 1244 (11th Cir. 2000), for example, a court decided that a prisoner's rights had not been violated when his religious name was placed on the back of his identification card. Other cases like this are *Ali v. Dixon*, 912 F.2d 86 (4th Cir. 1990) and *Imam Ali Abdullah v. Cannery*, 634 F.2d 339 (6th Cir. 1980). The procedure for getting a name change is usually controlled by state law, rather than the Constitution. More

information about name changes is available in Section 1 of this chapter, on the rights of LGBTQ+ prisoners.

Courts have addressed many other issues related to religion. In *Native American Council of Tribes v. Weber*, 750 F.3d 742 (8th Cir. 2014), a court held that a blanket ban on tobacco use violated the rights of Native American religious practitioners to use tobacco in ceremonies. In *Chriceol v. Phillips*, 169 F.3d 313 (5th Cir. 1999), a court held that the prison could ban a piece of religious mail because it had the potential to produce violence by advocating racial or religious hatred. In *Shaffer v. Saffle*, 148 F.3d 1180 (10th Cir. 1998), the court decided that a law requiring DNA sampling did not violate a prisoner's religious rights because it applied to all prisoners. The right to possess religious objects is discussed in *Morrison v. Garraghty*, 239 F.3d 648 (4th Cir. 2001). Some objects can be prohibited based on interests of safety, security, and discipline, such as in *McFaul v. Valenzuela*, 684 F.3d 564 (5th Cir. 2012) where a court allowed a prison to ban neo-Pagan medallions.

## C.

### Your Right to be Free from Discrimination

✓ **The Rule:** Any claim for discrimination must show that the regulation has both a discriminatory effect and intent. If there is discriminatory effect and intent, the court will use strict, intermediate, or rational-basis scrutiny to decide if the practice is constitutional. Which test it uses depends on whether you are complaining about race, religion, gender or some other form of discrimination.

What this means in practice is that prison officials cannot treat you differently because of your race, religion, ethnicity or gender and the prison can't segregate prisoners by race, ethnicity or religion except in very limited circumstances. However, proving discrimination is hard.

The Fourteenth Amendment to the Constitution guarantees everyone "equal protection of the law." Equal protection means that a prison cannot treat some prisoners differently than it treats others without a reason. How good of a reason the prison needs varies depending on what kind of discrimination is at issue. The courts are much more critical of laws that discriminate against people based on "suspect classifications." The most important suspect classification is race. For that reason, courts are very strict in reviewing laws that treat people of one race differently than another. Such laws are subjected to a type of review called "strict scrutiny" and are frequently struck down.

Other suspect classifications include ethnicity and religion. Suspect classifications target groups that are (1) a "discrete



or insular minority,” (2) have a trait they cannot change, also called an “immutable trait,” (3) have been historically discriminated against, and (4) cannot protect themselves through the political process. The Supreme Court discussed each of these factors in a case called *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). In that case, the Supreme Court decided that people with developmental disabilities are not entitled to suspect classification status.

The Supreme Court has applied an intermediate level of scrutiny to groups who need more protection than usual, but not quite as much as the most suspect classifications. Some courts refer to such groups as “quasi-suspect.” Sex and/or gender is a “quasi-suspect” classification. Quasi-suspect classifications are subject to an intermediate level of scrutiny that is sometimes called “heightened scrutiny.” Some lower courts have found that discrimination against LGBTQ+ status is also subject to heightened or intermediate scrutiny, but the Supreme Court has not yet weighed in. For more discussion about the equal protection rights of LGBTQ+ people, visit Section I Part 1.

LEVEL OF SCRUTINY	GOVERNMENT INTEREST OR OBJECTIVE	RELATION TO GOVERNMENT INTEREST
<b>STRICT SCRUTINY</b> (racial discrimination)	Compelling	Narrowly tailored
<b>HEIGHTENED/ INTERMEDIATE SCRUTINY</b> (sex, gender and, in some circuits, LGBTQ+ status)	Important	Substantially related
<b>RATIONAL BASIS</b> (other)	Legitimate	Rationally related

### 1. Freedom from Racial Discrimination

Racial discrimination and racial segregation by prison authorities are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. *Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1966). For example, prisons cannot prevent Black prisoners from subscribing to magazines and newspapers aimed at a Black audience. *Jackson v. Godwin*, 400 F.2d 529 (5th Cir. 1968). Nor can they segregate prisoners by race in their cells. *Sockwell v. Phelps*, 20 F.3d 187 (5th Cir. 1994). The Supreme Court stated that racial segregation in prison cannot be used as a proxy (a stand-in) for gang membership or violence without passing “strict scrutiny”—which is defined several paragraphs below and in the chart on the previous page.

The easiest type of equal protection claim to bring is a challenge to a policy that is explicitly race based, for example, if a prison has a written policy of segregating prisoners by race. It is rare to come across written policies

of that nature these days. More likely, you will be challenging a policy or practice that doesn’t actually say anything about race but has the effect of treating Black prisoners different than white prisoners, for example. For this type of claim there are two essential points to prove: (1) the prison rule had the effect of discriminating against you and (2) discriminatory purpose or intent was at least part of the reason for the rule. *David K. v. Lane*, 839 F.2d 1265 (7th Cir. 1988).

The first part is usually easier to prove: in a challenge to an unwritten segregation policy, for example, you could show that all the prisoners on your unit are Black. Proving intent to discriminate is harder, because prison officials will often come up with various excuses to explain away what looks like discrimination. You will need to show that you are being treated differently because of your race. If you have direct proof of discriminatory intent—like the warden who decides which unit prisoners go to has made racist comments—you should include that in your complaint. However, if you don’t have any direct proof of discriminatory intent, you can argue that discrimination is the only possible reason for the treatment you are experiencing. For example, a federal court in Alabama decided that the Constitution had been violated because it could not find any non-discriminatory reason for the fact that Black people consistently made up a greater proportion of those detained in Alabama’s segregation unit than those detained in Alabama’s prisons generally. *McCray v. Bennett*, 467 F. Supp. 187 (M.D. Ala. 1978).

However, proving a case like this is not easy, and will probably require expert witnesses and statistical analysis. One great example is *Santiago v. Miles*, 774 F. Supp. 775 (W.D.N.Y. 1991). In that case, the prisoners showed through statistical data that the prison was made up of mostly Black and Latino men, but white prisoners received better housing and job assignments and had better disciplinary hearing outcomes for similar infractions. The Court decided that discriminatory intent was the only possible explanation for what was going on in the prison. On the other hand, in *Betts v. McCaughtry*, 827 F. Supp. 1400 (W.D. Wisc. 1993) a different court held that prison officials did not violate the Constitution when they censored certain cassettes, most of which were Black musicians, because there was not enough evidence that they intended to discriminate against Black people.

Even if you successfully prove discriminatory effect and intent, courts may allow racial segregation or discrimination if prison officials can show that it passes “strict scrutiny.” Strict scrutiny is another two-step process where the prison officials will have to show that the segregation or discrimination is being done to advance a “compelling government interest” and the way the prison is achieving that interest is “narrowly tailored.” *Johnson v. California*, 543 U.S. 499 (2005). This means that the prison must have a very good reason for the rule and the rule must directly fix the problem that the rule is designed to solve.

Johnson is an important case to read if you are considering a segregation claim. In Johnson, the Supreme Court

considered a California policy that segregated prisoners by race for the first 60 days of any transfer. The Court decided in *Johnson* that the prison's concern about gang violence was a compelling government interest. (Courts often find "gang violence" to be a very good reason for rules.) However, the Court said that California's rule did not address the problem of gangs and violence in a way that was narrowly tailored because segregating prisoners without looking at their disciplinary history or gang connections affected all prisoners, not just those who were in gangs or who were violent. The Court stated the prison should have made a case-by-case decision about who to segregate. The Court also said that not all gang violence happens because people of different races are housed together, so the rule was not narrowly tailored.

**NOTE:** The California policy in *Johnson* is one of the rare policies described earlier that is explicitly based on race.

A vague fear of racial violence is not a sufficient justification for a broad policy of racial segregation. For example, in *Sockwell v. Phelps*, 20 F.3d 187 (5th Cir. 1994), the court did not accept the argument that there might be an increase in violence if people of different races shared two-person cells, since the rest of the prison was integrated. Another court allowed an equal protection claim to go forward where all Black prisoners were segregated and kept in lockdown in response to violence that only involved a few Black prisoners. *Richardson v. Runnels*, 594 F.3d 666 (9th Cir. 2010). However, some courts have held that a brief period of racial segregation, like during a lockdown or another emergency where the safety of members of one racial group is an issue, is OK. *Fischer v. Ellegood*, 238 Fed. Appx. 428 (11th Cir. 2007).

Most courts have held that racial epithets or other racially based verbal abuse do not violate the Constitution.

## 2. Freedom from Sex and Gender Discrimination

✓ **The Rule:** Policies or practices that treat people differently based on their sex, gender, and in some circuits, LGBTQ+ status, must be substantially related to important governmental interests.

The Equal Protection Clause of the Fourteenth Amendment also prohibits discrimination based on sex and gender. Men and women are protected under the rule, and so are LGBTQ+ people according to a growing number of courts.

To prevail on a claim, you will have to show that you were treated differently than others on account of your sex, gender, or LGBTQ status for reasons that were not "substantially related to a sufficiently important government interest." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985). This is "heightened scrutiny" as described above.

### a. The "Similarly Situated" Requirement

To make an equal protection claim, you must first show that the people you wish to compare are "similarly situated" for the purposes of the claim you are bringing. "Similarly situated" means that there are no differences between two people that could explain the different treatment they receive.

While it is unconstitutional to treat people who are in the same situation differently, it is acceptable to treat people in different situations differently. Courts will look at several factors to decide whether people are "similarly situated," including number of people in prison, average sentence, security classification, and special characteristics such as violent tendencies or experiences of abuse. In *Victory v. Berks County*, 2019 WL 211568 (E. D. Pa. Jan. 15, 2019), the court found the female "trustee" prisoner similarly situated to male "trustee" prisoners, because Berks County applied a risk-management equation to all prisoners, men and women, to determine who should get "trustee" status.

Unfortunately, courts very often decide on the basis of these factors that male and female prisoners are not similarly situated. *Mathis v. Monza*, 530 Fed. Appx. 124 (3d Cir. 2013); *Keegan v. Smith*, 100 F.3d 644 (8th Cir. 1996); *Klinger v. Dept. of Corrections*, 31 F.3d 727 (8th Cir. 1994). And as Section I, Part 2 explains, LGBTQ people making "similarly situated" arguments face their own unique challenges.

### b. Proving Discriminatory Intent

If you successfully show that you were treated differently than "similarly situated" people, next you must show that prison officials treated you differently based on your sex, gender, or LGBTQ status, and not for a different, legitimate reason. Courts will use a different test for this depending on whether the action you are challenging is "gender-based" or "gender-neutral." These two terms are explained below.

**Gender-based classifications:** Policies and actions are "gender-based" if prison officials make clear that different standards apply based on your sex, gender, or LGBTQ status. For example, a policy that says all women will be sent to childcare training and all men will be sent to vocational training is "gender-based." Judges look very carefully at gender-based rules. The government must show the distinctions being drawn are "substantially related to important governmental objectives." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Jackson v. Thornburgh*, 907 F.2d 194 (D.C. Cir. 1990). This is known as "heightened" or "intermediate" scrutiny. Heightened scrutiny also applies to actions by corrections officers that single you out based on sex/gender.

**NOTE:** This is a less strict standard than "strict scrutiny" which is used for racial discrimination, described in Part 1 of this Section.

**Gender-neutral classifications:** A “gender-neutral” policy or practice is one that does not actually say anything about gender, but still has the effect of discriminating against people. One example is a prison system that has a rule that only prisons with 2,000 prisoners or more get college programs, where women’s prisons are too small to qualify. If the action challenged is “gender-neutral” then the courts use a less strict standard of review. The court asks whether the rule is “rationally related to legitimate government interests,” or whether, instead, it shows an intent to discriminate on the basis of gender. *Jackson v. Thornburgh*, 907 F.2d 194 (D.C. Cir. 1990).

There are two important considerations to keep in mind about these tests:

1. Any type of government interest—whether it’s “important” or “legitimate”—cannot be based on stereotypes or outdated ideas about gender. *Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989). For example, the court will not accept a government interest of protecting one gender because it is “inherently weaker” than the other gender. *Glover v. Johnson*, 478 F. Supp 1075 (E.D. Mich. 1979).

Men in prison can also bring claims based on gender stereotypes. For example, *Sassman v. Brown*, 99 F. Supp. 3d 1223 (E.D. Ca. 2015) involved a California alternatives-to-incarceration program that was open to all women, but only open to men who are the primary caregivers of dependent children. A male prisoner sued, claiming that the program violated his right to equal protection. The court found the rule unconstitutional and made the program open to men and women equally.

2. It is not always obvious whether a prison’s action is gender-based or gender-neutral, and courts disagree on how to read regulations or policies. Often, there will be two regulations at play. The first regulation assigns people to specific prisons on the basis of their sex or gender. Outside of the context of placement of transgender prisoners (discussed in Section I, Part 2), courts have rarely held that this kind of segregation is discrimination. The second regulation assigns certain programs or facilities to prisons on the basis of such factors as size, security level, or average length of prisoner sentence. These second types of regulations do not appear to be gender-based; they seem to be based on characteristics of the prisons alone. However, they often result in different treatment of people in prison based on gender.

Some courts have been reluctant to find that prison rules are gender-based when they do not explicitly distinguish between men, women, or LGBTQ+ people when it comes to how the prison facility is run. *Klinger v. Dept. of Corrections*, 31 F.3d 727 (8th Cir. 1994); *Jackson v. Thornburgh*, 907 F.2d 194 (D.C. Cir. 1990). Other courts, however, have read the requirement more favorably to prisoners. They see that, in reality, gender-neutral regulations about programming interact with gender-based assignment of prisoners to specific prisons, which makes the regulations gender based. (“Programming” means the kinds of activities that prisoners are allowed or required to

engage in, such as work, education, etc.) One example of this is *Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989).

### 3. Freedom from Other Forms of Discrimination

If you believe you are being unfairly singled out for mistreatment, but it is not based on your race, ethnicity, gender, or some other suspect or quasi-suspect factor, you can still make an equal protection claim. However, that claim will be very hard to win. For example, in *Graziano v. Pataki*, 689 F.3d 110, 117 (2d Cir. 2012) a court said treating “violent offenders” differently from other offenders did not violate equal protection.

To win your case, you will need to show that you are being treated differently than other prisoners and that your treatment is not rationally related to a legitimate governmental purpose. One area where people in prison have had some success is when people are treated differently based on sexual orientation. A good example of a successful case is *Doe v. Sparks*, 73 F. Supp. 227 (W.D. Pa. 1990). In that case, the court held that it was irrational for a prison to ban same-sex boyfriends and girlfriends from non-contact prison visits. In another case, *Davis v. Prison Health Services*, 679 F.3d 433 (6th Cir. 2012), an appeals court allowed a case about a prisoner who was removed from a work program due to his sexual orientation.

On the other hand, in *Vega v. Lareau*, No. 9:04-cv-00750-GTS-ATB, 2010 U.S. Dist. LEXIS 66431 (N.D.N.Y. Mar. 16, 2010), a prisoner said he was harassed and discriminated against because a guard thought he was gay. The court held that the prisoner failed to prove the mistreatment happened because the guard thought he was gay. Instead, the court believed the guard, who claimed he thought the prisoner was involved in a romantic relationship with another prisoner, and that created a security concern.

## D. Your Procedural Due Process Rights Regarding Punishment, Administrative Transfers, and Segregation

✓ **The Rule:** If the prison subjects you to treatment or conditions that are an atypical and significant hardship in relation to the ordinary incidents of prison life, they must provide you with some level of process.

What this means in practice is you can only challenge a transfer or punishment in prison if it is extremely and unusually harsh, or if it is done to get back at you for something you have the right to do.

The Due Process Clause of the Fourteenth Amendment prohibits a state from depriving “any person of life, liberty or property without due process of law.” There are two parts to this clause: “substantive due process” and “procedural due process.” This section deals only with procedural due process.

Your right to procedural due process means that the prison must provide you with some amount of protection (like a hearing or a notice) if the prison does something that harms your life, liberty, or property. Discipline, placement in segregation, transfers to extremely restrictive prisons, and loss of good time credit are all things that the prison can do to you that might violate due process if they are done without procedural protections, like a hearing.

Procedural due process has two parts: first you have to show that you have been deprived of a liberty interest and second, you have to show that you should have gotten more procedure than you received.

You only have a liberty interest if the prison’s actions interfere with or violate your constitutionally protected rights, such as First Amendment rights, or if the prison treats you in a way that is much worse than is normal for prisoners. If a court finds that you don’t have a liberty interest, then the prison doesn’t have to provide you with any process at all.

## 1. Due Process Rights of People in Prison

Two important Supreme Court cases govern due process rights for prisoners:

> In the first case, *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Supreme Court found that when prisoners lose good time credits because of a disciplinary offense, they are entitled to: (1) written notice of the disciplinary violation; (2) the right to call witnesses at their hearing; (3) assistance in preparing for the hearing; (4) a written statement of the reasons for being found guilty; and (5) a fair and impartial decision-maker in the hearing.

> The second important Supreme Court case, *Sandin v. Conner*, 515 U.S. 472 (1995), sharply limits the decision of *Wolff*, so due process protection only applies to discipline that makes a prisoner’s time in prison longer (like by taking away his good time credits) or treatment that leads to an “atypical and significant hardship on the prisoner in relation to the ordinary incidents of prison life.” In *Sandin*, a prisoner was placed in disciplinary segregation for 30 days. The Supreme Court found that the prisoner had no liberty interest, because 30 days in disciplinary segregation is not an unusual or harsh punishment. “Significant hardship” means that treatment must be really awful, not just uncomfortable or annoying.

### Beware!

You cannot bring a procedural due process challenge to a disciplinary proceeding that took away good time, or otherwise lengthened your time in prison, unless you first exhaust your administrative remedies, and, for state or local prisoners, also exhaust state judicial remedies. If you are unsuccessful, you can then file a petition for a writ of habeas corpus in federal court.

This important but confusing concept comes from a Supreme Court case called *Edwards v. Balisok*, 520 U.S. 641 (1997). In *Edwards*, a person in prison challenged the conduct of his hearing examiner, stating that the examiner hid evidence that would have helped him and didn’t question witnesses adequately. At the hearing, the prisoner was sentenced to time in solitary and loss of good time credits. The Court held that, if what the prisoner said was true, it would mean that the result of his disciplinary hearing would have to be reversed and his good time credits would have to be given back to him. This would affect the length of his confinement, and a challenge like that can only be brought if the prisoner can show that their disciplinary conviction has already been overturned in a state proceeding.

If you are challenging a disciplinary decision that does not affect the length of your confinement, or just seeking fairer procedures in the future, you should not be affected by the *Edwards* decision. Read *Muhammad v. Close*, 540 U.S. 749 (2004) and *Wilkinson v. Dotson*, 544 U.S. 74 (2005), for more on this issue.

If you want to argue that your rights were violated in a prison disciplinary proceeding because you did not receive the procedures laid out in *Wolff*, you must first show that the punishment you received either prolonged your sentence (for example, it took away good time credits) or was extremely harsh. Frequently, short periods of disciplinary confinement, “keeplock,” or loss of privileges will not be considered harsh enough to create a liberty interest. For example, in *Key v. McKinney*, 176 F.3d 1083 (8th Cr. 1999), the court found that 24 hours in shackles was not severe enough to violate due process.

Different circuit courts have taken very different approaches to the question of whether prolonged placement in disciplinary or administrative segregation is atypical and significant. In the Second Circuit, more than 188 days in solitary confinement is severe enough to create a liberty interest. *J.S. v. T’Kach*, 714 F.3d 99 (2d Cir. 2013). In contrast, in *Griffin v. Vaughn*, 112 F.3d 703 (3d Cir. 1997), the Third Circuit held that 15 months in administrative segregation is not atypical and significant.

While courts in different circuits have very different interpretations, there does seem to be a recent trend that compares the segregation sentence in question to a “typical” stay in administrative or disciplinary segregation. If you can show that you have been sent to segregation for longer than is typical, you may be able to succeed in your claim. This is hard to do because courts rarely cite any

evidence about what is typical. One of the authors of this handbook wrote a law review article that you may find useful to cite on this issue, because it provides evidence about “typical” stays in segregation in the federal prison system and in various state systems. If you are put in segregation for longer than a year you may want to try citing this article for evidence that your sentence in segregation is longer than typical, and you should be entitled to due process protections: Rachel Meeropol, Communication Management Units: The Role of Duration and Selectivity in the *Sandin v. Conner Liberty Interest Test*, 1 U.C.L.A. Crim. Just. L. Rev. 35, 49-51 (2017). The following text box lists average stays in segregation in different jurisdictions, from the article, and from a study done by Yale Law School called: “Time-In-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison.”

### Average Time in Segregation

In the BOP, the typical stay in segregation is 3.98 weeks. Only 7.85% of people in BOP custody spend more than 20 weeks in segregation in an 18-month period.

In Alaska, Arkansas, D.C., Iowa, Kentucky, Massachusetts, Missouri, Montana, North Carolina, Pennsylvania, and South Carolina, the majority of people put in segregation were held there less than 90 days.

Less than 10% of prisoners put in segregation in Alaska, Colorado, D.C., Iowa, Kentucky, Massachusetts, Missouri, Montana, and North Carolina were held there for more than a year.

Length of time in segregation is not the only thing that matters, the severity of the conditions matters a lot too. For example, in *Palmer v. Richards*, 364 F.3d 60 (2d Cir. 2004), a court held that 77 days under aggravated conditions could be atypical and significant. *Gillis v. Litscher*, 468 F.3d 495 (7th Cir. 2006) and *Mitchell v. Horn*, 318 F.3d 523 (3d Cir. 2003) are other good cases examining short placement in very bad conditions.

Although *Sandin* changed the law in important ways, the Supreme Court did not say it was overruling *Wolff*. This means that when you can show that there is a liberty interest at stake, even though it is much harder to prove under *Sandin*, the rights guaranteed by *Wolff* still apply. In other words, if a decision by prison officials results in conditions that are severe enough to meet the “significant and atypical” standard, or prolongs your time in prison, the prison must give you procedures like a hearing and a chance to present evidence.

Courts have found violations in a person’s due process rights when people in prison are disciplined without the chance to get witness testimony, have a hearing, or present evidence. Courts have also found due process violations when punishment is based on vague claims of gang affiliation. Some cases in which these types of claims

were successfully made are: *Ayers v. Ryan*, 152 F.3d 77 (2d Cir. 1998); *Taylor v. Rodriguez*, 238 F.3d 188 (2d Cir. 2001); and *Hatch v. District of Columbia*, 184 F.3d 846 (D.C. Cir. 1999).

## 2. Transfers and Segregation

If you are transferred to a different facility or to a different location within a prison, the same standard in *Sandin v. Connor* applies: you must show that the transfer resulted in conditions that were a significant or atypical departure from the ordinary incidents of prison life. Given the fact that the new prison will likely be similar to prisons everywhere, it is very hard to win on such a claim. In *Meachum v. Fano*, 427 U.S. 215 (1976) the Supreme Court decided that a transfer from a medium security prison to a maximum-security prison did not create a liberty interest. Similarly, in *Freitas v. Ault*, 109 F.3d 1335 (8th Cir. 1997), a court said that transfer from a minimum-security facility to a maximum-security facility did not create a liberty interest.

However, you may have a case if you are transferred to a super-maximum security facility where conditions are way harsher than most prisons, or to a Communication Management Unit (CMU) where contact with family and the outside world is very limited. The Supreme Court considered transfer to a Supermax in *Wilkinson v. Austin*, 545 U.S. 209 (2005). The conditions were so harsh at the Supermax (almost no human contact, 24-hour lighting, no outside recreation, etc), that the Court found a liberty interest.

Despite *Wilkinson*, in a case called *Rezaq v. Nalley*, 677 F.3d 1001 (10th Cir. 2012), the Tenth Circuit said that there was no atypical and significant hardship in being transferred to the federal supermax prison, “ADX,” in Colorado. The court based its ruling, in part, on a finding that it was reasonable to put the prisoner who brought the case in ADX. We think this is an improper way to decide the issue and fails to follow what the Supreme Court has said. Hopefully that case will be overruled in the future. If it is not, prisoners in the 10th Circuit should know that they will have a particularly hard time bringing a due process claim about segregation.

If you are transferred to an unusual unit, or are subject to strange restrictions, an important due process case to read is *Aref v. Lynch*, 833 F.3d 242 (D.C. Cir. 2016). That case involved prisoners challenging their placement in a “Communications Management Unit” where prisoners were segregated from the general population, received very few phone calls and were not allowed contact visits. The court found that conditions in a CMU are not as harsh as in segregation, but prisoners were held there for years at a time. The court also thought it was important that very few prisoners were singled out for placement in the unit. The court decided that CMU prisoners have a liberty interest in avoiding the CMU and are entitled to due process protections when sent there, because of how long they might be stuck in a CMU, and how unusual it is to be sent there.

One good state court case you might want to read is *Schuyler v. Roberts*, 285 Kan. 677 (2008). In *Schuyler*, the Supreme Court of Kansas considered a prisoner's due process challenge to his classification as a sex offender even though he had not been convicted on that charge, nor had he been disciplined while incarcerated for inappropriate sexual behavior. Because of the sex offender status, the prisoner lost work privileges, had to transfer to another facility, and had to register as a sex offender upon release. Additionally, he would lose other privileges if he refused to participate in the program. The court found a liberty interest.

You may also have a right to procedural protections if you are transferred out of the prison system entirely. In *Vitek v. Jones*, 445 U.S. 480 (1980), the Supreme Court found a liberty interest when a prisoner was involuntarily removed from the prison to a medical hospital for mandatory mental health treatment. But there may not be a liberty interest under *Vitek* where a transfer to a mental health facility is temporary and for evaluation. *Green v. Dormire*, 691 F.3d 917 (8th Cir. 2012).

If a court finds that you have a liberty interest in avoiding transfer to a more restrictive unit, or to administrative segregation, or to some other supposedly non-disciplinary segregated confinement, you will have some due process rights, but these rights are more limited than what is required for a disciplinary proceeding. The Supreme Court has found that, in general, a formal or "adversarial" hearing is not necessary for putting prisoners in administrative segregation. All you get is notice and a chance to present your views informally. This was decided in *Hewitt v. Helms*, 459 U.S. 460 (1983), the most important case on administrative segregation. Recently, an appeals court said that prisoners kept in solitary confinement on death row after their sentences have been vacated are entitled to these types of procedures. *Williams v. Sec'y Penn. Dep't of Corr.*, 848 F.3d 549 (3d Cir. 2017).

There may be other ways of challenging transfers and administrative segregation as well. For example, a prison can't transfer you to punish you for complaining or to keep you from filing a lawsuit. Prison officials must not use transfers or segregation to restrict your access to the courts. For an example of this type of claim, read *Allah v. Seiverling*, 229 F.3d 220 (3d Cir. 2000) and Section G of this Chapter. And in some states, you can challenge disciplinary confinement or other kinds of segregation in state court by showing that the officials failed to follow their own rules in placing you there.

## E.

### Your Right to Privacy and to be Free from Unreasonable Searches and Seizures

✓ **The Rule:** Strip searches must be reasonably related to a legitimate penological interest and not done in a humiliating manner.

What this means in practice is that prison officials can search your cell whenever they want but there are some limits on when and how they can strip search you.

#### 1. Your Fourth Amendment Rights related to Searches

The Fourth Amendment forbids the government from conducting "unreasonable searches and seizures." Outside of prison, this means that a police officer or F.B.I. agent cannot come into your home or search your body without your consent or a search warrant, unless it is an emergency. However, the Fourth Amendment only protects places or things in which you have a "reasonable expectation of privacy." In the outside world, this means that if you have your window shades wide open, you can't expect somebody not to look in, so a cop can too.

In *Hudson v. Palmer*, 468 U.S. 517 (1984), the Supreme Court held that people in prison don't have a reasonable expectation of privacy in their cells, so prison officials can search cells as a routine matter without any particular justification, and without having to produce anything like a search warrant.

This doesn't mean that all cell searches are OK. If a prison official searches your cell just to harass you or for some other reason that is not justified by a penological need, this may be a Fourth Amendment violation. However, to get a court to believe that the "purpose" of a search was harassment, you will need some truly shocking facts. For example, in *Scher v. Engelke*, 943 F.2d 921 (8th Cir. 1991), a prison guard searched a prisoner's cell 10 times in 19 days and left the cell in disarray after three of these searches.

There is more protection against strip searches. While people have no expectation of privacy in their prison cells, they retain a "limited expectation of privacy" in their bodies. *Henry v. Hulett*, 969 F.3d 769 (7th Cir. 2020) (en banc). In analyzing body cavity searches, strip searches, or any invasions of bodily privacy, a court will balance the need for the search against the invasion of privacy the search involves. Strip searches are generally allowed but many courts state that the searches must be related to legitimate penological interests and cannot be excessive or used to harass, intimidate, or punish. In *Jean-Laurent v. Wilkenson*, 540 F. Supp. 2d 501 (S.D.N.Y. 2008), for

example, one court stated that a second strip search might be unconstitutional because the prisoner was under the constant supervision of guards since the first search. In another case, a court found that body-cavity searches three times a day of prisoners in segregation served no valid penological interest because it was impossible that prisoners in segregation could smuggle contraband in three times a day. *Parkell v. Danberg*, 833 F.3d 313 (3d Cir. 2016).

Prisoners seem to have had the most success when the searches were conducted by, or in front of, guards of the opposite gender. For example, in *Hayes v. Marriott*, 70 F.3d 1144 (10th Cir. 1995), the court held that a body cavity search of a male prisoner in front of female guards stated a claim for a Fourth Amendment violation because there was no security need to do it that way. In *Cornwell v. Dahlberg*, 963 F.2d 912 (6th Cir. 1992), the court recognized a male prisoner's Fourth Amendment claim based on a strip search done outdoors, in front of several female guards. In *Byrd v. Maricopa Cnty. Sheriff's Dep't.*, 629 F.3d 1135 (9th Cir. 2011) (en banc), an appeals court held that a strip search of a male prisoner by a female officer violated the Fourth Amendment where the search involved intimate contact and ten to fifteen non-participating officers watched the search, and at least one person videotaped the search. This rule is not limited to strip searches. Where a female prisoner had a documented history of sexual abuse but was forced by male guards to endure pat-down searches that sometimes included inappropriate touching and unwarranted sexual advances, an appeals court found that the circumstances could violate the Fourth Amendment's prohibition against unreasonable searches and its more general guarantee of a right to some measure of bodily privacy. *Colman v. Vasquez*, 142 F. Supp. 2d 226 (D. Conn. 2001). In *Fortner v. Thomas*, 983 F.2d 1024 (11th Cir. 1993), the court recognized a claim by male prisoners who were observed by female guards while they showered and went to the bathroom. In *Kent v. Johnson*, 821 F.2d 1220 (6th Cir. 1987), an appeals court refused to dismiss a prisoner's complaint that stated female prison guards routinely saw male prisoners naked, showering, and using the toilet.

Even when the search is not done by or in front of a person of the opposite gender, however, you may be able to show a Fourth Amendment violation if there was no reasonable justification for the invasive search.

Unfortunately, many courts have held that strip searches after contact visits are constitutional. Additionally, courts have held strip searches that are accompanied by officer misconduct (like name calling or other verbal abuse) usually do not violate the prisoner's constitutional rights if there is no physical injury. This may, however, be actionable under state tort law and should always be reported and investigated. We discuss this more in Section F, Part 2 of this chapter. Strip searches involving sexual assault or inappropriate touching are discussed below.

The law is slightly better for pretrial detainees, so if you have not been convicted yet, read Section J of this Chapter, on the rights of pretrial detainees. Special rules

also apply to searches if you are transgender, so be sure to read Section I, Part 2 of this Chapter.

## 2. Your Fourteenth Amendment Right to Medical Privacy

Some courts have found that a constitutional right to privacy exists under the Fourteenth Amendment when it comes to sensitive medical information like your mental health information or HIV status. For instance, in *Hunnicuttt v. Armstrong*, 152 Fed. App'x 34 (2d. Cir. 2005), an appeals court found that a plaintiff whose mental health issues were discussed in front of other prisoners and non-healthcare staff had adequately alleged a privacy violation. Collectively, these cases establish that prison staff may not disclose a prisoner's HIV status or psychiatric history without need.

But courts have been reluctant to find privacy violations where medical information is disclosed to government officials. *Doe v. Wigginton*, 21 F.3d 733 (6th Cir. 1994) (allowing HIV disclosure to other corrections officials) *Seaton v. Mayberg*, 610 F.3d 530 (9th Cir. 2010) (allowing disclosure of sensitive health information to state DAs).

Qualified immunity can also make it difficult for you to seek monetary damages for a privacy breach since the law on privacy is evolving. You will also need to show that you were physically hurt in order to recover damages under the PLRA. This problem is described in Chapter Four, Section C, Part 2.

The federal HIPAA statute also protects medical records from improper disclosure, but you cannot sue officials for a HIPAA breach. Instead, you can cite HIPAA violations as evidence that your constitutional privacy rights were violated.

Additional privacy rights that apply to LGBTQ+ people and people living with HIV/AIDS are discussed in Section I, below.

## F. Your Right to be Free from Cruel and Unusual Punishment

The Eighth Amendment forbids "cruel and unusual punishment" and is probably the most important amendment for prisoners. It has been interpreted to prohibit excessive force and guard brutality, as well as unsanitary, dangerous, or overly restrictive conditions. It is also the source for your right to medical care in prison.

## 1. Your Right to Be Free from Physical Brutality and Sexual Assault by Prison Staff

✓ **The Rule:** A use of force is excessive and violates the Eighth Amendment when it is not applied in an effort to maintain or restore discipline, but is used to maliciously and sadistically cause harm. Where a prison official is responsible for unnecessary and wanton infliction of pain, the Eighth Amendment has been violated.

What this means in practice is that guards do NOT have the right to beat you or harm you unless their action is considered justified given the situation.

### a. Use of Excessive Force and Physical Brutality by Prison Officials

“Excessive force” is any physical contact by a guard that is meant to cause harm rather than keep order.

“Excessive force” by prison guards is cruel and unusual punishment. In a very important Supreme Court case called *Hudson v. McMillian*, 503 U.S. 1 (1992), the Court found a violation of the Eighth Amendment when prison officials punched and kicked a prisoner, leaving him with minor bruises, swelling of his face and mouth, and loose teeth. The Court held that a guard’s use of force violates the Eighth Amendment when it is not applied “in a good faith effort to maintain or restore discipline,” but instead is used to “maliciously and sadistically cause harm.” To prevail under *Hudson*, a two-part test applies. First you must show that prison officials “acted with a sufficiently culpable state of mind” (the subjective element)—i.e., not for a legitimate penological purpose, but “maliciously and sadistically for the very purpose of causing harm,” and (2) the harm caused was more than “de minimis”. “De minimis” means so trivial it’s not even worth considering.

In applying this test to excessive force claims, judges may consider:

- > The need for force;
- > Whether the amount of force used was justified given the need;
- > How serious the need for force appeared to the guards;
- > Whether the guard made efforts to use as little force as necessary; and
- > How badly you were hurt.

This means that to win on an excessive-force claim, you will have to show that more force was used against you than was justified given the situation, but you do not have to show injury. It is usually enough to show some harm, even if it is relatively minor. In 2010 the Supreme Court made it clear that a prisoner can win an excessive force case even if they are not seriously injured. *Wilkins v. Gaddy*, 559 U.S. 34 (2010). In *Wilkins*, the Supreme Court

explained that a beating is excessive force, even if it doesn’t result in injuries that require medical care. De minimis harm, on the other hand, is something like a push or a shove that does not inflict pain or injury.

The most important thing to prove is “whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.”

This is about the “state of mind” of prison officials. “Maliciously and sadistically” means harm that is cruel, done for the purpose of hurting someone, and is uncalled-for. You can meet this requirement by showing that the force used was not a necessary or reasonable part of keeping order.

For example, one court found an Eighth Amendment violation when an officer repeatedly hit a prisoner even though the prisoner had immediately obeyed an order to lie face down on the floor and was already being restrained by four other officers. *Estate of Davis by Ostefeld v. Delo*, 115 F.3d 1388 (8th Cir. 1997). In another successful case, the prisoner was handcuffed and hit several times in the head and shoulders while in a kneeling position. *Brown v. Lippard*, 472 F.3d 384 (5th Cir. 2006). On the other hand, the Ninth Circuit held that there was no Eighth Amendment violation when a prisoner was shot in the neck during a major prison disturbance because the court found that the officer was trying to restore order. *Jeffers v. Gomez*, 267 F.3d 895 (9th Cir. 2001). The Eighth Circuit said pepper spraying a prisoner’s genitals was not excessive force when the prison said he was refusing orders to submit to wrist restraints and being unruly. *Ward v. Smith*, 844 F.3d 717 (8th Cir. 2016).

With mechanical restraints, you might be able to bring an “excessive force” claim even if the prison says the treatment is just a “condition of confinement” (which is a separate category and discussed below). For example, in *Young v. Martin*, 801 F.3d 172 (3d Cir. 2015), an appeals court applied the excessive-force test when a prisoner was forced into a restraint chair and remained naked there for fourteen hours.

Unfortunately, many courts have found that prison officials who only make verbal threats of physical harm do not violate the Eighth Amendment. See *Walton v. Terry*, 38 F. App’x 363, 364–65 (9th Cir. 2002) (“verbal threats do not constitute cruel and unusual punishment.”); *Turner v. Mull*, 784 F.3d 485, 492 (8th Cir. 2015) (threatening to drown plaintiff without taking further action was not unconstitutional). But in *Lisle v. Welborn*, 933 F.3d 705, 710 (7th Cir. 2019), the Seventh Circuit found that a plaintiff who was taunted for his failed suicide attempts and encouraged to try again had a valid Eighth Amendment claim.

**NOTE:** As with many of the other types of claims described in this Handbook, please remember that a constitutional claim in federal court is not your only option. In a guard brutality case, it may be simpler to bring a “tort” case in state court.



## b. Sexual Assault and Abuse by Prison Officials

Rape and sexual assault by prison staff also violates the Eighth Amendment. See *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000) (sexual assaults by guards violate the Eighth Amendment “regardless of the gender of the guard or of the prisoner”); *Smith v. Cochran*, 339 F.3d 1205 (10th Cir. 2003) (assault by prison work program supervisor violates the Eighth Amendment).

For sexual assault by prison officials, the two-part test from *Hudson v. McMillian*, 503 U.S. 1 (1992) applies. However, this test can be easier to meet here because sexual assault is very harmful and violates contemporary standards of decency without a legitimate penological purpose, even in cases where there is no physical injury. See *Wilkins v. Gaddy*, 559 U.S. 34, 40 (2010) (explaining claims can proceed even if physical injury is “de minimis”).

Sexual abuse that falls short of rape can violate the Eighth Amendment as well. Some courts like the Second and Eleventh Circuits require the sexual abuse to be “severe or repetitive” in order for plaintiffs to prevail. See *Sconiers v. Lockhart*, 946 F.3d 1256, 1266–67 (11th Cir. 2020), *Crawford v. Cuomo*, 796 F.3d 252 (2d Cir. 2015). But one severe, isolated incident can meet this standard.

In *Daskalea v. District of Columbia*, 227 F.3d 433 (D.C. Cir. 2000), a court of appeals upheld a prisoner’s Eighth Amendment claim where she was forced to do a striptease in front of all the prisoners and officers at her facility. The court found deliberate indifference based on the plaintiff’s repeated filing of grievance claims and letters to officials seeking help, as well as the widespread and ongoing pattern of harassment and sexual assault at the facility. The District argued that it was not deliberately indifferent because it had a policy in place prohibiting such behavior, but the court rejected this argument because it found that no prisoner had ever received a copy of the policy, only a few employees remembered receiving it, and it had never been posted anywhere in the facility.

A pat or strip search can violate the Eighth Amendment too if conducted in a sexual manner to humiliate a prisoner (Fourth Amendment claims for searches are discussed in Section E above). One good case to read for this issue is *Crawford v. Cuomo*, 796 F.3d 252 (2d Cir. 2015). That case involved a guard searching a prisoner by grabbing his genitals and taunting him. The Second Circuit said that intentionally touching genitalia or intimate areas for the officer’s pleasure or to humiliate the prisoner violates the Eighth Amendment. Another is *Sconiers v. Lockhart*, 946 F.3d 1256, 1266–67 (11th Cir. 2020), where an appeals court found that a guard who shoved his finger into the plaintiff’s anus outside the context of an approved body-cavity search violated the Eighth Amendment.

But in *Berryhill v. Schriro*, 137 F.3d 1073 (8th Cir. 1998), a court rejected the Eighth Amendment claim of a plaintiff who was briefly touched on the buttocks by prison staff in an attempt to embarrass him, without any accompanying sexual advances.

You can bring a claim for commission of a sexual act under the PLRA even if it does not result in physical injury. For purposes of this exception, 18 U.S.C. § 2246 defines a sexual act as follows:

- A.** contact between the penis and the vulva or the penis and the anus, and...contact involving the penis occurs upon penetration, however slight;
- B.** contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
- C.** the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
- D.** the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

For more on the PLRA’s physical injury requirement that applies in cases that do not involve sexual assault, read Chapter Four, Section C.

Rape and sexual assault can also result in criminal prosecution of the guard or person responsible. Congress and most states have passed laws criminalizing rape or sexual assault of a prisoner by a correctional officer. See 18 U.S.C. §§ 2242 and 2243 (making prison sexual assault unlawful). The Washington College of Law’s Project on Addressing Prison Rape has put together a survey of all state criminal laws prohibiting sexual abuse of individuals in custody at <https://www.wcl.american.edu/impact/initiatives-programs/endsilence/research-guidance/>.

If you are assaulted or witness an assault, consider reporting it immediately and you may also want to think about preserving potential evidence like DNA samples and the clothes you wore during the assault.

## c. Sexual Harassment and Verbal Abuse by Guards

In rare cases, sexually explicit comments and verbal abuse by prison officials can also violate the Eighth Amendment. See *Hudson v. Palmer*, 468 U.S. 517, 530 (1984) (stating “calculated harassment unrelated to prison needs” can also violate the Eighth Amendment). But it is a difficult standard to meet. Just as courts do not always recognize the seriousness of sexual harassment outside of prison, they do not acknowledge the harm that verbal sexual abuse or less invasive sexual touching can cause in prison. Courts often call sexual harassment by prison guards “outrageous” or “reprehensible” but do not find it unconstitutional. This is unfortunate.

In *Beal v. Foster*, 803 F.3d 356, 358 (7th Cir. 2015), the Seventh Circuit found that prison officials who made lewd sexual comments and gestures and called the plaintiff a “punk, fag, sissy, and queer” may have violated the Eighth Amendment because the conduct caused the plaintiff

severe psychological harm, and being labeled LGBTQ+ increased his risk of abuse and assault.

Other cases failed to find Eighth Amendment violations despite noting the seriously inappropriate behavior of prison officials. For example, one court found that it was not cruel and unusual punishment when a corrections official repeatedly made sexual comments about a female prisoner's body to her, including one instance when he entered her cell while she was sleeping and commented on her breasts. *Adkins v. Rodriguez*, 59 F.3d 1034 (10th Cir. 1995).

But not all courts have been so insensitive to the effects of sexual harassment. In *Women Prisoners of District of Columbia Department of Corrections v. District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996), the court upheld a decision ordering a prison to adopt a new sexual harassment policy that prohibited conduct including: "(1) all unwelcome sexual activity directed by any DCDC employee at a prisoner including acts of sexual intercourse, oral sex, or sexual touching, and any attempt to commit these acts; and (2) all unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature directed by any DCDC employee at a prisoner." *Id.* at 933.

#### d. "Consensual" Sex between Prisoners and Guards

Courts disagree about whether a correctional officer can be held liable for having sex with a prisoner when the prisoner consents to the act. In *Carrigan v. Davis*, 70 F. Supp. 2d 448 (D. Del. 1999), a federal court in Delaware held that a guard had violated the Eighth Amendment by engaging in vaginal intercourse with a prisoner under his supervision, whether or not she had consented. The court relied on Delaware state law that made it a crime for a correctional officer to have sex with a prisoner, whether or not it was consensual.

In *Freitas v. Ault*, 109 F.3d 1335 (8th Cir. 1997), however, the Eighth Circuit found that consensual sex does not constitute cruel and unusual punishment because it does not cause any pain, according to that court's definition. Other cases like this are *Graham v. Sheriff of Logan County*, 741 F.3d 1118 (10th Cir. 2013) and *McGregor v. Jarvis*, No. 9:08-CV-770, 2010 U.S. Dist. LEXIS 97408 (N.D.N.Y. Aug. 20, 2010).

The Ninth Circuit has looked at the issue differently. In *Wood v. Beauclair*, 692 F.3d 1041 (9th Cir. 2012) the court explained that because the relationship between officers and prisoners is coercive, the court assumes that a prisoner cannot consent unless the officers prove otherwise. This means the burden is on the officers to give proof that no coercion occurred.

Today, the federal government and most states have statutes making it a crime for a correctional employee to have intercourse with a person in prison, regardless of whether or not that person consents. A federal law, 18 U.S.C. § 2243, criminalizes sexual intercourse or other physical conduct between an officer and prisoner in any

federal prison. You can check out the resources listed earlier in this section for state laws on sexual contact between guards and prisoners.

#### e. Challenging Prison Supervisors and Prison Policies

If you are a victim of sexual abuse in prison, you may wish to sue not only the person who abused you but also that person's supervisors. Or, you may want to challenge some of your prison's policies. You can sue prison supervisors for allowing you to be raped or assaulted by a guard or another prisoner under the deliberate-indifference standard explained in the next section.

If you are considering this type of case, be sure to read the section on special issues about suing supervisors in Chapter Four, Section D.

In one major case, women in prison successfully challenged the policies regarding sexual harassment in Washington, D.C. prisons. The court in that case, *Women Prisoners of District of Columbia Department of Corrections v. District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996), ordered the prison to implement a new prisoner grievance procedure so that prisoners could report sexual harassment confidentially and get a prompt response, and to start a confidential hotline for women to report instances of abuse, and to create a mandatory training program on sexual harassment for all corrections officers in D.C. prisons.

States also may be liable for sexual abuse if facilities have a policy and practice of permitting male staff to view and supervise incarcerated women, especially in isolated or remote settings, without female staff present. *Cash v. Erie County*, No. 04-CV-0182C(F), 2007 U.S. Dist. LEXIS 50129 (W.D.N.Y. July 10, 2007). You may also want to read a later decision in the same case: *Cash v. Erie County*, 654 F.3d 324 (2d Cir. 2011).

In another case, however, women in prison attempted but failed to challenge a county's policies regarding sexual harassment after they were sexually abused by a prison employee. The court held that a municipality can only be accountable for an Eighth Amendment violation when it shows deliberate indifference and explained that deliberate indifference only exists where a municipality has actual notice that its actions or failures to act will result in a constitutional violation, or when it is highly predictable that a constitutional violation will occur. Since the county in this case did provide training programs addressing sexual harassment and prisoner-officer relations to the officer convicted of abuse, the court did not find deliberate indifference. *Barney v. Pulsipher*, 143 F.3d 1299 (10th Cir. 1998).

Finally, if you have been sexually assaulted in detention, you may want to obtain a copy of Just Detention International's booklet, *Hope for Healing: Information for Survivors of Sexual Assault in Detention* (2009) at <https://www.prearesourcecenter.org/sites/default/files/library/hopeforhealingweb.pdf>, or by writing to Just

Detention International, 3325 Wilshire Boulevard, Suite 340, Los Angeles, CA 90010.

## 2. Your Right to Be Free from Physical and Sexual Assault by Other Incarcerated People

Everyone has a right to be free from physical and sexual assault in prison, including at the hands of other incarcerated people. This was established in an important Supreme Court case called *Farmer v. Brennan*, 511 U.S. 825 (1994), which found that “prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners” under the Eighth Amendment, including violence in the form of sexual assault. *Id.* at 833.

To bring a failure-to-protect claim regarding physical or sexual assault, you need to show “deliberate indifference.” This requires proof that:

1. Guards knew that there was a substantial risk you would be seriously harmed; and
2. They failed to respond reasonably to protect you.

If you feel you’re at risk, do not wait until you are attacked to ask for help or protection, such as placement in protective custody. That way, prison officials will be on notice of your risk and will have a duty to respond.

### a. Failure to Protect from Prisoner Sexual Assault

Prison officials who do not take reasonable steps to protect you from sexual assault by other prisoners violate your clearly established rights under the Eighth Amendment and *Farmer v. Brennan*, 511 U.S. 825 (1994). Here, *Farmer’s* familiar two-part test applies: First, you must show prison officials knew you stood a substantial risk of serious harm from assault. Second, you must show they did not take reasonable steps to protect you.

To argue that prison officials unreasonably disregarded an excessive risk to your safety, it can be helpful to mention if prison officials violated your prison’s own policies on safety and sexual assault prevention. It may also be useful to mention the *Prison Rape Elimination Act of 2000*, 42 U.S.C. § 15601 et seq., and its implementing regulations, 28 C.F.R. § 115 et seq. (collectively “PREA”). PREA instructs federal and state prisons, jails, lockups, and immigration detention centers to adopt a zero-tolerance approach to sexual abuse. PREA also details steps that prison officials can take to protect vulnerable people in custody, such as LGBTQ+ people and people with a history of sexual abuse.

Although PREA does not offer a legal remedy for violations, you can use it to support your Eighth Amendment claim by citing it as evidence that prison officials knew of but disregarded your substantial risk of harm.

### b. Failure to Protect from Prisoner Physical Abuse

You can also use *Farmer v. Brennan’s* two-part test to sue prison officials under the Eighth Amendment if they fail to protect you from being attacked by another incarcerated

person. In *Harper v. Dourrette*, 107 Fed. Appx. 444 (5th Cir. 2004), a court explained that it is not reasonable for guards to do nothing after a prisoner has reported a substantial risk of injury.

Sometimes a court will find that prison officials acted reasonably, even if they knew of a substantial risk, and failed to prevent a prisoner from being harmed. In *Walls v. Tadman*, 762 F.3d 778 (8th Cir. 2014), a prisoner who reported a risk of attack was placed in protective custody and then told the guards there was no longer a risk and asked to go back to general population. The prison did so, and he was attacked while in general population. The Eighth Circuit Court of Appeals ruled against his failure-to-protect claim because it found the guards acted reasonably given the prisoner’s request. And in *Longoria v. Texas*, 473 F. 3d 586 (5th Cir. 2006), the court ruled that prison officials did not have to endanger their own safety to protect a plaintiff who was being stabbed.

If you are at risk of assault but are denied protective custody because of a disability, you may be able to bring a claim under the *Americans with Disabilities Act* (ADA). In *Bradley v. Wexford, Inc.*, 2019 Dist. LEXIS 115532 (D.D. Ill. 2019), a plaintiff’s ADA claim was allowed to go forward when he was denied access to protective custody because he was a wheelchair user.

## 3. Your Right to Decent Conditions in Prison

✓ **The Rule:** Prison officials violate the Eighth Amendment when they act with deliberate indifference to a prison condition that exposes a prisoner to an unreasonable risk of serious harm or deprives a prisoner of a basic human need.

What this means in practice is that you have a right to humane conditions in prison. Conditions that are harsh but not harmful do not violate the Constitution.

The Eighth Amendment’s prohibition of cruel and unusual punishment protects your right to safe and humane conditions in prison. You can challenge prison conditions that are unsafe or that deprive you of a “basic human need,” such as shelter, food, exercise, clothing, sanitation, and hygiene. However, the standard for unconstitutional conditions is high: courts allow conditions that are “restrictive and even harsh.” *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981). You must have evidence of conditions that are serious and extreme.

To challenge prison conditions using the Eighth Amendment, you must meet both “objective” and “subjective” requirements. *Farmer v. Brennan*, 511 U.S. 825 (1994); *Wilson v. Seiter*, 501 U.S. 294 (1991). To meet the objective Eighth Amendment standard, you need to show that you were deprived of a basic human need or exposed to serious harm. Under the subjective part of the test, you usually must show that the prison official you are suing knew you were being deprived or harmed and did not respond reasonably. You must also show how you were

injured and prove that the denial of a basic need caused your injury.

Under the objective part of the test, the court will look at whether the condition or conditions you are challenging could seriously affect your health or safety. In considering a condition, a court will think about how bad it is and how long it has lasted. *Barney v. Pulsipher*, 143 F.3d 1299 (10th Cir. 1998). You must show that you were injured either physically or psychologically, though courts do not agree on how severe the injury must be. You may challenge conditions even without an injury if you can show that the condition puts you at serious risk for an injury in the future, like secondhand smoke. *Helling v. McKinney*, 509 U.S. 25 (1993).

Under the subjective part of the test, you must show that the official you are suing acted with “deliberate indifference.” *Wilson v. Seiter*, 501 U.S. 294 (1991). This is an important legal term. It means that the official knew of the condition and did not respond to it in a reasonable manner. *Farmer v. Brennan*, 511 U.S. 825 (1994). One way to show this is by proving that the condition was so obvious that the official must either know about it or be purposefully ignoring it. Courts will also consider any complaints or grievance reports that you or other prisoners have filed, *Vance v. Peters*, 97 F.3d 987 (7th Cir. 1996), as well as prison records that refer to the problem. Prison officials cannot ignore a problem once it is brought to their attention.

Prison officials may try to argue that the prison does not have enough money to fix problems, but courts have generally not accepted this defense. *Carty v. Turnbull*, 144 F. Supp. 2d 395 (D.V.I. 2001). It is important to note that while there is a subjective component to Eighth Amendment claims, you do not need to show why prison officials acted as they did.

Remember that courts disagree on whether the Prison Litigation Reform Act (PLRA) means that you can't get damages if you only prove emotional or mental injury without any physical injury. This provision will not affect a lawsuit that tries to change conditions (injunctive relief). However, it may be difficult to get money damages for exposure to unsafe or overly restrictive conditions unless they have caused you a physical injury. The courts are not in agreement on this issue, so you may want to just include these claims anyway and hope for the best.

Below are some of the most common Eighth Amendment challenges to prison conditions. Remember, to prevail on a claim for any of these, you must show both subjective and objective evidence.

**> Food:** Prisons are required to serve food that is nutritious and prepared under clean conditions. *Robles v. Coughlin*, 725 F.2d 12 (2d Cir. 1983). Meals cannot be denied as retaliation, since denying meals (usually several meals; one denial will most likely not succeed) can be a deprivation of a life necessity, violating the Eight Amendment. *Foster v. Runnels*, 554 F.3d 807 (9th Cir. 2009). However, as long as the prison diet meets

nutritional standards, prisons can serve pretty much whatever they want, including prison “loaf.” Prisons must provide a special diet for prisoners whose health requires it. *Byrd v. Wilson*, 701 F.2d 592 (6th Cir. 2013).

**> Exercise:** Prisons must provide prisoners with opportunities for exercise outside of their cells. *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996); *Delaney v. DeTella*, 256 F.3d 679 (7th Cir. 2001). Courts have not agreed upon the minimum amount of time for exercise required, and it may be different depending on whether you are in the general population or segregation. One court considered three hours per week adequate, *Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir. 1996), while another approved of just one hour per week for a maximum-security prisoner, *Bailey v. Shillinger*, 828 F.2d 651 (10th Cir. 1987). Some circuits have determined that prisoners cannot be deprived of outdoor exercise for long periods of time. *Hearns v. Terhune*, 413 F.3d 1036 (9th Cir. 2005). Prisons must provide adequate space and equipment for exercise, but again, there is no clear standard for this. It is generally acceptable to limit exercise opportunities for a short time or during emergencies.

**> Air Quality and Temperature:** Prisoners have successfully challenged air quality when it posed a serious danger to their health, particularly in cases of secondhand smoke, *Talal v. White*, 403 F.3d 423 (6th Cir. 2005); *Alvarado v. Litscher*, 267 F.3d 648 (7th Cir. 2001); asbestos, *LaBounty v. Coughlin*, 137 F.3d 68 (2d Cir. 1998) and radon gas, *Vega v. Semple*, 963 F.3d 259 (2d Cir. 2020). While you are not entitled to a specific air temperature, you should not be subjected to extreme heat or cold, and should be given bedding and clothing appropriate for the temperature. *Bibbs v. Early*, 541 F.3d 267 (5th Cir. 2008); *Gaston v. Coughlin*, 249 F.3d 156 (2d Cir. 2001).

**> Sanitation and Personal Hygiene:** Prisoners are entitled to sanitary toilet facilities, proper trash procedures, no roach or rat infestations, and basic supplies such as toothbrushes, toothpaste, soap, sanitary napkins, razors, and cleaning products. *Womble v. Chrisman*, 770 F. App'x 918, 925 (10th Cir. 2019) (denial of clean toilets & showers); *Fountain v. Rupert*, 819 F. App'x 215, 219 (5th Cir. 2020) (unsanitary conditions and inadequate nutrition); *Gillis v. Litscher*, 468 F.3d 488 (7th Cir. 2006) (denial of mattress, bedding, clothing, soap); *DeSpain v. Uphoff*, 264 F.3d 965 (10th Cir. 2001) (repeated floodings). In *Taylor v. Riojas*, 141 S. Ct. 52 (2020), the Supreme Court ruled that holding a prisoner in a cell covered in feces even for just a few days violated clearly established Eighth Amendment rights, such that money damages were available.

**> Overcrowding:** Although overcrowding is one of the most common problems in U.S. prisons, it is not considered unconstitutional on its own. *Rhodes v. Chapman*, 452 U.S. 337 (1981); *C.H. v. Sullivan*, 920 F.2d 483 (8th Cir. 1990). However, overcrowding is unconstitutional when it leads to other problems. The Supreme Court struck down overcrowding in California's prisons in *Brown v. Plata*, 563 U.S. 493 (2011). The prisons were at 200% of design capacity and this led to the prison system's inability to provide medical and mental health care, dozens of sick

prisoners held together awaiting medical treatment, and preventable deaths occurring once per week on average. If you wish to challenge overcrowding, you must show that it has caused a serious deprivation of basic human needs such as food, safety, or sanitation. *French v. Owens*, 777 F.2d 1250 (7th Cir. 1985); *Toussaint v. Yockey*, 722 F.2d 1490 (9th Cir. 1984).

> **Rehabilitative Programs:** In general, prisons are not required to provide counseling services like drug or alcohol rehabilitation to prisoners unless they are juveniles, mentally ill, or received rehabilitative services as part of their sentence. *Women Prisoners of District of Columbia Dept. of Corrections v. District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996).

> **Solitary Confinement:** Although the Supreme Court has not yet decided whether long-term solitary confinement violates the Eighth Amendment, the Court has stated that the duration of solitary confinement “cannot be ignored in deciding whether the confinement meets constitutional standards.” *Hutto v. Finney*, 437 U.S. 678, 686 (1978). The Supreme Court has also said that the standards of “human dignity” set by the Eighth Amendment are not fixed but should evolve and “acquire meaning as public opinion becomes enlightened by humane justice.” *Hall v. Florida*, 572 U.S. 701, 708 (2014). In non-binding opinions, Justice Anthony Kennedy has said, “[y]ears on end of near-total isolation exact a terrible price.” *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring). Justice Stephen Breyer has said, “it is well documented that . . . prolonged solitary confinement produces numerous deleterious harms.” *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting). Finally, Justice Sonia Sotomayor has said, “we do know that solitary confinement imprints on those it clutches a wide range of psychological scars.” *Apodaca v. Raemisch*, 139 S. Ct. 5 (2018) (Sotomayor, J. concurring in denial of certiorari). These quotes are not binding because they were not from the court’s main opinions, but they are still helpful to mention.

Other federal courts have been willing to rule that solitary confinement violates the Eighth Amendment when it lasts a long time. In *Young v. Martin*, 801 F.3d 172 n. 8 (3rd Cir. 2015), an appeals court said that six-year solitary confinement “raises serious concerns under the Eighth Amendment’s conditions of confinement test.” In *Johnson v. Wetzel*, 209 F. Supp. 3d 766 (M.D. Pa. 2016), the court ordered that a plaintiff be moved out of solitary confinement and into the general population because long-term solitary confinement was likely a violation of his Eighth Amendment rights. In *Porter v. Clarke*, 290 F. Supp. 3d 518, 530-31 (E.D. Va. 2018), the court found that plaintiffs kept in prolonged solitary confinement on death row had a valid Eighth Amendment claim because “prolonged isolation and lack of stimulation can have devastating psychological and emotional consequences,” and that “it would defy logic to suggest that [defendants] were unaware of the potential harm that lack of human interaction on death row could cause.” The court stated that because of the Eighth

Amendment’s incorporation of contemporary standards of decency and the “rapidly evolving information available about the potential harmful effects of solitary confinement,” it was not bound by old court decisions denying Eighth Amendment claims.

In another important case, *Ashker v. Brown*, No. C 09-5796 CW, 2013 U.S. Dist. LEXIS 51148 (N.D. Cal. Apr. 9, 2013), ten prisoners at Pelican Bay State Prison in California brought a class action challenging decades in solitary confinement. The plaintiffs complained of prolonged isolation, lack of stimuli, and serious psychological pain and suffering. The officials were put on notice because of administrative grievances, written complaints, and hunger strikes. The court allowed the Eighth Amendment claim to go forward, and the case ultimately settled after the state agreed to end indefinite solitary confinement in California. The judge referred to the agreement as both innovative and humane.

Solitary confinement can also violate the Eighth Amendment if you can show it has harmed your physical or mental health. In *Jones El v. Burge*, 164 F. Supp. 2d 1096 (W.D. Wisc. 2001), the court found that that constant isolation, illumination, and other sensory deprivation for prisoners with serious mental health issues violates the Eighth Amendment. In cases where this argument failed, the prisoners were not able to prove the subjective element—that the prison knew the conditions were making their mental illness worse. *Scarver v. Litscher*, 434 F.3d 972 (7th Cir. 2006).

In recent years, the U.S. Department of Justice (DOJ) has acknowledged that solitary confinement causes harm. In a 2014 report, the DOJ stated that long-term use of solitary confinement on mentally ill prisoners “violate[s] the Eighth Amendment’s prohibition against ‘cruel and unusual punishments.’” DOJ Investigation of the Pa. Dept’t of Corr. Use of Solitary Confinement on Prisoners with Serious Mental Illness and/or Intellectual Disabilities, which can be accessed on the internet at [https://www.justice.gov/sites/default/files/crt/legacy/2014/02/25/pdoc\\_finding\\_2-24-14.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/02/25/pdoc_finding_2-24-14.pdf). In a 2016 report, the DOJ recommended that incarcerated people be housed in the “least restrictive setting necessary” to ensure their safety, and that stated juveniles, women who are pregnant or post-partum, and people with serious mental illness not be placed in solitary confinement at all. DOJ U.S. Department of Justice Report and Recommendations Concerning the Use of Restrictive Housing (Jan. 2016), <https://www.justice.gov/archives/dag/file/815551/download>. While both the 2014 and 2016 reports are non-binding, they contain powerful statements from the DOJ.

> **Other Conditions:** Prisoners have also successfully challenged problems with lighting and fire safety, *Hoptowitz v. Spellman*, 753 F.2d 779 (9th Cir. 1985); sleep deprivation, *Walker v. Schult*, 717 F.3d 119 (2d Cir. 2013); furnishings, *Brown v. Bargery*, 207 F.3d 863 (6th Cir. 2000); accommodation of physical disabilities, *Bradley v. Puckett*, 157 F.3d 1022 (5th Cir. 1998); unsafe work requirements, *Fruit v. Norris*, 905 F.2d 1147 (8th Cir. 1990); as well as other inadequate or inhumane conditions.

Instead of challenging a particular condition, you may also bring an Eighth Amendment suit on a “totality of the conditions” theory. You can do this on your own or as part of a class action lawsuit. Using this theory, you can argue that even though certain conditions might not be unconstitutional on their own, they add up to create an overall effect that is unconstitutional. *Palmer v. Johnson*, 193 F.3d 346 (5th Cir. 1999). The Supreme Court has limited this argument to cases where multiple conditions add up to create a single, identifiable harm, *Wilson v. Seiter*, 501 U.S. 294 (1991), but the courts disagree on exactly what that means.

#### 4. Your Right to Medical Care

✓ **The Rule:** Prison officials may not act with deliberate indifference to a serious medical need.

What that means in practice is that the prison must provide you with medical care if you need it, but the Eighth Amendment does not protect you from medical malpractice.

The Eighth Amendment protects your right to get medical care. The Constitution guarantees prisoners this right, even though it does not guarantee medical care to people outside of prison. The Supreme Court explained that this is because “[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.” *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). Unfortunately, the Eighth Amendment does not guarantee you the same level of medical care you might choose if you were not in prison.

If you feel that your right to adequate medical care has been violated, the Constitution is not the only source of your legal rights. You can bring claims under your state constitution or state statutes relating to medical care or the treatment of prisoners. You can also bring a medical malpractice suit in state court. If you are a federal prisoner, you might also bring a claim in federal court under the *Federal Tort Claims Act*. However, this section will focus exclusively on your right to medical care under the U.S. Constitution.

To succeed in an Eighth Amendment challenge to the medical care in your prison, you must show three things. These are:

1. You had a serious medical need;
2. Prison officials showed “deliberate indifference” to your serious medical need; and
3. This deliberate indifference caused your injury.

*Estelle v. Gamble*, 429 U.S. 97 (1976). These requirements are described in more detail below.

##### a. Serious Medical Need

Under the Eighth Amendment, you are entitled to medical care for “serious medical needs.” Serious medical needs can relate to “physical, dental, and mental health.” *Edmo v. Corizon, Inc.*, 935 F.3d 757, 785 (9th Cir. 2019).

Some courts describe a serious medical need as “one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a layperson would easily recognize the necessity for a doctor’s attention.” *Hill v. Dekalb Reg’l Youth Det. Ctr.*, 40 F.3d 1176, 1187 (11th Cir. 1994); *Youmans v. Gagnon*, 626 F.3d 557 (11th Cir. 2010). Courts usually agree that a prisoner can show a serious medical need if the “failure to treat a prisoner’s condition could result in further significant injury or the ‘unnecessary and wanton infliction of pain.’” *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006). In other words, if a doctor says you need treatment, or your need is obvious, then it is probably a “serious medical need.”

Courts generally agree that the existence of a serious medical need depends on the facts surrounding each person. *Smith v. Carpenter*, 316 F.3d 178 (2d Cir. 2003). A condition may not be a serious medical need in one situation but could be a serious medical need in another. Chronic conditions like diabetes, HIV, AIDS, hepatitis, epilepsy, and hypertension are serious medical needs, for which you deserve medical attention and care. *Brown v. Johnson*, 387 F.3d 1344 (11th Cir. 2004) is a nice example of a court deciding that HIV and hepatitis are serious medical needs.

In considering whether you have a serious medical need, the court will look at several factors, including:

- > Whether a reasonable doctor or patient would consider the need worthy of comment or treatment;
- > Whether the condition significantly affects daily activities; and
- > Whether you have chronic and serious pain.

For more on these factors, a good case to read is *Brock v. Wright*, 315 F.3d 158 (2d Cir. 2003).

The right to adequate medical care also includes “a right to psychiatric and mental health care, and a right to be protected from self-inflicted injuries, including suicide.” *Belcher v. City of Foley, Ala.*, 30 F.3d 1390, 1396 (11th Cir. 1994). Other decisions recognizing the right to mental health care include *Gibson v. County of Washoe*, 290 F.3d 1175, 1187 (9th Cir. 2002), *Clark-Murphy v. Foreback*, 439 F.3d 280, 292 (6th Cir. 2006) and *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987).

Several courts have held that a risk of suicide is a serious medical need for the purposes of the Eighth Amendment. *Estate of Cole by Pardue v. Fromm*, 94 F.3d 254 (7th Cir. 1996); *Gregoire v. Class*, 236 F.3d 413 (8th Cir. 2000).

It is important that you keep detailed records of your condition and inform prison medical staff of exactly how you are suffering.

### b. Deliberate Indifference

To satisfy the “subjective” portion of the Eighth Amendment standard, you must show that prison officials treated you with deliberate indifference. This means, (1) prison officials knew about your serious medical need, and (2) the prison officials failed to respond reasonably to it. *Estelle*, 429 U.S. at 104; *Gutierrez v. Peters*, 111 F.3d 1364 (7th Cir. 1997).

To show that prison officials knew about your medical needs, you will need to describe all the ways you tried to notify prison officials about your medical condition and treatment needs, by submitting grievances and medical requests. This means that any time you experience a serious medical issue, you should keep careful records of your efforts. You should take advantage of sick-call procedures at your prison and report your condition even if you do not think officials will help you. You should keep notes of the dates that you requested medical assistance and the identification of the prison officials. You should describe the medical complaint that you had and the effect that any delays had on your health. You should include these details in your formal grievances and complaints.

Prison officials who know about your serious medical needs must provide treatment “at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards.” *United States v. DeCologero*, 821 F.2d 39, 43 (1st Cir. 1987). This means that treatment decisions are unconstitutional and inadequate when they are “far afield of accepted professional standards.” *Arnett v. Webster*, 658 F.3d 742, 751 (7th Cir. 2011).

Courts most often find deliberate indifference when:

> A prison doctor fails to respond appropriately or does not respond at all to your serious medical needs. *Scott v. Ambani*, 577 F.3d 642 (6th Cir 2009); *Spruill v. Gillis*, 372 F.3d 218 (3d Cir. 2004); *Meloy v. Bachmeier*, 302 F.3d 845 (8th Cir. 2002).

> Prison doctors or officials delay or deny giving you medically necessary mental, medical, or dental care, or a medical diet. *Grieverson v. Anderson*, 538 F.3d 763, 779 (7th Cir.2008) (1.5 day delay in treating broken nose); *Smith v. Knox Cnty. Jail*, 666 F.3d 1037 (7th Cir. 2012) (5 day delay providing emergency medical care); *Brown v. District of Columbia*, 514 F.3d 1279 (D.C. Cir. 2008) (2 month delay on medical care); *Harrison v. Barkley*, 219 F.3d 132, 138 (2d Cir. 2000) (one year delay for dental care); *Byrd v. Wilson*, 701 F.2d 592 (6th Cir. 2013) (medical diet).

> Prisons adopt policies that restrict access to medical treatment on a blanket basis, regardless of individual need. *Roe v. Elyea*, 631 F.3d 843 (7th Cir. 2011), *Johnson v. Wright*, 412 F.3d 398 (2d Cir. 2005);

> When non-medical officials interfere with the treatment that your doctor has ordered. *Estelle*, 429 U.S. at 104-05; *Lopez v. Smith*, 203 F.3d 1122 (9th Cir 2000).

The easiest cases to win are cases where you are completely denied medical treatment, but you can also bring an Eighth Amendment claim saying treatment you are currently receiving is inadequate. Here, one good case to cite is *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 704 (11th Cir. 1985), which stated “medical care . . . so cursory as to amount to no treatment at all may violate the [Eighth] Amendment.” Another is *Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir. 1998), which stated that a prison official or medical practitioner “may be deliberately indifferent if he or she consciously chooses ‘an easier and less efficacious’ treatment plan.”

Prisons cannot deny you medical treatment just because it is new or expensive, like Hepatitis C treatment or complex surgeries. *Allah v. Thomas*, 679 F. App’x 216, 220–21 (3d Cir. 2017) and *Roe v. Elyea*, 631 F.3d 843 (7th Cir. 2011) are two good cases about the right to Hepatitis C treatment even though it is expensive. And in *Edmo v. Corizon, Inc.*, 935 F.3d 757 (9th Cir. 2019) a court ruled that a transgender prisoner was entitled to gender-confirmation surgery, regardless of cost.

Although prison officials generally can rely on the treatment recommendations that prison doctors give them, prison officials can still be held liable for denying you treatment if the need would be obvious to anyone. For example, in *McRaven v. Sanders*, 577 F.3d 974 (8th Cir. 2009) a court found that prison officials could not deny hospitalization to an unconscious person who overdosed just because a nurse recommended against it.

Unfortunately, courts do not usually require prison medical staff to give you the best possible care. For example, one court did not find a violation when prison medical staff followed the doctor’s orders about what to do with a prisoner who had been beaten. Even though the prisoner complained several times and the prisoner’s condition was more serious than the doctor had recognized, there was no violation of the Eighth Amendment. *Perkins v. Lawson*, 312 F.3d 872 (7th Cir. 2002). Another court found that there was not deliberate indifference in a case where a patient received thirteen medical examinations in one year, even though he claimed that a muscular condition in his back did not improve. *Jones v. Norris*, 310 F.3d 610 (8th Cir. 2002). Even if there is a delay in treatment, you may still need to show that the doctor knew better. In *Whiting v. Wexford Health Sources, Inc.*, 839 F.3d 658 (7th Cir. 2016), the court found no deliberate indifference when a doctor tried to treat a prisoner’s undiagnosed cancer with antibiotics, saying instead that the doctor’s approach was reasonable.

### c. Causation

You must show that you suffered some harm or injury as a result of the prison official’s deliberate indifference. If officials failed to respond to your complaints about serious pain but the pain went away on its own, you will not succeed in a constitutional challenge. For example, courts

have said that short interruptions of otherwise adequate treatment of serious conditions like epilepsy and arthritis may not violate the Eighth Amendment. *Bilal v. White*, 494 Fed. Appx. 143 (2d Cir. 2012).

In some situations, you may wish to challenge your prison's medical care system as a whole and not just the care or lack of care that you received in response to a particular medical need. These systemic challenges to prison medical care systems are also governed by the deliberate indifference standard. For example, in *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014), Arizona prisoners brought a class action challenging terrible medical, mental, and dental health care provided by a private company operating in the prisons. The case eventually settled for important changes. Successful cases have also challenged the medical screening procedures for new prisoners, the screening policies or staffing for prisoners seeking care, and the disease control policies of prisons. *Hutto v. Finney*, 437 U.S. 678 (1978).

Remember, you cannot bring an Eighth Amendment challenge to medical care just because it was negligent (such as if a doctor tries to help you but accidentally makes you worse) or because you disagree with the type of treatment a doctor gave you. You might be able to bring those sorts of claims through other means, such as state medical malpractice laws.

#### d. The COVID-19 Pandemic

Many people in prison and detention have sought release from prison based on the risk to their health posed by the COVID-19 pandemic. For example, in *Martinez-Brooks v. Easter*, 459 F. Supp. 3d 411 (D. Ct. 2020), people in Danbury federal prison in Connecticut filed a class action Habeas lawsuit to challenge the prison's failure to adequately protect them from catching the virus under the Eighth Amendment. A "Habeas" lawsuit is different from a 1983 or *Bivens* action in that it allows a prisoner to ask for release from prison as a form of relief. In the Danbury case, the prisoners first got a temporary restraining order from the judge, ordering the warden to identify medically vulnerable prisoners and create standards for release to home confinement. Temporary restraining orders are described in chapter four. The case settled a few months later, creating a process for court review of decisions about home confinement for all medically vulnerable prisoners.

Some federal prisoners have also succeeded in filing individual cases for compassionate release based on medical vulnerability to COVID-19. One example is *United States v. Young*, 460 F. Supp. 3d. 71 (D. Ma. 2020). Not all COVID-19 cases are about release. In *Seth v. McDonough*, 461 F.Supp.3d 242 (D. Md. 2020), a class of men detained in a county correctional facility won injunctive relief forcing the jail to improve COVID-19 precautions, like testing, protective equipment, and cleaning.

Many cases have been less successful, however, and as this handbook goes to print, this is a quickly changing area of law with a lot of procedural complications. So if you are

considering a COVID-19 related case, you will want to read as many cases as you can find in your circuit and district to figure out your best chance of success.

## G.

### Your Right to Use the Courts

✓ **The Basics:** Prisoners have a fundamental right to access and use the court system.

Just like people on the outside, people in prison have a fundamental constitutional right to use the court system. This right is based on the First, Fifth, and Fourteenth Amendments to the Constitution. Under the First Amendment, you have the right to "petition the government for a redress of grievances," and under the Fifth and Fourteenth Amendments, you have a right to "due process of law." Put together, these provisions mean that you must have the opportunity to go to court if you think your rights have been violated. This right is referred to as the "right of access to the courts." Unfortunately, doing legal work in prison can be dangerous, as well as difficult, so it is important to KNOW YOUR RIGHTS!

A terrible but common consequence of prisoner activism is harassment by prison officials. Officials have been known to block the preparation and filing of lawsuits, refuse to mail legal papers, take away legal research materials, and deny access to law books, all in an attempt to stop the public and the courts from learning about prisoner issues and complaints. Officials in these situations are worried about any actions that threaten to change conditions within the prison walls or limit their power. In particular, officials may seek to punish those who have gained legal skills and try to help their fellow prisoners with legal matters. Prisoners with legal skills can be particularly threatening to prison management who would like to limit the education and political training of those in prison. Some jailhouse lawyers report that officials have taken away their possessions, put them in solitary confinement on false charges, denied them parole, or transferred them to other facilities where they were no longer able to communicate with the prisoners they had been helping.

With this in mind, it is very important for those of you who are interested in both legal and political activism to keep in contact with people in the outside world. One way to do this is by making contact with people and organizations in the outside community who do prisoners' rights or other civil rights work. You can also try to find and contact reporters who may be sensitive to, and interested in, prison issues. These can include newspapers, broadcast television and radio shows, and online websites. It is always possible that organizing from the outside aimed at the correct pressure points within prison management can have a dramatic effect on conditions for you on the inside.



Certain court decisions that have established standards for prisoner legal rights can be powerful weapons in your activism efforts. These decisions can act as strong evidence to persuade others that your complaints are legitimate and reasonable, and most of all, can win in a court of law. It is sometimes possible to use favorable court rulings to support your position in non-legal challenges, such as negotiations with prison officials or in administrative requests for protective orders, as well as providing a basis for a lawsuit when other methods may not achieve your desired goals.

The Supreme Court established that prisoners have a fundamental right to access the courts in a series of important cases, including *Ex parte Hull*, 312 U.S. 546 (1941), *Johnson v. Avery*, 383 U.S. 483 (1969), and *Bounds v. Smith*, 430 U.S. 817 (1977). This right allows you to file a Section 1983 or *Bivens* Claim, habeas petitions, or to work on your criminal case. The right is so fundamental that it requires a prison to fund a way for you to have meaningful access to the court. Prisons can do this in different ways. They can give you access to a decent law library OR they can hire people to help you with your cases.

However, the right of access to the courts has very serious limitations thanks to a Supreme Court case called *Lewis v. Casey*, 518 U.S. 343 (1996). This case states that a prisoner cannot claim he was denied his right of access to the courts unless he shows an “actual injury.” For you to show “actual injury,” you have to prove that prison officials or prison policy stopped you from being able to assert a “nonfrivolous claim.” In other words, even if your prison isn’t allowing you to use the law library and isn’t giving you legal help, you still can’t necessarily win a lawsuit about it. To win, courts usually require you to show that you had a legitimate claim or case that you lost, or were unable to bring, due to some action by prison officials, or due to the inadequacy of your access to legal assistance.

You can show actual injury in a lot of different ways. In *Myers v. Hundley*, 101 F.3d 542 (8th Cir. 1996), for example, the court held that a prison policy requiring prisoners to choose between purchasing hygiene supplies and stamps to file legal documents might violate the right to access the courts if it caused a prisoner to miss a filing deadline. And in *Benjamin v. Kerik*, 102 F. Supp. 2d 157 (S.D.N.Y. 2000), the court found actual injury (though it ultimately denied relief) when a prisoner could not locate cases cited by defendants in the prison law library, and thus could not fully respond to his adversary’s motion.

The unfortunate problem of *Lewis v. Casey* is that some courts will only recognize “actual injury” if you have lost your suit or missed a filing deadline because of inadequate access. Other courts, however, allow access to the court claims based on “impairment” of a legal claim, even if the case is not lost. For example, in *Cody v. Weber*, 256 F.3d 764 (8th Cir. 2001), the court found “actual injury” based on the advantage defendants gained by reading a plaintiff’s confidential legal material.

The most common areas of litigation around court access include your right to:

- > Talk to and meet with lawyers and legal workers;
- > Get reasonable access to law books;
- > Obtain legal help from other prisoners or help other prisoners; and
- > Be free from retaliation based on legal activity.

## 1. The Right to Talk and Meet with Lawyers and Legal Workers

For pretrial detainees or other prisoners with pending criminal cases, the Sixth Amendment right to counsel protects your right to see your attorney, and the *Lewis v. Casey* actual-injury requirement does not apply.

Prisoners without pending criminal cases have a due process right to meet with a lawyer. However, as explained above, that right is limited by the *Lewis v. Casey* actual-injury requirement.

Fortunately you also have a First Amendment free speech right to talk to a lawyer (in a visit or a telephone call) that is separate from your right to access a court and is NOT subject to the “actual-injury requirement.” *Al-Amin v. Smith*, 511 F.3d 1317 (11th Cir. 2008).

### **Lewis v. Casey**

It is important to keep the *Lewis v. Casey* “actual injury” requirement in mind as you read the rest of this chapter. It applies to almost all of the following rights related to access to the courts, and it means that many cases on access to courts from before 1996 are of somewhat limited usefulness. Those cases can still help you understand the content of the right of access to the court, but unless denial of the right has led to injury under *Lewis v. Casey*, you will not be able to win.

When prisons impose restrictions on the timing, length, and conditions of attorney visits, those restrictions will be reviewed under the Turner standard described earlier in this chapter. For example, in *Lopez v. Cook*, No. 2:03-cv-1605, 2014 WL 1488518 (E.D.Ca. Apr. 15, 2014), a court ruled that a blanket ban on contact visits between a prisoner and his lawyer violated the First Amendment. On the other hand, in *Suciu v. Washington*, No. 12-12316, 2012 WL 4839924 (E.D.Mich. Oct. 11, 2012), a court held that restricting legal visits to certain days and times did not violate the First Amendment.

Other important ways to communicate with a lawyer are through legal calls and legal mail. Your right to confidential conversation and communication with your lawyer is explained in Section A of this chapter and is also subject to Turner analysis.

## 2. The Right to Access to a Law Library

If your prison decides to have a law library to fulfill the requirements under *Bounds*, you can then ask the

question: Is the law library adequate? A law library should have the books that prisoners are likely to need. The lower courts have established some guidelines as to what books should be in the library. Remember, under *Lewis v. Casey*, you can't sue over an inadequate law library unless it has hurt your non-frivolous lawsuit or habeas petition.

#### **Books That Should Be Available in Law Libraries:**

- > Relevant state and federal statutes
- > State and federal law reporters from the past few decades
- > Shepard's Citations
- > Basic treatises on habeas corpus, prisoners' civil rights, and criminal law

Federal courts have also required that prison libraries provide tables and chairs, be of adequate size, and be open for prisoners to use for a reasonable amount of time. This does not mean that people in prison get immediate access or unlimited research time. Limitations that are too restrictive may constitute a denial of your right of access to the courts, but only if you show that these problems caused actual injury. The Nebraska Supreme Court said it was okay to limit law library access to an hour, when it could be extended by an hour showing a special need or deadline. *Payne v. Nebraska Dep't of Corr.*, 288 Neb. 330 (Neb. 2014). The court said that law libraries are just for legal research and taking notes, and that writing can be done in cells.

If the denial of access to the law library is somehow connected to another violation of your constitutional rights, you might not have to show that the denial harmed your lawsuit. For example, in *Salahuddin v. Goord*, 467 F.3d 263 (2d Cir 2006), a prisoner was not allowed to go to religious services on the days he went to the law library. The case was primarily about free exercise of religion, so the prisoner did not have to meet the actual-injury requirement. However, the court still considered the case to be, in part, about access to the library. Similarly, in *Kaufman v. Schneider*, 474 F. Supp. 2d 1014 (W.D. Wisc. 2007), the court found an Eighth Amendment violation when a prisoner was forced to choose between using limited out-of-cell time for exercise or for access to the law library.

Prisoners who cannot visit the law library because they are in disciplinary segregation or other extra-restrictive conditions must have meaningful access to the courts some other way. Some prisons use a system where prisoners request a specific book and that book is delivered to the prisoner's cell. This system makes research very hard and time-consuming, and some courts have held that, without additional measures, such systems violate a prisoner's right to access the courts. *Trujillo v. Williams*, 465 F.3d 1210 (10th Cir. 2006); *Marange v. Fontenot*, 879 F. Supp. 679 (E.D. Tex. 1995).

Some access cases have been successful. The Ninth Circuit held in favor of one prisoner who was not allowed to go to

the law library because of prison lockdowns and as a result was not able to file a brief within a 30-day deadline, and lost his appeal. *Hebbe v. Pliier*, 627 F.3d 338 (9th Cir. 2010). But in another case, a court said a library restriction during a two-month lockdown was okay where the prisoner was given alternate access, which was a small cage for two hours at a time with a copy of the California Criminal Law Practice and Procedures text. *Lopez v. Athey*, No. 1:11-cv-02075, 2014 U.S. Dist. LEXIS 28144 (E.D. Cal. Mar. 4, 2014).

It is possible in rare cases that interfering with legal access might be a reason to get court deadlines extended. The Tenth Circuit Court of Appeals said that 'extraordinary circumstances' could be used to extend a deadline, which is also called "equitable tolling." *United States v. Galbadon*, 522 F.3d 1121 (10th Cir. 2008).

### **3. Getting Help from a Jailhouse Lawyer and Providing Help to Other Prisoners**

You have a right to get legal help from other prisoners unless the prison "provides some reasonable alternative to assist prisoners in the preparation of petitions." *Johnson v. Avery*, 393 U.S. 483 (1969). This means that if you have no other way to work on your lawsuit, you can insist on getting help from another prisoner. In *Johnson*, the Supreme Court held that the prison could not stop prisoners from helping each other write legal documents because no other legal resources were available.

If you have other ways to access the court, like a law library or a paralegal program, the state can restrict communications between prisoners under the Turner test if "the regulation...is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78 (1987) (See Section A for more discussion). The Supreme Court has held that jailhouse lawyers do not receive any additional First Amendment protection, and the Turner test applies even for legal communications. Therefore, if prison officials have a "legitimate penological interest," they can regulate communications between jailhouse lawyers and other prisoners. *Shaw v. Murphy*, 532 U.S. 223 (2001).

Courts vary in what they consider "reasonable" regulation. *Johnson* itself states that "limitations on the time and location" of jailhouse lawyers' activities are permissible. The Sixth Circuit Court of Appeals said that it was OK to ban meetings in a prisoner's cell and require a jailhouse lawyer to only meet with prisoner-clients in the library. *Bellamy v. Bradley*, 729 F.2d 416 (6th Cir. 1984). The Eighth Circuit Court of Appeals upheld a ban on communication when, due to a transfer, a jailhouse lawyer was separated from his prisoner-client. *Goff v. Nix*, 113 F.3d 887 (8th Cir. 1997). However, the *Goff* court did require state officials to allow jailhouse lawyers to return a prisoner's legal documents after the transfer.

While a state can regulate jailhouse lawyers, it can't ban them altogether if prisoners have no other means of access to the court. In *Bear v. Kautzky*, 305 F.3d 802 (8th Cir. 2002), for example, the court found an access-to-courts

violation when a prison banned prisoners who had no other way to get legal help from speaking to jailhouse lawyers.

The right of access to the court is a right that belongs to the person in need of legal services. It does not mean that you have a right to be a jailhouse lawyer or provide legal services. *Gibbs v. Hopkins*, 10 F.3d 373 (6th Cir. 1993); *Tighe v. Wall*, 100 F.3d 41 (5th Cir. 1996). Since jailhouse lawyers are usually not licensed lawyers, they generally do not have the right to represent prisoners in court or file legal documents with the court, and conversations between jailhouse lawyers and prisoner-clients are not usually privileged. *Bonacci v. Kindt*, 868 F.2d 1442 (5th Cir. 1989); *Storseth v. Spellman* 654 F.2d 1349 (9th Cir. 1981). Furthermore, the right to counsel does not give a prisoner the right to choose who he wants as a lawyer. *Gometz v. Henman*, 807 F.2d 113 (7th Cir. 1986). And jailhouse lawyers don't get any special protection from rules that may impact communication with clients. Rather, courts will apply the Turner test described in Section A. *Shaw v. Murphy*, 532 U.S. 223 (2001).

Some courts require a jailhouse lawyer to get permission from prison officials before helping another prisoner. For example, a New York state court held that the prison could punish a prisoner for helping another prisoner write to the FBI without first getting permission from the other prisoner or authorization from the law librarian. *Rivera v. Coughlin*, 620 N.Y.S.2d 505 (App. Div. 1994).

In *re Morales* may be a helpful case to reference if you are trying to defend the work of jailhouse lawyers. In that case, a prisoner was charged with the unauthorized practice of law for acting as a jailhouse lawyer. The Vermont Supreme Court dismissed the charges, saying that they were overbroad. The court discussed the important role played by jailhouse lawyers, saying they are "a well-established fixture in the legal system." *In re Morales*, 2016 VT 85 (Vt. 2016).

Being a jailhouse lawyer will not protect you from transfer, although the transfer may be unconstitutional if it hurts the case of the prisoner you are helping. For more on this, compare *Buise v. Hudkins*, 584 F.2d 223 (7th Cir. 1978) with *Adams v. James*, 784 F.2d 1077 (11th Cir. 1986). The prison may reasonably limit the number of law books you are allowed to have in your cell. Finally, jailhouse lawyers have no right to receive payment for their assistance. *Johnson v. Avery*, 393 U.S. 483 (1969).

#### 4. Dealing with Retaliation

If you file a civil rights claim against the warden, a particular guard, or some other prison official, there is a chance that they will try to threaten you or scare you away from continuing with your suit. Retaliation can take many forms. In the past, prisoners have been placed in administrative segregation without cause, denied proper food or hygiene materials, transferred to another prison, and had their legal papers intercepted. Some have been physically assaulted. Most forms of retaliation are illegal, and you may be able to sue to get relief.

In many states, you may be transferred to another correctional facility or briefly put in administrative segregation for a number of reasons. *Olim v. Wakinekona*, 460 U.S. 238 (1983). However, you cannot be put into administrative segregation solely to punish you for filing a lawsuit. *Cleggett v. Pate*, 229 F. Supp. 818 (N.D. Ill. 1964). Nor can you be transferred to punish you for filing a lawsuit, whether for yourself, or for someone else. *Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999). Of course, there are other, more subtle things that officers can do to harass you. Perhaps your mail will be lost, your food served cold, or your turn in the exercise yard forgotten. One of these small events may not be enough to make a claim of retaliation, but if it keeps happening, it may be enough to make a claim of a "campaign of harassment." *Calhoun v. Hargone*, 312 F.3d 730 (5th Cir. 2002); *Witte v. Wisconsin Dept. of Corrections*, 434 F.3d 1031 (7th Cir. 2006) (prison doctor subjected to a campaign of harassment for testifying for prisoners).

To prove that the warden or a correctional officer has illegally retaliated against you for filing a lawsuit, you must show three things:

1. You were doing something you had a constitutional right to do, which is called "protected conduct." Filing a Section 1983 claim or a grievance is an example of "protected conduct" as part of your First Amendment rights;
2. What the prison official(s) did to you, which is called an "adverse action," was so bad that it would stop an "average person" from continuing with their suit; and
3. There is a "causal connection." That means the officer did what they did because of what you were doing. Or, in legal terms: the prison official's adverse action was directly related to your protected conduct.

If you show these three things, the officer will have to show that they would have taken the same action against you regardless of your lawsuit.

**EXAMPLE:** An officer learns that you have filed suit against the warden and throws you into administrative segregation to keep you away from law books or other prisoners who might help you in your suit. The "protected action" is you filing a lawsuit against the warden; the "adverse action" is you being placed in the hole. You would have a valid claim of retaliation unless the officer had some other reason for putting you in the hole, like you had just gotten into a fight with another prisoner.

In one case, a prisoner was able to prove that there was a policy or custom of retaliating against prisoners who helped other prisoners exercise their right of access to the courts. The retaliation violated their First Amendment rights. *Gomez v. Vernon*, 255 F.3d 1118 (9th Cir. 2001).

An important case to look at is *Perez v. Gates*, No. 13-cv-05359-VC, 2015 U.S. Dist. LEXIS 127009 (N.D. Cal. Sept. 22, 2015). In that case, guards retaliated against a prisoner for joining hunger strikes at Pelican Bay and for writings that were critical of DOC incarceration practices. Several guards acted together to trash the prisoner's cell and confiscate legal papers. The court allowed the case to continue on retaliation claims. The case went to trial and a federal jury found that the defendants violated the prisoner's First Amendment rights and were liable for \$25,000 total in damages, which included punitive damages.

Be aware that some courts break the three-part test into five parts, but the substance is basically the same. For example, in *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005) the court explained that retaliation claims require "five basic elements: (1) an assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal."

It is possible—but not easy—to get a preliminary injunction to keep correctional officers from threatening or harming you or any of your witnesses in an upcoming trial. *Valvano v. McGrath*, 325 F. Supp. 408 (E.D.N.Y. 1970). Preliminary injunctions are discussed in Chapter Four, Section B. It is also a federal crime for state actors (the prison officials) to threaten or assault witnesses in federal litigation. 18 U.S.C. § 1512 (a)(2). Also remember that groups of prisoners are allowed to bring class action suits if many of them are regularly deprived of their constitutional rights. You have strength in numbers—it cannot hurt to enlist the help of friends inside and outside prison. If you can get somebody on the outside to contact the media or the prison administration on your behalf, it may remind prison officials that others are out there watching out for you, and it may scare them away from engaging in particularly repressive tactics.

Finally, remember that even when you think it would be pointless or go through the prison's formal complaint system, the PLRA still requires you to do so. If you complain and a guard or someone else threatens you, you still have to go through all available prison grievance and appeal procedures before the court will consider your Section 1983 claim. *Booth v. Churner*, 532 U.S. 731 (2001).

## H.

### Issues of Importance to Women in Prison

As you learned in Section C, women in prison have the same rights under the U.S. Constitution as everyone else. But even though the number of women in prison continues

to grow, most cases involving prisoners have been about male prisoners and their needs.

This section discusses some issues of special concern to women in prison, including gynecological care, prenatal care (medical care during pregnancy), abortion, and privacy from observation and searches. For discussion on the needs of transgender women, see Section I.

#### 1. Medical Care

As you learned in Section F, Part 4 of this chapter, your right to medical care is guaranteed by the Eighth Amendment, which prohibits cruel and unusual punishment. To make a claim for an Eighth Amendment medical-care violation, you must show a "serious medical need" and a prison official must have shown "deliberate indifference" to that need.

Despite these rights, women in prison often do not get the medical care they need. In *Todaro v. Ward*, 565 F.2d 48 (2d Cir. 1977), for example, a class of women in prison argued that their prison's medical system violated constitutional standards. The court applied the "deliberate indifference" test and determined that by not properly screening women's health problems and poorly administering prison health services, the prison had denied or unreasonably delayed prisoners' access to proper medical care in violation of the Eighth Amendment. The court ordered the prison to take specific steps to improve its medical services.

##### a. Proper Care for Women in Prison

Most courts have not yet considered how to judge the level of medical care women in prison need, including pregnant women. However, state and local regulations sometimes require certain medical services, such as a physical exam, for every new prisoner. Under federal law, all federal prisoners are entitled to a medical screening, with appropriate record keeping, that meets guidelines issued by the Bureau of Prisons. 28 CFR §§ 522.20 - 522.21.

If you are unsure about your own medical needs or want to challenge the medical care you have received, you may want to take a look at some guidelines for women's health published by national medical associations. The *Jailhouse Lawyer's Manual* from Columbia University provides a good summary of the medical services and tests that national guidelines recommend for women. Information on how to order the *Columbia Jailhouse Lawyer's Manual* is available in Appendix K.

While a court cannot enforce these guidelines, a judge may be willing to take them into account, especially since there is not that much case law in this area.

##### b. Medical Needs of Pregnant Women

Women who are pregnant require special medical care, called "prenatal care," to ensure that they deliver healthy babies. Many pregnant women experience complications during their pregnancy. With immediate and appropriate

medical care, these complications can be resolved, and women can go on to have healthy pregnancies and babies. When these complications are ignored, however, they can lead to miscarriages, premature or risky labor, and future reproductive health problems for the pregnant woman involved.

### **Challenging inadequate prenatal care in court**

The two-part test for inadequate medical care under the Eighth Amendment raises some special questions in the area of prenatal care:

> Is pregnancy a serious medical need? Complications during pregnancy, like pain or vaginal bleeding, are serious medical needs. *Coopers v. Rogers*, 968 F. Supp. 2d 1121 (M.D. Ala. 2013). But courts disagree whether a healthy pregnancy is a “serious medical need.” One court said that pregnancy is not a serious medical need if a doctor has not identified any special need for care and when it would not be obvious to an average person that there is a problem. *Coleman v. Rahija*, 114 F.3d 778 (8th Cir. 1997). In a case about a prisoner’s right to an abortion, however, another court stated that pregnancy is different from other medical issues and is a “serious medical need,” even when there are no complications or abnormalities. *Monmouth County Correctional Institution Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987).

> What counts as deliberate indifference? If you experienced major complications during your pregnancy, a court is likely to find that you had a serious medical need, but the court must still decide whether a prison official who denied you appropriate care showed deliberate indifference to your needs. In *Coleman v. Rahija*, 114 F.3d 778 (8th Cir. 1997), the court found that a prison nurse showed deliberate indifference when she ignored requests to transfer a pregnant prisoner in early labor to a hospital, leaving the prisoner to give birth in severe pain on the floor of her prison cell. The court held that the nurse must have known of the prisoner’s serious medical need because the signs of her preterm labor were obvious and because the nurse had access to the prisoner’s medical records, which documented a history of multiple pregnancies, all with serious complications. In *Goebert v. Lee County*, 510 F.3d 1312 (11th Cir. 2007), the court found that a pregnant pretrial detainee’s rights were violated when she did not get medical care for 11 days while leaking amniotic fluid and ultimately had a stillbirth.

In some cases, a prison official’s supervisor can be found guilty of deliberate indifference when the official violates a prisoner’s rights, even if the supervisor was not aware of the particular incident in question. In *Boswell v. Sherburne County*, 849 F.2d 1117 (8th Cir. 1988), the court found a possibility of deliberate indifference among both the jailers who repeatedly ignored a pregnant pretrial detainee’s complaints of severe vaginal bleeding and their supervisors, even though the supervisors were not directly involved. The court relied on the fact that the supervisors encouraged jailers to use their own untrained medical judgment and to reduce the jail’s medical costs, even when it put pretrial detainees’ health at risk.

You should be aware, however, that it is very difficult in general to succeed on a claim that a supervisor is liable to you for a violation of your rights. For a detailed explanation of when you may be able to bring a claim against a supervisor, see Chapter 4, Section D of this Handbook.

### **Is it legal to shackle a pregnant prisoner?**

It is a sad fact that prisons sometimes shackle pregnant prisoners. At least one court has held that a prison cannot use any restraints on a woman during labor, delivery, or recovery from delivery, and cannot use any restraints while transporting a woman in her third trimester of pregnancy unless that woman has a history of escape or assault, in which case only handcuffs are allowed. *Women Prisoners of the District of Columbia Dept. of Corrections v. District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996). Another good case on this issue is *Nelson v. Correction Medical Services*, 583 F.3d 522 (8th Cir. 2009), in which a woman prisoner who was forced to endure the final stages of labor and delivery while shackled was entitled to go to trial against the guard who shackled her. In 2011, another court relied on *Nelson* to say that women should not be shackled during labor or post-partum recovery and that prisons must provide women with medically necessary devices, such as breast pumps, when prescribed by doctors. *Villegas v. Metro. Gov’t of Davidson Cnty.*, 789 F. Supp. 2d 895 (M.D. Tenn. 2011). Some cases have led to settlements, such as a case that settled in 2014 for \$130,000 against the Nevada Department of Corrections after a prisoner was shackled from labor to delivery, and her medically prescribed breast-milk pump was taken. *Nabors v. Nevada Dep’t of Corr.*, No. 2:12-cv-01044-LRH-VCF (D. Nv. 2014). And in 2012, a federal judge approved a \$4.1 million settlement in a class-action suit against Cook County, Illinois, after 80 women sued over in-custody births where the women were shackled.

It may be helpful to reference these cases, as well as a June 15, 2010 resolution by the American Medical Association (AMA) which prohibits the use of restraints on a female prisoner “in labor, delivering her baby or recuperating from the delivery.” AMA Resolution 203(A-10).

## **2. Your Right to an Abortion in Prison**

✓ **The Basics** You cannot be forced to have an abortion you don’t want, and you must be allowed an abortion if you want one. If you are being denied an abortion you want, or forced to have one you don’t want, you may want to contact the ACLU Reproductive Freedom Project. Their address is listed in Appendix I.

In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court upheld a woman’s right to choose to have an abortion under the Fourteenth Amendment, which protects certain fundamental rights to privacy. Almost twenty years later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the court once again upheld the right to an abortion, but also held that the state can limit this

right in certain ways to promote childbirth. The state can require women to do certain things, as long as those limitations did not place an “undue burden” on a woman’s right to choose abortion. For example, the state can make a woman wait a certain period of time before having an abortion, or it may be able to require a parent’s permission if the woman is a minor. The court defined an “undue burden” as “a state regulation that has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion.” *Casey*, 505 U.S. at 877.

A woman in prison may challenge an official’s failure to provide her access to an abortion in one of two ways. First, she can claim a violation of her fundamental right to privacy under the Fourteenth Amendment. Second, she can claim a violation of her Eighth Amendment right to medical care, using the two-part test described above. Each of these approaches has been successful, but they can also be challenging for a number of reasons.

### a. Fourteenth Amendment Claims

If the prison has a policy that limits your ability to get an abortion in any way, you can challenge that policy under the Fourteenth Amendment. In deciding if the policy is constitutional, the court will use the Turner standard, described in Section A of this Chapter.

One important case is *Monmouth County Correctional Institution Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987). In that case, a prison policy required pregnant women to get a doctor to state that an abortion was medically necessary or get a court order before it would allow the prisoner to obtain an abortion. The Court held that this violated both the Fourteenth Amendment and Eighth Amendment. The Monmouth court applied the four-part Turner reasonableness test to the prison policy in question and determined that the women in prison’s Fourteenth Amendment rights outweighed any claim of legitimate penological interest that might explain the policy.

The court addressed each part of the test as follows:

> Is there a valid, reasonable connection between the prison regulation and a legitimate, neutral state interest used to justify the regulation? The court found that the regulation had no valid relationship to a legitimate security interest. It pointed out that maximum- and minimum-security prisoners could receive “medically necessary” services without a court order, but that even minimum-security prisoners had to receive a court order to seek an abortion.

> Is there another way for prisoners to exercise the constitutional right being limited under the regulation? The court found no other way for prisoners to exercise their right to an abortion under the regulation. It argued that maximum-security prisoners would be unlikely to be released for an abortion by court order and could not get an abortion in the prison. While minimum-security prisoners might receive the release order for an abortion, the court argued that the likelihood of delay in the process

was too big a risk, since women are unable to have abortions legally past a certain point in their pregnancy.

> How would eliminating the court-ordered release requirement for prisoner abortions impact prison resources, administrators, and other prisoners? The court noted that although allowing prisoners access to abortions imposed some costs on the prison, giving prisoners proper prenatal care and access to hospitals for delivery imposes equal costs, so eliminating the regulation would not be too costly for the prison. The court also noted that while a prison must help fund abortions for prisoners who cannot pay for them, it is not obligated to pay for all abortion services.

> Are there less restrictive ways for the government to promote its interests? In other words, is the regulation an exaggerated response to the government’s interests? Finally, the court ruled that the regulation was an exaggerated response to questionable financial and administrative burdens because it had nothing to do with prison security and because plaintiffs were simply asking the prison to accommodate the medical needs of all pregnant prisoners, not just those who wished to give birth.

*Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008) is another very positive case. There, a class of women seeking elective abortions sued over a Missouri Department of Corrections policy that denied pregnant prisoners transport to receive elective abortions. The department defended the policy by citing a security concern: that protests and conditions at abortion clinics posed a risk to guards and prisoners. The Court decided this concern was legitimate, and that, under the first Turner question, the ban on transport did rationally advance the concern. However, under Turner question two, the Court found that the transport ban entirely eliminated access to abortion, which weighed very heavily against the constitutionality of the rule. After considering the final two Turner factors, the court determined that the rule violated the Fourteenth Amendment and had to be struck down.

Not all Fourteenth Amendment claims have been successful. One bad case is *Victoria W. v. Larpenter*, 369 F.3d 475 (5th Cir. 2004). That case involved an unwritten prison policy requiring pregnant women to obtain a court order allowing transport for an elective abortion. The court found that the prison’s policy of requiring prisoners to seek and receive a court order before allowing them to be released for non-emergency medical services met the *Turner v. Safley* test for reasonableness. On the other hand, in *Doe v. Arpaio*, 214 Ariz. 237 (Ct. App. Ariz. 2007), women in prison sued after they were denied access to abortions without a court order. The Arizona Court of Appeals upheld a decision to strike down the jail’s policy of requiring court orders for abortions because it served no legitimate penological purpose.

### b. Eighth Amendment Claims

While a Fourteenth Amendment due process claim is a more likely way to win an abortion case, prisoners have

also had success with Eighth Amendment claims. However, proving both a serious medical need and deliberate indifference can be difficult.

### ***Is abortion a serious medical need?***

When an abortion is necessary to preserve your life or health, it is without question a “serious medical need.” The debate among courts centers on abortions that are “elective”—that is, abortions that are not medically necessary to preserve a woman’s health or save her life.

In Monmouth, the Court of Appeals determined that abortions are a serious medical need whether or not they are medically necessary to protect the health of the woman. The Court rejected the argument that only a painful or serious injury counts as a serious medical need, and noted the unique nature of pregnancy. Even when an abortion is elective, the court decided, it is always a serious medical need because delaying an abortion for too long or denying one altogether is an irreversible action. Without fast medical attention, a woman who wants to exercise her right to have an abortion cannot do so.

Not all courts have agreed with the Monmouth decision, and the case law on whether an elective abortion is a serious medical need is different in different states. For example, in *Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008), described above, the appellate court reversed the district court’s decision that the Missouri policy violated the Eighth Amendment. The court decided that because an elective abortion is not medically necessary, it is not a serious medical need.

### ***When is the failure to provide access to abortion deliberate indifference?***

Proving deliberate indifference can also be hard. Courts seem to disagree about the standard for deliberate indifference when it comes to abortion. Some courts find only negligence (which is not a violation of a constitutional right) even when it seems like a prison official knew of a prisoner’s request for and right to an abortion. For example, in *Bryant v. Maffuci*, 923 F.2d 979 (2d Cir. 1991), the court held that prison officials had only been negligent in failing to schedule an abortion for a pregnant prisoner until it was too late for her to have one under New York law, even though, as the dissent noted, the prisoner requested an abortion upon her arrival to prison and every day thereafter, and the medical staff had measured the duration of her pregnancy so far and marked her file as an “EMERGENCY.”

It can be especially difficult to prove deliberate indifference when the actions of many officials are involved. In *Gibson v. Matthews*, 926 F.2d 532 (6th Cir. 1991), a federal judge sentenced a pregnant woman to prison and, based on the prisoner’s repeated requests for an abortion, requested that she be provided with an abortion as soon as possible. After several days of travel, Ms. Gibson reached her assigned facility and learned that no abortions were performed there. When she finally arrived at a facility that did perform abortions, she was told that it was too late in her pregnancy to arrange an abortion. The court held that the denial of Ms. Gibson’s

abortion could not be attributed to any particular official, and was only negligence, not deliberate indifference.

## **2. Discrimination Towards Women in Prison**

In addition to the sexism and bias that exists outside prison, women often experience discrimination because they are a minority population in prison. While the population of women in prison has grown much larger over the past few years, women still are at risk for being lumped together in one prison with other prisoners from all levels of security classification because there are fewer women’s prisons. They will sometimes be sent much farther away from their homes than men because there are no women’s prisons nearby. The ACLU report *Worse than Second-Class: Solitary Confinement of Women in the United States* (April 2014) documented the effects that time spent in solitary confinement has on women in prison. States that provide treatment and educational programs for male prisoners usually provide fewer programs for women because it is very expensive to provide so many programs for so few women.

Faced with these inequalities, women have brought successful suits against state prison officials using an equal protection argument. For example, in a landmark class action case in Michigan, *Glover v. Johnson*, 478 F. Supp. 1075 (E.D. Mich. 1979), women challenged the educational opportunities, vocational training, prison industry and work pass programs, wage rates, and library facilities they were provided as compared to those male prisoners were provided. Although prison officials tried to argue that it was impractical and too expensive to provide the smaller population of women the same level of services that they provided to men, the court ruled in favor of the women. The judge ordered the prison to undertake a series of reforms, and the court oversaw these reform efforts for close to twenty years, often stepping in to enforce its decision when it became clear that the prison was not following the Glover court’s orders. Also, in *Victory v. Berks County*, 2019 WL 211568 (E. D. Pa. Jan. 15, 2019) a federal court ruled in favor of a woman with “trustee” security status, whose conditions of confinement were far more restrictive than those allowed for male “trustee” prisoners.

For more information on how to bring equal protection claims, reread Section C in this chapter.

## **3. Observations and Searches by Male Guards**

Many women in prison feel uncomfortable or anxious when they are observed or searched by male guards. *The Prison Rape Elimination Act* (PREA), 28 C.F.R. § 115.15, limits cross-gender viewing, pat-downs, and strip-searches to “exigent circumstances” and requires that all such searches be documented. You can’t enforce PREA in the courts, but you can use it as evidence of community standards or to show that prison officials are aware of the risk of harm from cross-gender pat searches. The Constitution provides you with some protection from these searches: the Fourth Amendment protects your right to privacy from unreasonable searches, while the Eighth

Amendment protects your right to be free from cruel and unusual punishment. However, as with other constitutional rights, your Fourth and Eighth Amendment rights must be weighed against the prison's interests in security and efficiency. It is also important to understand that since the federal government prohibits employment discrimination based on gender, courts are reluctant to prevent men from doing a certain type of work in prisons simply because they are men.

Title VII of the *United States Code*, a federal law, forbids employment discrimination against someone because of their gender. 42 U.S.C. § 2000e et seq. This means that, in general, an employer cannot refuse to hire someone for a certain job or give someone a promotion because of their gender. The only exception to this rule is when there is a strong reason, not based on stereotypes about gender, to believe that a person of one gender could not perform the job or would undermine the goal of the work. In the language of the statute, it must be “reasonably necessary” to have an employee of a specific gender; if this is the case, gender is considered a “BFOQ” which stands for “bona fide occupational qualification.” If the court finds a BFOQ, that means it is legitimate to take gender into account.

Many courts have weighed prisoners' privacy interests against the need to prevent discrimination in our society and decided that preventing discrimination is a more serious concern. For example, in *Johnson v. Phelan*, 69 F.3d 144 (7th Cir. 1995), a case about women guards in men's prisons, the court expressed concern that women would get stuck with office jobs and decided that gender is not a BFOQ. In *Torres v. Wisconsin Department of Health and Human Services*, 859 F.2d 1523 (7th Cir. 1988), however, the same court found it acceptable that a women's maximum-security prison did not allow men to work as security guards because the administrators of the women's prison had determined that male guards might harm the women in prison's rehabilitation. According to the court, *Johnson* and *Torres* are not inconsistent even though they reached different conclusions about a similar question, because in each case the court deferred to the expertise of prison administrators.

There was a similar result in *Everson v. Michigan Department of Corrections*, 391 F.3d 737 (6th Cir. 2004). There, the court considered a decision by the Michigan Department of Corrections to ban men from certain positions at women's prisons in reaction to widespread sexual abuse of prisoners. Male guards sued the prison unsuccessfully. The court deferred to prison officials and found that gender was a BFOQ.

Courts have reached similar conclusions, like in *Teamsters Local Union No. 117 v. Wash. Dep't Corr.*, 789 F.3d 979 (9th Cir. 2015), where the court looked at a Washington policy of having female-only correctional positions after the state faced years of problems in women's prisons. The court said that because of the history and documented allegations of abuse, plus interests in privacy and prevention of sexual assault, gender qualified as a BFOQ in that case.

Although many courts have recognized that strip searches and pat downs by guards of the opposite sex can be uncomfortable and even humiliating, courts do not usually consider these searches cruel and unusual punishment. In one important case, however, a court found that pat-down searches of female prisoners by male guards did violate the Eighth Amendment because the searches led the women to experience severe emotional harm and suffering. The court based its argument on statistics showing that 85% of women in that particular prison had been abused by men during their lives. Since the superintendent knew these statistics and had been warned that pat-downs could lead to psychological trauma in women who had been abused, and since the superintendent could not show that the searches were necessary for security reasons, the court called the search policy “wanton and unnecessary” and held it unconstitutional. *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993). There are also some good cases about cross-gender strip searches done in unreasonable ways in Section E of this Chapter.

The Department of Justice National Standards on the PREA includes a ban on cross-gender pat-down searches of female prisoners. 28 C.F.R. § 115.15.

**NOTE:** These standards are non-binding, do not apply to states, and cannot be the basis for a lawsuit. But you may want to mention them to support your argument that constitutional rights were violated.

Courts are more likely to uphold invasions of your privacy by male prison guards when there is an emergency situation. For example, the *Jordan* court did not prohibit all cross-gender searches of prisoners, despite the women's histories of abuse; it only found “random” and “suspicionless” searches by male guards unconstitutional. In contrast, another court approved of a visual body cavity search performed on a male prisoner in front of female correctional officers because the officer performing the search believed the situation to be an emergency, even though it was not. *Cookish v. Powell*. 945 F.2d 441 (1st Cir. 1991).

## I. Issues of Importance to LGBTQ+ People and People Living with HIV/AIDS

Although prisons often fail to recognize the beauty, diversity and complexity of our lived experiences, this section offers tools and information that lesbian, gay, bisexual, transgender, queer, or intersex (“LGBTQ+”) people and people living with HIV/AIDS can use to fight against the ignorance, discrimination, and violence in prison. Law and society have a long way to go until there is true liberation for all people, but that day will come.



There are several organizations involved in this movement, so you may want to contact one of them before beginning any case. They are listed in Appendix I.

Section I: Table of Contents	
Part 1 .....	Right to Be Free from Discrimination
Part 2 .....	Protection from Violence and Abuse
Part 3.....	Rights to Facility Placement
Part 4.....	Rights to Healthcare
Part 5 .....	Right to Free Gender Expression
Part 6 .....	Other Rights

This Section describes legal issues that may be important to LGBTQ+ prisoners. Unfortunately, the law operates in binary terms, and cases cited in this handbook will often use outdated and derogatory language like homosexual or transsexual and may conflate gender and gender identity for sexual orientation.

People who are intersex or have differences of sexual development (DSDs) (i.e., bodies that do not seem “typically” male or female) may have some challenges in prison that are similar to those that LGBTQ+ people face. Where we could, we have also talked about some cases brought by people with intersex conditions in prison.

## 1. Your Right to Be Protected from Discrimination

### a. Discrimination Generally

In *Romer v. Evans*, 517 U.S. 620 (1996), the Supreme Court affirmed that the Equal Protection Clause protects LGBTQ+ people from discrimination. In a landmark decision, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), the Supreme Court also ruled that discrimination against LGBTQ+ people is a form of sex discrimination, just like discrimination against women or men.

These decisions did not address whether discrimination against LGBTQ+ people is subject to “heightened” scrutiny (sometimes called “intermediate” scrutiny), which would make discrimination easier to prove. As you will recall from Section C on equal protection, “heightened scrutiny” is a much better standard than rational basis review, because it requires the prison to prove that its policy is substantially related to an important government interest.

But a growing number of other courts have found that discrimination against LGBTQ+ people is subject to heightened scrutiny, just like other forms of discrimination based on sex and gender.

For instance, in *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), an appeals court found that lesbian and gay people are a quasi-suspect class whose discrimination claims should receive heightened scrutiny based on four traditional factors considered by the Supreme Court: (1) whether lesbian and gay people have suffered a history of persecution; (2) whether being gay or lesbian makes people less able to contribute to society; (3) whether lesbian and gay people are part of a discrete group that has “obvious, immutable, or distinguishing characteristics”; and (4) whether lesbian or gay people are a politically weakened minority group. This decision was affirmed by the Supreme Court on other grounds, based on a due process theory, in *United States v. Windsor*, 570 U.S. 744 (2013).

In *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014), another appeals court reached the same conclusion and ruled that sexual orientation discrimination is subject to heightened scrutiny.

A number of courts have held that transgender people are also a quasi-suspect class that receive heightened scrutiny. Some of these cases are: *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020); *Adams v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286 (11th Cir. 2020); *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019); and *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017).

But not all courts have been willing to apply heightened scrutiny to LGBTQ+ discrimination claims.

The following table lists the rules that apply based on your jurisdiction. Circuits with good appellate decisions appear in bold. Keep in mind that many of the “bad decisions” were issued before many of the Supreme Court’s important LGBTQ+ rights decisions. Old cases decided before the Court’s same-sex marriage decisions appear with one asterisk, and even older cases decided before the Court’s *Lawrence v. Texas* decision which struck down laws that made same-sex intimacy illegal appear with two asterisks. You may want to mention this if one of these old cases is cited in a brief against you.

QUESTION:	YES:	NO:	MAYBE: (i.e., some good decisions from district courts):
<p><b>Does Heightened/ Intermediate Scrutiny Apply to Transgender Discrimination Claims?</b></p>	<p>Fourth Circuit: <i>Grimm v. Gloucester Cty. Sch. Bd.</i>, 972 F.3d 586 (4th Cir. 2020)</p> <p>Sixth Circuit: <i>Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.</i>, 208 F. Supp. 3d 850, 854 (S.D. Ohio 2016)</p> <p>Seventh Circuit: <i>Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.</i>, 858 F.3d 1034 (7th Cir. 2017)</p> <p>Ninth Circuit: <i>Karnoski v. Trump</i>, 926 F.3d 1180 (9th Cir. 2019); <i>Hecox v. Little</i>, No. 1:20-CV-00184-DCN, 2020 WL 4760138 (D. Idaho Aug. 17, 2020)</p> <p>Eleventh Circuit: <i>Adams v. Sch. Bd. of St. Johns Cty.</i>, 968 F.3d 1286 (11th Cir. 2020); <i>Glenn v. Brumby</i>, 663 F.3d 1312 (11th Cir. 2011)</p> <p>Second Circuit: <i>Windsor v. United States</i>, 699 F.3d 169 (2d Cir. 2012)</p> <p>Ninth Circuit: <i>SmithKline Beecham Corp. v. Abbott Labs.</i>, 740 F.3d 471 (9th Cir. 2014)</p>	<p>Tenth Circuit: <i>Etsitty v. Utah Transit Auth.</i>, 502 F.3d 1215, 1220 (10th Cir. 2007)*</p> <p>First Circuit: <i>Cook v. Gates</i>, 528 F.3d 42 (1st Cir. 2008)*</p> <p>Fourth Circuit: <i>Veney v. Wyche</i>, 293 F.3d 726 (4th Cir. 2002)**</p> <p>Fifth Circuit: <i>Johnson v. Johnson</i>, 385 F.3d 503, 532 (5th Cir. 2004)*</p> <p>Sixth Circuit: <i>Ondo v. City of Cleveland</i>, 795 F.3d 597 (6th Cir. 2015)</p> <p>Seventh Circuit: <i>Schroeder v. Hamilton Sch. Dist.</i>, 282 F.3d 946 (7th Cir. 2002)*</p> <p>Eighth Circuit: <i>Richenberg v. Perry</i>, 97 F.3d 256 (8th Cir. 1996)**</p> <p>Tenth Circuit: <i>Price-Cornelison v. Brooks</i>, 524 F.3d 1103 (10th Cir. 2008)*</p> <p>Eleventh Circuit: <i>Lofton v. Sec'y of Dep't of Children &amp; Family Servs.</i>, 358 F.3d 804 (11th Cir. 2004)*</p>	<p>First Circuit: <i>Doe v. Massachusetts Dep't of Correction</i>, No. CV 17-12255-RGS, 2018 WL 2994403 (D. Mass. June 14, 2018)(Yes)</p> <p>Second Circuit: <i>Adkins v. City of New York</i>, 143 F. Supp. 3d 134 (S.D.N.Y. 2015)(Yes)</p> <p>Third Circuit: <i>Evancho v. Pine-Richland Sch. Dist.</i>, 237 F. Supp. 3d 267 (W.D. Pa. 2017) (Yes); <i>A.H. v. Minersville Area Sch. Dist.</i>, 408 F. Supp. 3d 536 (M.D. Pa. 2019)(Yes)</p> <p>Unclear because there are no recent, relevant decisions: Fifth Circuit &amp; Eighth Circuit</p> <p>Third Circuit: <i>Whitewood v. Wolf</i>, 992 F. Supp. 2d 410 (M.D. Pa. 2014)(Yes)</p>

If you live in a Circuit that uses heightened scrutiny to review claims of discrimination against LGBTQ+ people, it should be easier for you bring equal protection challenges. But if you do not, that's okay too. You can still bring equal protection claims to challenge your treatment under the rational-basis test, discussed in Section C Part 2.

## b. Job/Program Discrimination

If you think you were denied or removed from a prison job or program because you are LGBTQ+, you may be able to bring an equal protection claim. Although it arose outside the prison context, a good case to cite is the Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), which found that discrimination against LGBTQ+ workers is unlawful sex discrimination.

Even prior to *Bostock*, courts have found that equal protection claims brought by LGBTQ+ people denied prison jobs and program participation may succeed. In *Davis v. Prison Health Services*, 679 F.3d 433 (6th Cir. 2012), *Johnson v. Knable*, 1988 WL 119136 (4th Cir. 1988), and *Counce v. Kemma*, 2005 WL 579588 (W.D. Mo. 2005), courts ruled that LGBTQ+ plaintiffs who were denied prison work assignment because of their sexual orientation had a valid equal protection claim. In *Holmes v. Artuz*, No. 95 Civ. 2309 (SS), 1995 WL 634995 (S.D.N.Y. Oct. 26, 1995), the Court also rejected a policy denying mess hall jobs to "overt homosexual[s]" on equal protection grounds, writing: "A person's sexual orientation, standing alone, does not reasonably, rationally or self-evidently implicate...security concerns." The Court also rejected the argument that the employment ban was necessary to prevent "potential disciplinary and security problems" among prisoners biased against LGBTQ+ people.

In *McKibben v. McMahon*, 2015 WL 10382396 (C.D. Cal. 2015), LGBTQ+ prisoners successfully brought a class action challenging their denial of educational opportunities, including occupational training and GED classes, and drug rehab programs.

To prevail on your equal protection claim, you will have to show an actual injury, such as attempting to participate in a program and being denied. In *Bass v. Santa Clara Dept. of Corrections Sup'rs*, 1994 WL 618554 (N.D. Cal. Oct. 27, 1994), the court rejected a case brought by nine LGBTQ+ prisoners who alleged they were barred from participating in prison programs but had never actually tried to join and been denied.

Due process claims challenging the denial of a job or program are unlikely to succeed because prisoners do not have a constitutionally protected interest in their prison jobs.

However, if being denied access to prison programs is preventing you from earning good time credits that could lead to an early release, you can try to argue your due process rights are being violated because of your liberty interest in earning a reduced sentence. A good case to cite is the Supreme Court's decision in *Wolff v. McDonnell*, 418 U.S. 539 (1974), which found that prisoners have a liberty interest in good time credits, so due process applies. Be aware though, when considering whether a prisoner has a liberty interest in the opportunity to earn good time credit, the law differs from state to state and depends on the nature of the state's good time credit regulations. For example, in *Stine v. Fox*, 731 Fed.Appx. 767 (10th Cir. 2018), a court held there was no liberty interest in unearned good time credit in the Bureau of Prisons.

Similarly, in *Abed v. Armstrong*, 209 F.3d 63 (2d Cir. 2000), a court held that Connecticut prison officials have discretion in awarding good time credit, so prisoners there have no liberty interest in unearned credit. On the other hand, in *Montgomery v. Anderson*, 262 F.3d 641 (7th Cir. 2001), a court found that Indiana law does create a liberty interest in one's good time credit classification, which controls the rate at which you can earn good time credit.

Finally, there could be a basis for a First Amendment claim if you were not allowed into or were kicked out of a program because of your gender expression, political belief in LGBTQ+ rights, or your objection to the mistreatment of LGBTQ+ prisoners. For instance, in *Holmes v. Artuz*, cited above, the judge allowed a First Amendment claim on the theory that the prisoner was retaliated against after complaining about unfair treatment for LGBTQ+ prisoners.

## c. Marriage and Visitation for LGBTQ+ People in Prison

In *Turner v. Safley*, 482 U.S. 78 (1987), the Supreme Court held that incarcerated people have a constitutionally protected right to marry. In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme Court ruled that bans on same-sex marriage are unconstitutional. Then, in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), the Supreme Court held that discrimination against LGBTQ+ workers is unlawful sex discrimination—a ruling that extends beyond the workplace. Together, these cases mean that LGBTQ+ people in prison have a fundamental right to marry, and same-sex couples must be treated the same as other couples by prisons in all fifty states.

If your spouse is not incarcerated, a prison cannot restrict visitation simply because you are a same-sex couple. Often the prison will argue it has many reasons for denying a visitor, but if the main reason is to "rehabilitate your homosexuality," you have strong grounds to challenge the decision because restrictions on visitors must have a "legitimate penological purpose." You should cite to *Obergefell*, and also *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court case that found sex between consenting adults in private should no longer be considered a crime just because the people having sex are LGBTQ+. After *Lawrence* and *Obergefell*, disapproval of same-sex relationships is not a valid reason to bar visitors.

Although there is no constitutional right to conjugal visits, same-sex conjugal visits are allowed in at least two states: California and New York. If your state allows opposite-sex conjugal visits but bans them for same-sex couples, cite *Bostock* and argue the prison is violating your right to equal protection by engaging in sex discrimination.

Regardless of whether you and your partner are married, you can also bring an equal protection claim if you are treated differently than opposite-sex couples. In *Whitmire v. Arizona*, 298 F.3d 1134 (9th Cir. 2002), the Ninth Circuit ruled that a gay couple had a valid equal protection claim when they were banned from hugging and kissing during jail visits while straight couples were allowed to. And in *Doe v. Sparks*, 733 F. Supp. 227 (W.D. Pa. 1990), a court

struck down a ban on prison visits by the boyfriends and girlfriends of LGBTQ+ people on equal protection grounds despite its alleged aim of preventing anti-LGBTQ+ violence within the prison.

### **Marriages and Relationships with Other LGBTQ+ Prisoners**

Following *Obergefell*, at least one LGBTQ+ couple has successfully challenged a rule barring them from marrying in prison. See *Barnes v. Lawrence*, No. 19-CV-00806-SMY, 2019 WL 6117721 (S.D. Ill. Nov. 18, 2019) (citing Turner and *Obergefell*). However, virtually every prison system has rules saying that sex between prisoners is not allowed, even when it is consensual. Courts have upheld these rules. See *Veney v. Wyche*, 293 F.3d 726 (4th Cir. 2002) (citing health and security concerns). Unfortunately, some prison systems, such as Massachusetts, even have policies stating that consensual sex between prisoners should be treated as a form of sexual abuse. Some prison systems also have rules against kissing, holding hands, or hugging. And prisons generally have the power to transfer you away from your partner, friend, or lover, to keep you from writing to one another, and to keep you from being affectionate so long as it is “reasonably related to legitimate penological interests” under Turner’s four-part test (1987).

Because the Supreme Court’s decision in *Lawrence v. Texas*, 539 U.S. 558 (2003) concerned same-sex intimacy in the home, it has not been interpreted to confer a more generalized right to consensual sex in prison. See *Morales v. Pallito*, 2014 WL 1758163 (D. Vt. 2014) (ruling that sexual intimacy between prisoners is not constitutionally protected by *Lawrence*).

## **2. Your Right to be Free from Sexual and Physical Violence**

LGBTQ+ prisoners are often more vulnerable than other prisoners to physical assault, harassment, and sexual violence. Having a body or gender that does not match dominant norms can be challenging outside of prison. On the inside, the close quarters, reduced privacy, and power dynamics can present more problems. The system often increases the risks faced by transgender people by assigning transgender women to male prisons. Prison employees may be unaware of the needs of incarcerated transgender individuals. All too often, they are part of the problem, ‘looking the other way’ when violence happens, or they are directly abusing transgender people. But as this section explains, you do not have to suffer in silence.

### **a. Abuse by Prison Officials**

As Section F Part 2 of this Chapter explains, the Eighth Amendment protects you from physical and sexual abuse involving prison guards and staff. Whether an incident of objectionable sexual touching meets the objective component of an Eighth Amendment claim will depend on what Circuit you are in, how serious the touching was, and whether it was a single incident or happened repeatedly. One example of a successful case is *Schwenk v. Hartford*,

204 F.3d 1187 (9th Cir. 2000). In that case, a court ruled in favor of a transgender woman in prison who claimed a guard ground his exposed penis into her buttocks after she refused his demand for oral sex, allowing her to make an Eighth Amendment argument.

LGBTQ+ people in prison have also brought successful cases challenging physical brutality and assault by guards. In *Morris v. Trevino*, 301 F. App’x 310, 313 (5th Cir. 2008), an appeals court ruled that a gay plaintiff who suffered bruises and mental anguish after being punched, hit, and brutally handcuffed because he was gay had a valid Eighth Amendment excessive force claim. And in a New York state case, a transgender prisoner, Misty LaCroix, brought suit after New York prison guards punched and kicked her while saying anti-transgender slurs, all without provocation and while other guards failed to intervene. That case settled for \$80,000 in February 2015. There is no published decision from this case, but you can cite a New York Times article that includes the settlement to support attempts to settle your own case. Tom Robbins, “A Brutal Beating Wakes Attica’s Ghosts,” NY Times, Feb. 28, 2015.

### **b. Abuse from Other Incarcerated People**

LGBTQ+ people have a constitutional right to be protected from sexual violence and assault in prison according to *Farmer v. Brennan*, 511 U.S. 825 (1994), a case that was brought by a transgender woman who was sexually assaulted in a men’s prison. This right extends to abuse by guards as well as other prisoners. Because of *Farmer*, the right is also “clearly established,” meaning you can recover damages as a form of compensation.

As Section F Part 1 explains in greater detail, to hold a prison official liable if you are attacked by another prisoner, you will need to show that the prison officials (1) knew you faced a substantial risk for assault or serious harm, but (2) failed to take reasonable steps to protect you.

If you are a gay person or a transgender woman housed in a men’s prison, you can try to claim that prison officials knew you faced a substantial risk of sexual assault because “the risk was obvious.” *Farmer*, 511 U.S. at 842. Another good case to cite is *Lojan v. Crumbsie*, No. 7:12-cv-00320-VB, 2013 U.S. Dist. LEXIS 15590 (S.D.N.Y. Jan. 25, 2013), where a court held that mere knowledge that a prisoner was transgender was enough to put prison officials on notice that she was susceptible to physical attack. In a recent case out of Washington D.C., the district court held that a jury could infer that two guards knew that the plaintiff, a transgender woman, faced a substantial risk of rape when they placed her alone in a cell with a man for an extended period of time. *Doe v. D.C.*, 215 F. Supp. 3d 62 (D.D.C. 2016).

Some courts have also inferred that prison officials knew of the risk facing LGBTQ+ plaintiffs based on their appearance, small size, youthfulness, or reputation as a drag queen or “known homosexual.” *Taylor v. Mich. Dept. of Corrections*, 69 F.3d 76 (6th Cir. 1995), *Jones v. Banks*, 878 F. Supp. 107 (N.D. Ill. 1995). And in *Howard v. Waide*, 534 F.3d 1227, 1238 (10th Cir. 2008), a court found that prison

officials should have known a plaintiff who was “openly gay and slight of build” would face an increased risk of harm. But if prison officials are not aware you are LGBTQ+, this claim will fail. See *Ramos v. Hamblin*, 840 F.3d 442, 445 (7th Cir. 2016).

Another way to demonstrate notice is showing that corrections officials at your facility received policies and reports documenting the vulnerability of LGBTQ+ people in prisons. This strategy worked in *Zollicoffer v. Livingston*, 169 F. Supp. 3d 687, 696 (S.D. Tex. 2016), where the Court also noted that “gay and transgender prisoners are vulnerable to abuse in prison.” And in *Shaw v. District of Columbia*, 944 F.Supp.2d 43 (D.D.C. 2013), a court found that reports, regulations, and guidelines concerning the treatment of transgender people put prison officials on notice of a transgender woman’s risk of harm while housed in men’s facilities.

If you want to try and make a similar argument, cite to the *Prison Rape Elimination Act* of 2000, 42 U.S.C. § 15601 et seq. and the federal PREA Standards, 28 C.F.R. § 115 et seq. Together these laws are often referred to as “PREA”. PREA explains that LGBTQ+ and intersex people are especially vulnerable to sexual violence in custody and mandates that prisons adopt special safeguards and screening protocols to protect them. Also see if your prison has issued PREA policies on their own. Appendix E has summaries of a few state policies.

You may also want to cite the DOJ Bureau of Justice Statistics, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12, Supplemental Tables: Prevalence of Sexual Victimization Among Transgender Adult Inmates (2014)*, which show that transgender people are 10 times more likely to be assaulted in prison, and that 40% of transgender people have been sexually assaulted in prison compared to 4% of the general population.

If you have reported previous abuse or harassment in prison to officials, that will probably be enough to show knowledge of the risk. A good case to cite here is *Diamond v. Owens*, 131 F.Supp.3d 1346 (M.D. Ga. 2015).

Another good case is *Greene v. Bowles*, 361 F.3d 290 (6th Cir. 2004). In that case a transgender plaintiff made it past summary judgment on her claim against a prison warden. She sued the warden for failing to protect her from a maximum-security prisoner who beat her with a fifty-pound fire extinguisher. The court found that she provided enough facts to show the warden knew about the risk to her safety because of her “vulnerability as a transsexual” and her attacker’s reputation as a “predator.”

Other “failure to protect” cases have led to settlements, such as in the case of Lorenzo Carl Paynes, a California prisoner who reached a \$5,000 settlement in 2010 after prison staff overlooked him being assaulted in his cell. In other case, Jackie Tates was paid \$58,000 in a settlement with Sacramento County after being assaulted by a male prisoner whom personnel let access her cell.

Along with proving notice of a risk to your safety, you will also have to show that the guard did not take reasonable steps to protect you. If the guard took any action, like writing up the matter or processing a complaint you submitted, the court might say the guard didn’t disregard the risk to your safety. In *Williams v. Wetzel*, 827 F. App’x 158, 161 (3d Cir. 2020), the Third Circuit denied an Eighth Amendment claim by a gay man who was assaulted three times because the prison took some safety measures, including transferring and separating him from would-be assailants, even though these steps proved inadequate.

And in *Johnson v. Johnson*, 385 F. 3d 503 (5th Cir. 2004), the Fifth Circuit held that an officer who “referred the matter for further investigation” might have done enough to not be liable to a gay prisoner who claimed to have been forced into sexual servitude by a prison gang.

LGBTQ+ people can also bring challenges under the Equal Protection Clause where prison officials failed to protect them from violence because of their LGBTQ+ status, which is a form of bias. *Johnson v. Taylor*, No. 18 C 5263, 2020 WL 5891401 (N.D. Ill. Oct. 5, 2020).

As with all the other types of claims discussed in this handbook, you can always consider bringing a case in state court as well. For a good example of a state claim about violence endured by a prisoner, see *Giraldo v. California Dept. of Corrections and Rehabilitation*, 168 Cal.App.4th 231 (1st Dist. 2008). Ms. Giraldo, a transgender woman, successfully sued prison guards under California state law after she was repeatedly raped and abused by other prisoners. In another case in Florida, a jury awarded \$40,000 to a transgender pretrial detainee who was raped in jail and sued Orange County for negligence. *D.B. v. Orange Cnty*, No. 2012-CA-19811-0 (Fl. Cir. Ct. 2012).

## b. Sexual Harassment and Verbal Abuse

Humiliation and verbal harassment of LGBTQ+ people in custody takes many forms. At one prison, transgender women in prison reported being forced to walk topless through a sea of male prisoners to get their clothes each week. Other people in prison face frequent transphobic slurs and solicitations for sex.

Some courts have found sexual harassment and verbal abuse by prison guards can violate the Constitution if it puts LGBTQ+ prisoners at a high risk of physical or sexual assault, or psychological harm. In *Beal v. Foster*, 803 F.3d 356 (7th Cir. 2015), a court allowed an Eighth Amendment claim to go forward when guards called the plaintiff a “punk, faggot, sissy and queer” in front of other prisoners and increased his likelihood of assault. And in *Hughes v. Farris*, 809 F.3d 330 (7th Cir. 2015), a plaintiff who received an “onslaught of homophobic epithets, including ‘sissy, faggot, bitch, whore, slut’” succeeded in bringing an equal protection claim against officers at his facility. The Court also stated, “The equal protection clause protects against both sexual harassment by a state actor under color of state law, and discrimination on the basis of sexual orientation.” *Id.* at 334.

However, some courts have found that verbal comments alone cannot be a constitutional violation. For example, in *Murray v. U.S. Bureau of Prisons*, 106 F.3d 401 (6th Cir. 1997), a transgender plaintiff tried to sue over a series of harassing comments about her bodily appearance and her presumed sexual preference. The court dismissed the claim, saying that verbal abuse alone does not rise to the level of “unnecessary and wanton infliction of pain” necessary for an Eighth Amendment violation.

Cases like these are an unfortunate reminder that sexual harassment and verbal abuse claims can be difficult to litigate. To learn about the legal arguments available to you, reread Section F Part 2 of this Chapter.

### c. Access to Protective Custody

Most prisons have a process available to ask for placement in segregation if you fear for your safety. If you are refused protective custody by officers who know you are at risk for harm in general population, you may have a valid Eighth Amendment claim. In *Wright v. Miller*, 561 F. App'x 551 (7th Cir. 2014), an appeals court found that a gay plaintiff and ex-gang member had a valid Eighth Amendment claim when officials denied him protective custody despite knowing that he would be at risk in general population. And in *A.K. v. Annucci*, 17 CV 769 (VB), 2018 WL 4372673, 2018 U.S. Dist. LEXIS 156455 (S.D.N.Y. Sep. 13, 2018), a court found that a transgender woman who suffered an initial sexual assault and then endured others after being denied protective custody had a valid Eighth Amendment claim against several corrections officers.

In *Cole v. Tredway*, 2016 U.S. LEXIS 169178 (S.D. Ill. 2016) however, a court said that prison officials did not have knowledge of a substantial risk of serious harm when an incarcerated transgender woman told those officials that she had been verbally harassed, subjected to sexually suggestive gestures, and propositioned for sex, but “[did] not claim anyone threatened involuntary sexual contact.” Similarly, in *Escobar v. Frio Cty.*, 2019 U.S. Dist. LEXIS 120031 (W.D. Tex. 2019), the court said that although prison officials knew that the plaintiff was gay, that “homosexuals generally face more risk of sexual assault,” and that “homosexual inmates are often housed separately to protect them from sexual violence,” this was not enough to establish knowledge of a substantial risk of serious harm.

If you are denied protective custody because of your gender, sexual orientation, or race, you might also have an equal protection claim against prison officials. In *Johnson v. Johnson*, 385 F.3d 503 (5th Cir. 2004), an effeminate gay male prisoner was repeatedly raped by other prisoners. He asked for help from guards over and over again and asked to be held in “safekeeping” or put in protective custody. The prison kept him in general population and told him to learn to “f\*\*\* or fight.” He brought a case against the officials for violation of his Eighth Amendment and equal protection rights. When discussing the equal protection claim, the court stated that if the officials denied him protection because he was gay, that would violate equal protection. *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir.

2004). Equal protection claims are discussed in Section C and Section I Part 1 of this chapter.

While you are in protective custody, the federal PREA standards require prisons to give you access to programs, education, and other opportunities to the greatest extent possible.

### d. Cross-Gender Strip Searches

Section E of this Chapter summarizes the law about searches in prison, and Section H, Part 3 includes information about cross-gender strip searches. However, when it comes to searches, transgender and intersex people in prison have additional rights.

PREA mandates that searches of transgender and intersex people in prison be respectfully and professionally done and prohibits the use of searches solely to determine a person’s gender. Some states, like California and Connecticut, have also passed good policies on transgender searches or PREA policies of their own, so ask if your state has one.

Transgender people have successfully challenged cross-gender strip searches in a handful of occasions. In *Doe v. Massachusetts Dep't of Correction*, No. CV 17-12255-RGS, 2018 WL 1156227 (D. Mass. Mar. 5, 2018), a court ordered prison officials in Massachusetts to use female guards when conducting strip searches of a transgender woman wherever possible. In another case, *Shaw v. District of Columbia*, 944 F. Supp. 2d 43 (D.D.C. 2013), a court found that a transgender woman who was strip-searched by male prison staff had alleged a clearly established violation of her Fourth Amendment rights. The court applied analysis from cross-gender strip searches and mentioned *Byrd v. Maricopa Cnty. Sheriff's Dep't.*, 629 F.3d 1135 (9th Cir. 2011). In that case, an appeals court held that a strip search of a male prisoner by a female officer that involved intimate contact with the genitalia violated the Fourth Amendment.

In *Schneider v. San Francisco*, No. 3:97-cv-02203 (N.D. Cal. 1999), a transgender woman successfully challenged being strip searched to determine her gender and was awarded \$750,000 in damages at a jury trial. There does not appear to be a reported opinion from this case. In another good case, *Meriwether v. Faulkner*, 821 F.2d 408 (7th Cir. 1987), a court allowed a transgender woman to proceed with an Eighth Amendment claim after she was strip searched before a group of guards who sought to humiliate and harass her. In that case, the court emphasized that the Eighth Amendment protects against bodily searches that are malicious and have no security purpose.

On the other hand, in *Doe v. Balaam*, 524 F. Supp.2d 1238 (D. Nev. 2007), a transgender man lost his case challenging a strip search. After he was arrested for a misdemeanor, he told the police that he was transgender. he was forced to strip in front of several officers before he was released on his own recognizance. The court found that the search was OK because the officers had reasonable suspicion that he was concealing “contraband” in his crotch area. The court

agreed with the officers who claimed that they had no way of knowing if the man was being truthful that what was in his pants was a rolled-up sock.

### e. Shower Privacy

The federal PREA standards state that transgender people should be given the opportunity to shower separately from others in prison. 28 C.F.R. § 115.42(f). Although the PREA guidelines are difficult to enforce, a few plaintiffs have brought cases that successfully challenged communal showering on grounds it increased their risk of physical or psychological harm.

In *Doe v. Massachusetts Dep't of Correction*, No. CV 17-12255-RGS, 2018 WL 1156227, at \*2 (D. Mass. Mar. 5, 2018), a transgender woman won a court order granting her access to a private shower for purposes of safety. And in *Balsewicz v. Pawlyk*, 963 F.3d 650 (7th Cir. 2020), an appeals court found that a transgender woman who was attacked after being denied access to private showers had a valid Eighth Amendment claim. But in *Campbell v. Bruce*, No. 17-CV-775-JDP, 2019 WL 4758367, at \*1 (W.D. Wis. Sept. 30, 2019), a court denied the Eighth Amendment claim of a transgender plaintiff who was denied access to private showers on three occasions, but usually received them.

A few people have also brought cases seeking access to private showers for medical reasons. In *Thompson v. Lengerich*, 798 F. App'x 204 (10th Cir. 2019), an appeals court found that a man with Post-Traumatic Stress Disorder (PTSD) who was denied access to private showers had a valid Eighth Amendment claim since he was forced to choose between his hygiene and his mental wellbeing. The Court also found that he had a valid equal protection claim if prisoners with similar privacy needs were given access to private showers while he was not. But in *Kokinda v. Pennsylvania Dep't of Corr.*, 779 F. App'x 938 (3d Cir. 2019), an appeals court rejected an Eighth Amendment shower privacy claim brought by a non-LGBTQ+ person who requested them due to his obsessive-compulsive disorder (OCD).

## **3. Your Right to Facility Placements**

### a. Placement in male or female facilities

As Section I Part 2 explains, prison officials have an obligation to keep LGBTQ+ people safe from harm. But for transgender and intersex people, facility placements are a big component of safety. For a very long time, transgender and intersex people were placed in male or female facilities based only on their sex assigned at birth, regardless of their gender identity, despite the risks to their safety. Getting placed in a facility based on your gender as a transgender person is still very difficult, but today there are more resources to help you.

It may also be possible to challenge your facility placement in court, though we recommend you speak to a lawyer first. We discuss those types of claims below, and a list of legal organizations that serve LGBTQ+ people appears in Appendix I.

### **The Federal Prison Rape Elimination Act**

The federal PREA standards require that the decision to place transgender and intersex people in women's or men's facilities must be made on an individualized, "case-by-case basis," to ensure the person's safety. 28 C.F.R. § 115.42(c). "Any written policy or actual practice that assigns transgender or intersex prisoners to gender-specific facilities, housing units, or programs based solely on their external genital anatomy violates the standard." See PREA Resource Center, at <https://www.prearesourcecenter.org/>. PREA also instructs prisons to give "serious consideration" to transgender and intersex people's own preferences regarding housing and safety. 28 C.F.R. § 115.42(e). Prisons are also supposed to review transgender and intersex housing placements twice a year, or when issues arise, and make adjustments as needed. 28 C.F.R. § 115.42(d).

Although you cannot bring a lawsuit for a violation of PREA, you can use PREA and PREA violations as evidence to support an Eighth Amendment failure-to-protect claim by saying they show your prison isn't taking reasonable steps to protect you despite knowing of the risks you face as a transgender or intersex person.

Unfortunately, a small handful of states, including Texas, have refused to implement PREA at all.

### **State Policies on Facility Placement**

A growing number of prison systems have adopted their own PREA policies and policies on transgender and intersex housing placements. Some states, including California, Connecticut, and Massachusetts, now allow transgender women to be housed in female facilities, regardless of their surgery status. States are adopting new policies all the time, so be sure to see what policies may apply to your facility. You can also check Appendix E for more.

### **Challenging Housing Placements in Court**

Some transgender women have brought lawsuits against prison officials for categorizing them as men and placing them in male facilities rather than treating them as women and placing them in female facilities. But these cases are very difficult to win. So far, there have only been a handful of successful cases. This is a novel and quickly developing area of the law where lots of lawyers are interested in pushing for progress. If you are thinking of bringing a challenge of this nature, we encourage you to reach out to the organizations listed in Appendix I for assistance.

In a recent important case, *Tay v. Dennison*, 457 F. Supp. 3d 657 (S.D. Ill. 2020), a court granted a preliminary injunction to a transgender woman who challenged her placement in men's prisons where she was abused and attacked under the Eighth Amendment and the Equal Protection Clause.

In another important case, *Doe v. Massachusetts Dep't of Correction*, No. CV 17-12255-RGS, 2018 WL 2994403 (D. Mass. June 14, 2018), a court ruled that a transgender prisoner who was denied placement in a women's prison solely because of her birth-assigned sex had valid equal protection and due process claims. Regarding due process, the court stated that housing transgender women in men's prisons imposed an "atypical and significant hardship." For more on due process claims, see Section D.

Another case that survived dismissal and successfully reached a settlement involved a transgender woman who challenged her cross-gender search and detention in a male prison under the Fourth and Fifth Amendments, *Shaw v. District of Columbia*, 944 F. Supp. 2d 43 (D.D.C. 2013). The court reasoned that transgender women were just like any other women, so placing the transgender plaintiff in men's prisons clearly violated the law.

Unfortunately, the majority of these types of cases have been unsuccessful. In *Guzman-Martinez v. Corr. Corp. of Am.*, No. CV 11-02390-PHX-NVW, 2012 U.S. Dist. LEXIS 97356 (D. Ariz. July 13, 2012), a court stated that a transgender woman could not recover damages because she "does not have a clearly established constitutional right to be housed in a women's detention facility or in a single-occupancy cell in a men's detention facility, or to be released from detention based solely on her status as a transgender woman."

A non-transgender woman with an intersex condition brought a lawsuit because she was placed with men and strip searched by male guards. The court ruled against her, saying that she could not prove that the sheriff was "deliberately indifferent" because he seemed to have mistakenly thought that she was a man. The court also said that she could not prove a "sufficiently serious deprivation" because she did not say that she had physical injuries. *Tucker v. Evans*, No. 07-CV-14429, 2009 U.S. Dist. LEXIS 23450 (E.D. Mich. Mar. 24, 2009).

On one occasion, a non-transgender woman brought a lawsuit because a transgender woman was housed with her in a female facility. The plaintiff, a non-transgender woman, argued that a transgender woman should not be housed with her and that prison officials were violating her privacy rights. The court ruled against the plaintiff and said that the prison officials were not liable for placing a transgender woman in a female facility with her. *Crosby v. Reynolds*, 763 F. Supp. 666 (D. Me. 1991).

Strategies other than lawsuits may have a chance. For example, working with others to convince a prison system to make new policies for classifying transgender people in prison may lead to change. Or, trying to find a friendly doctor or psychologist who will explain to prison officials why you should be placed in a particular facility could help.

### **b. Placement in involuntary segregation**

Above, we talked about situations when transgender people may want to be put in protective custody. But other times transgender and intersex people in prison end

up in segregation against their will, sometimes as punishment, sometimes for "protection," and sometimes because prison officials cannot decide what gender they should consider the person. If you are in some form of segregation or restrictive housing and don't want to be, there are a few different ways to challenge your placement. Remember, in a lawsuit you don't have to pick just one theory. You can and should include all the theories that you think might have some real chance of working.

### ***Equal Protection Arguments***

If you are treated differently than other prisoners by being put in segregation when other prisoners would not, you can challenge this treatment under the Equal Protection Clause. The requirements for an equal protection claim are laid out above in Section C and Section F Part 2 of this chapter.

There have been a few very important victories in this area. In *Adkins v. City of New York*, 143 F. Supp. 3d 134 (S.D.N.Y. 2015), a court ruled that heightened scrutiny applies to prison officials' decisions concerning the placement and treatment of transgender people in custody. In two other good cases, *Tates v. Blanas*, No. S-00-2539, 2003 U.S. Dist. LEXIS 26029 (E.D. Cal. Mar. 6, 2003) and *Medina-Tejada v. Sacramento County*, No. Civ.S-04-138, 2006 U.S. Dist. LEXIS 7331 (E.D. Cal. Feb. 24, 2006), courts ruled that placing transgender women in "Total Separation" or "T-Sep" was unconstitutional because it treated transgender people worse than others and placed them in a part of the facility reserved for the most dangerous and violent prisoners.

Other challenges have not gone as well. In *Murray v. U.S. Bureau of Prisoners*, 106 F.3d 401 (6th Cir. 1997), a court said a transgender woman's rights were not violated when she was placed in segregation on several occasions, both to protect her and as a form of discipline for refusing to wear the bra prison officials had ordered her to wear. In *Dack v. Gatchell*, 2006 U.S. Dist. LEXIS 52575 (W.D. Wash. 2006), the court denied a transgender woman's equal protection claim because prison officials argued that the woman's placement in solitary confinement was for her safety and therefore was not discriminatory.

In *Mitchell v. Price*, No. 11-CV-260-WMC, 2014 U.S. Dist. LEXIS 171561 (W.D. Wis. Dec. 11, 2014), an equal protection challenge failed when a transgender person in prison was sent to segregation, since the court found that the transfer was no different punishment than that received by other prisoners who break rules. However, the court did let a claim stand against one defendant because that defendant knew about the transgender prisoner's special needs.

Finally, in a case that did not concern solitary confinement exactly, *Veney v. Wyche*, 293 F.3d 726, 733 (4th Cir. 2002), the Fourth Circuit upheld a prison policy that denied cellmates to gay people, and placed them in single-occupancy cells instead, on grounds that it reduced friction between prisoners as well as the opportunity for sexual activity.



## Due Process Arguments

In certain situations, prisoners are entitled to “procedural due process” before being placed in segregation. Procedural due process and the “significant and atypical” test are explained in Section D of this Chapter.

In *Farmer v. Kavanaugh*, 494 F. Supp. 2d 345 (D. Md. 2007), a transgender woman named Dee Farmer challenged her transfer to a supermax facility after another prisoner said she was trying to steal the identity of a warden. The court said that her due process rights were violated because supermax was so harsh and isolating, and said that she should have been given a chance to oppose her transfer.

However, these cases are frequently hard to win. In *Estate of DiMarco v. Wyoming Dept. of Corrections*, 473 F.3d 1334 (10th Cir. 2007), for example, the Tenth Circuit found that an intersex plaintiff who was kept in administrative segregation for 14 months—the entire time they were in prison—did not have a valid due process claim.

## Eighth Amendment Arguments

### \* *Deliberate Indifference to a Serious Medical Need*

Isolation can hurt anyone’s mental health, but it can be especially dangerous for people with certain psychiatric disabilities. If prison officials know that you have a serious medical need that isolation makes worse and ignore that need, you might have a claim. The general requirements for these types of claims are described in Part 4 of Section F, above.

If you have a diagnosis of gender dysphoria and being placed in segregation prevents you from accessing hormone therapy, mental health services, or other transition-related care, you may be able to make an Eighth Amendment claim based on that deprivation. These claims are not always successful, however. In *Hampton v. Baldwin*, 2018 U.S. Dist. LEXIS 190682 (S.D. Ill. 2018), a court rejected the Eighth Amendment claim of a transgender plaintiff who was denied access to her prison’s transgender support group after being placed in segregation.

### \* *Basic Needs and Cruel and Unusual Punishment*

Section F, Part 3 of this chapter explains your right to have your basic needs met in prison. If you have been placed in segregation and are not allowed to have basic things, like food, showers, or exercise, you might be able to bring a case based on your right to be free from cruel and unusual punishment. If you are kept in solitary confinement for an extended period of time, you might also be able to bring a case based on the duration of your confinement.

In *Meriweather v. Faulkner*, 821 F.2d 408 (7th Cir. 1987), a transgender woman serving a thirty-five-year sentence challenged her placement in administrative segregation. The court said that placing her in administrative segregation might be cruel and unusual punishment because it was for such a long period of time. Section F, Part 3 lists several other cases that might be helpful in bringing this kind of claim.

## c. HIV/AIDS Segregation

People living with HIV/AIDS are also more likely to be segregated or isolated from the general population. For years, courts upheld HIV segregation as constitutional. Some examples of these bad decisions are: *Onishea v. Hopper*, 171 F.3d 1289 (11th Cir. 1999); *Camarillo v. McCarthy*, 998 F.2d 638, 640 (9th Cir. 1993); *Moore v. Mabus*, 976 F.2d 268, 271 (5th Cir. 1992); and *Muhammad v. Carlson*, 845 F.2d 175 (8th Cir.1988).

But in *Henderson v. Thomas*, 891 F. Supp. 2d 1296 (M.D. Ala. 2012), however, the district court found that a policy of segregating incarcerated people on the basis of HIV-positive status violated their rights under the Americans with Disabilities Act. For a little more information about the Americans with Disabilities Act, re-read Chapter 2.

## Policy Arguments

The *Prison Rape Elimination Act* (PREA), which is discussed in Part 2 of this section, limits the use of involuntary protective custody and requires prison officials to consider all available alternatives. 28 C.F.R. § 115.42(f). PREA does not have a private cause of action—meaning you cannot bring a lawsuit based on it being violated—but you can use it to support your legal claims by using it as evidence of contemporary standards of decency or to show what prison officials should know. In *Brown v. Patuxent*, OAH No. DPSC-IG0-002V-14-33232 (M.D. 2015), an administrative law judge in Maryland ruled against prison officials for placing a transgender woman in solitary confinement for sixty-six days where they watched her shower and encouraged her to commit suicide. The Judge held that Maryland had to create and implement policies and trainings in accordance with PREA and awarded the woman \$5,000 in damages.

It may also be helpful to mention the National Institute of Corrections, Policy Review and Development Guide: Lesbian, Gay, Bisexual, Transgender, and Intersex Persons in Custodial Settings (2013), which states “Administrative segregation, and the ensuing isolation from the general population for purposes of ‘safety,’ often exacerbates mental health conditions such as depression or gender dysphoria.”

Additionally, you might mention the 2016 guidelines issued by the Department of Justice (DOJ), called “Report and Recommendations Concerning the Use of Restrictive Housing.” The report states that “[i]nmates who are LGBTI or whose appearance or manner does not conform to traditional gender expectations should not be placed in restrictive housing solely on the basis of such identification or status.” The report also says that “correctional officials can sometimes avoid the unnecessary use of restrictive housing for protective custody by making different classification assignments,” and that correction officers must choose facility and program assignments “on a case-by-case basis...giving serious consideration to the inmate’s own views.” The DOJ’s report is not binding on courts, but it may be persuasive.

## 4. Your Right to Health Care

### a. Your Right to Mental and Medical Health Care Generally

LGBTQ+ people in custody have a right to receive treatment for their serious medical and mental health needs. In *Lucas v. Chalk*, 785 F. App'x 288, 291–92 (6th Cir. 2019), an appeals court held that denying medical or mental health treatment to LGBTQ+ survivors of sexual abuse because of their sexual orientation violates the Eighth Amendment and the Fourteenth Amendment Equal Protection Clause, even under rational-basis review.

If you are a person living with HIV/AIDS, you also have a constitutional right to medical care. One good case to cite is *Morales Feliciano v. Rullan*, 378 F.3d 42 (1st Cir. 2004), where an appeals court found that completely denying people HIV medication violates the Eighth Amendment. However, if prison officials just miss a few doses of your HIV medication, that probably is not enough to bring a constitutional claim since it is unlikely to cause you serious harm. *Smith v. Carpenter*, 316 F.3d 178 (2d Cir. 2003).

## 5. Your Right to Gender-Affirming Medical Care and Free Gender Expression

Transgender people in prison also have a constitutional right to gender-affirming medical care under the Eighth Amendment. To succeed, you will probably need to convince prison officials that you have gender dysphoria (formerly known as “gender identity disorder” or “transsexualism”). The American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders defines gender dysphoria as “a difference between one’s experience/expressed gender and assigned gender.”

Most courts agree that gender dysphoria (“GD”) is a serious medical need that prison officials must treat in some fashion. Examples of some of these good cases are: *Rosati v. Igbinoso*, 791 F.3d 1037 (9th Cir. 2015); *De’Lonta v. Johnson*, 708 F.3d 520 (4th Cir. 2013); *Battista v. Clarke*, 645 F.3d 449 (1st Cir. 2011); *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011); *White v. Farrier*, 849 F.2d 322 (8th Cir. 1988); and *Brown v. Zavaras*, 63 F.3d 970 (10th Cir. 1995)

Some transgender people find a GD diagnosis to be helpful in understanding and explaining trans experience. Others, however, consider this diagnosis to be offensive or stigmatizing, and feel frustrated by having to fit their experience into a medical and mental health framework. If that is true for you, try to think of GD diagnoses as a tool that can help you get your gender-related healthcare needs met.

If you have never gotten a formal diagnosis, try to get evaluated by prison mental health and medical staff by submitting a grievance or medical request that asks for a gender dysphoria evaluation and treatment. If you hit roadblocks or delays, be persistent and consider filing grievances and possibly even a lawsuit. Be sure to explain how you feel about your gender and how long you have felt that way, any attempts you may have made to live and

appear as the gender you identify with, your GD treatment needs, and the ways that not being able to get treatment has affected you.

Once you have a GD diagnosis, you can use it to access treatment. Treatment for gender dysphoria can include hormone therapy, changes in gender expression, gender-confirmation surgery, sometimes called gender-affirmation surgery (GAS) or sex-reassignment surgery (SRS), and individual or group mental health counselling to support and affirm your transition.

If you feel that your GD treatment needs are not being met, be sure to exhaust your administrative remedies by filing grievances.

### a. Challenging Gender Dysphoria Treatment Denials Generally

Denying transgender people medically necessary GD treatment can violate the Eighth Amendment. Examples of good cases are: *Rosati v. Igbinoso*, 791 F.3d 1037 (9th Cir. 2015); *De’Lonta v. Johnson*, 708 F.3d 520 (4th Cir. 2013); *Battista v. Clarke*, 645 F.3d 449 (1st Cir. 2011); *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011); *White v. Farrier*, 849 F.2d 322 (8th Cir. 1988); and *Brown v. Zavaras*, 63 F.3d 970 (10th Cir. 1995). To win this kind of case, you must show that prison officials were deliberately indifferent to your GD treatment needs.

Before trying to file a lawsuit on your own, consider writing to a legal organization that serves the LGBTQ+ community to see if they can help you. A list of these organizations appears in the Appendix I. Also be sure to re-read Chapter 3, Section F, Part 4, which discusses the deliberate indifference standard in detail. You will need to show that prison officials (1) knew you had a GD diagnosis or knew you needed to be evaluated for GD and (2) denied or delayed giving you medically necessary treatment in ways that put you at a substantial risk of serious harm. Here, harm means the physical and psychological side effects of untreated GD, which can include depression, anxiety, mental anguish, hormone withdrawal, self-harm, self-castration attempts, or suicidal thoughts. And “medically necessary treatment” means treatment that is individualized and effectively manages your GD symptoms. *Edmo v. Corizon, Inc.*, 935 F.3d 757 (9th Cir. 2019), cert. denied No. 19-1280, 2020 WL 6037411 (U.S. Oct. 13, 2020). In *De’Lonta v. Johnson*, 708 F.3d 520 (4th Cir. 2013), for example, a court decided that self-harm and self-castration attempts that were side effects of a plaintiff’s untreated GD are also “serious medical needs” that required medical treatment.

The easiest cases to bring are when you are being denied any forms of GD treatment whatsoever. For example, in *Johnson v. Kruse*, No. 17-cv-237-JPG, 2017 U.S. Dist. LEXIS 143138 (S.D. Ill. Sept. 5, 2017), the court found that a transgender plaintiff had a valid Eighth Amendment claim when her requests for medical treatment (including hair removal products) were ignored, and her warden said he would “not entertain the transgender bull crap.” And in *Brown v. Zavaras*, 63 F.3d 967, 970 (10th Cir. 1995), an

appeals court found that denying people with GD any treatment whatsoever could violate the Eighth Amendment.

If you are receiving some GD treatment in prison, but the treatment is inadequate, you may also have a claim. But the road will be much harder because courts do not like to second-guess the treatment recommendations of prison doctors. In one bad case, *Koselik v. Spencer*, 774 F.3d 63 (1st Cir. 2014), an appeals court ruled that a prison's decision to provide Michelle Kosilek hormone therapy, facial hair removal, feminine clothing, antidepressants, and psychotherapy instead of gender confirmation surgery did not give rise to an Eighth Amendment violation, since it was not the court's place to second-guess the judgment of prison medical professionals. In another bad case, *Lamb v. Norwood*, 899 F.3d 1159, 1163 (10th Cir. 2018), an appeals court found that a transgender woman who was already receiving counseling and hormone therapy was not entitled to anything more, "even if [that] is subpar or different from what [she] wants." And although a court found a transgender woman had a valid Eighth Amendment claim in *Diamond v. Owens*, 131 F.Supp.3d 1346 (M.D. Ga. 2015), when she was denied GD treatment like hormone therapy and just given psychiatric drugs and counselling instead, the Third Circuit rejected a nearly identical claim in *Smith v. Hayman*, 489 F. App'x 544, 547 (3d Cir. 2012), which found that denying hormone therapy but providing counseling was sufficient under the Eighth Amendment.

To prevail on a claim that the treatment you are already receiving is constitutionally inadequate, you generally will need to show that (1) you are still having bad GD symptoms and (2) prison staff knew more treatment was needed. For instance, in *Edmo v. Corizon, Inc.*, 935 F.3d 757 (9th Cir. 2019) and *De'Lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003), appeals courts found that transgender women who repeatedly attempted to harm themselves had a valid Eighth Amendment claim because the behavior put prison officials on notice that their GD was not being properly treated. And in *Hicklin v. Precynthe*, 2018 U.S. Dist. LEXIS 21516, 2018 WL 806764 (E.D. Mo. 2018), the court found that "some treatment"—in this case, psychiatric care—was constitutionally inadequate because the plaintiff continued to have severe GD symptoms like depression, anxiety, and thoughts of self-harm.

If you are successful, you may be able to start receiving the gender-affirming healthcare you need. You also may be able to recover damages by arguing that qualified immunity (discussed in Chapter Four, Section D, Part 2) does not apply. A good case to cite is *Diamond v. Owens*, 131 F.Supp.3d 1346 (M.D. Ga. 2015), which found that the right to GD treatment was clearly established based on *Estelle v. Gamble*, 429 U.S. 97 (1976), because it is like any other medical condition. Another good case to cite is *South v. Gomez*, No. 99-15976, 2000 U.S. App. LEXIS 3200 (9th Cir. Feb. 25, 2000). There, a transgender woman sued prison officials after they stopped her female-hormone therapy. The guards asked the court to dismiss South's

claim because of qualified immunity, but the appeals court refused.

### **The WPATH Standards**

People who bring successful Eighth Amendment medical claims often use the WPATH Standards of Care for the Health of Transsexual, Transgender & Gender-Nonconforming People ("WPATH Standards") in making their legal arguments. The WPATH Standards are the internationally accepted medical standards for the treatment of gender dysphoria, and they explain that hormone therapy, "changes in gender expression and role," and gender confirmation surgery are all forms of GD treatment that people may need. If you cite the WPATH Standards in court, you should note in your legal papers that the National Commission on Correctional Healthcare, U.S. Department of Justice, National Institute of Corrections, and medical associations agree that the WPATH Standards apply to the treatment of GD in prisons. So do many courts. In a case called *Edmo v. Corizon, Inc.*, 935 F.3d 757, 769 (9th Cir. 2019), cert. denied, No. 19-1280, 2020 WL 6037411 (U.S. Oct. 13, 2020), an appeals court affirmed that the WPATH Standards apply in prisons and listed lots of other court cases that agreed.

In another case, *De'lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013), an appeals court ruled that only following the WPATH Standards in part could be inadequate. The Court stated: "just because [defendants] have provided [a transgender person] with some treatment consistent with the [WPATH] Standards of Care, it does not follow that they have necessarily provided [them] with constitutionally adequate treatment."

### **Freeze Frame Policies and Treatment Bans**

If a prison categorically bans or limits the GD treatment available to you, that may also be enough to show an Eighth Amendment violation. For example, in *Allard v. Gomez*, 9 Fed. Appx 793 (9th Cir. 2001), an appeals court held that denying treatment to an incarcerated trans woman based on a blanket policy, rather than on an individualized medical evaluation, was "deliberate indifference to a serious medical need" and violated the Eighth Amendment. Similarly, in *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011), an appeals court found that a prison policy that banned hormone therapy and transition-related surgery for anyone in custody violated the Eighth Amendment, just like a policy that banned "all effective cancer treatments" in prison. The Court also rejected the argument that GD treatment was too expensive to provide, noting that hormone therapy and surgery are often cheaper than other medical treatments that prisons provide.

"Freeze-frame" policies that only allow you to receive the GD treatment you received prior to prison can also violate the Eighth Amendment because they limit treatment regardless of need and make it impossible for newly diagnosed people to get care. Here, it is helpful to cite the U.S. Department of Justice's Statement of Interest in *Diamond v. Owens* (2015), which described freeze-frame

policies as “facially unconstitutional.”  
<https://www.justice.gov/file/387296/download>.

### **b. Gaining Access to Hormone Therapy**

If you are a transgender person with a gender-dysphoria diagnosis, you also may be entitled to hormone therapy under the Eighth Amendment. To prevail, you should argue that you asked for hormone therapy, prison officials knew that hormone therapy is medically necessary treatment for your gender dysphoria, and that you will suffer serious harm if denied.

In 2015, the U.S. Department of Justice released a Statement of Interest stating that prison officials must treat gender dysphoria just as they would any other medical condition and provide hormone therapy to people as needed. You can access the statement here: <https://www.justice.gov/file/387296/download>. Since then, many state DOCs have adopted policies providing hormone therapy to transgender people in custody. Read our Appendix E to learn about policies that may apply in your state.

Many courts have also found that denying hormone therapy to people who need it is unconstitutional. Good cases to cite are *Kothmann v. Rosario*, 558 F. App'x 907 (11th Cir. 2014); *Battista v. Clarke*, 645 F.3d 449 (1st Cir. 2011); *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011); *Allard v. Gomez*, 9 F. App'x 793, 794 (9th Cir. 2001); *Diamond v. Owens*, 131 F.Supp.3d 1346 (M.D. Ga. 2015); and *Phillips v. Michigan Department of Corrections*, 731 F. Supp. 792 (W.D. Mich. 1990).

But bad cases exist as well. In *Druley v. Patton*, 601 F. App'x 632, 635 (10th Cir. 2015), the Tenth Circuit, which covers Wyoming, Colorado, Utah, New Mexico, Kansas, and Oklahoma, stated that denying people hormone therapy does not violate the Eighth Amendment because hormone therapy is “medically controversial.” If you are incarcerated in one of those states, you still may be able to get hormone therapy because some DOCs provide it voluntarily. But you will face difficulties if you try to sue.

### **c. Clothing, Grooming, and Social Transition**

If you are transgender, expressing your gender authentically may also feel necessary to your survival and well-being. If so, you can try to submit grievances telling prison officials that your gender expression is a medically necessary form of GD treatment. You can also ask for accommodations to grow or cut your hair, remove facial and body hair, and access gender-affirming undergarments and commissary items.

Be sure to see if your facility has a good transgender healthcare policy that includes gender expression. For instance, the BOP Program Statement 5200.04 allows transgender people in federal prisons to have undergarments of their identified gender even if they are not housed with prisoners of that gender. Other states have adopted good policies that give transgender people access to gender-affirming commissary items. Our

Appendix E summarizes policies from a few other DOCs and will be updated to include others over time.

Otherwise, if your prison does not take steps to accommodate you, you can try to bring a lawsuit. Below we discuss Constitutional claims you can try to bring related to your gender-expression needs. Though not discussed here, there may also be state law claims that you can bring. In *Doe v. Bell*, 194 Misc.2d 774 (N.Y. Sup. Ct. 2003), a young transgender woman in foster care won a case against her group home when they would not let her wear feminine clothes. The court said that not allowing her to wear clothes that matched her identity violated the state law against discrimination on the basis of disability.

Just be sure to think carefully before you try to file a lawsuit on these issues. Because prison officials can generally restrict clothing and grooming due to safety and prison administration concerns, the law may not be on your side and you may face an uphill battle. And as explained in Chapter 5, Section C, Part 2, if your lawsuit is dismissed as frivolous, it counts as a strike under the PLRA.

### **Eighth Amendment Arguments**

Eighth Amendment claims are some of the most promising when it comes to getting allowances for your gender expression. To succeed on an Eighth Amendment claim, prison officials must be aware of your need for gender-expression accommodations and the fact that denying them is causing you harm.

The easiest way to win a claim regarding your gender expression is to get at least one prison healthcare provider to agree that gender-expression changes are treatment for your GD. For example, in *Hicklin v. Precynthe*, 2018 U.S. Dist. LEXIS 21516, 2018 WL 806764 (E.D. Mo. 2018), the court ordered prison officials to provide a transgender woman GD treatment including hormone therapy, electrolysis, and access to transition-related commissary items, in part because prison doctors admitted she needed it but took no action. And in *Alexander v. Weiner*, 841 F. Supp. 2d 486 (D. Mass. 2012), a court found that a transgender plaintiff had a valid Eighth Amendment claim when prison doctors recommended that she receive laser hair removal three times but prison officials ignored them.

Another good way to gain access to gender-expression accommodations is to challenge bad prison policies that limit your access to treatment. In *Soneeya v. Spencer* 851 F. Supp. 2d 228 (D. Mass. 2012), a court found that a blanket policy that prohibited hair removal and other GD treatments violated the Eighth Amendment. The court said that the law requires that incarcerated people receive individualized assessments of medical needs and that a prison rule prohibiting specific treatments shows that the prison has failed to provide those individualized assessments. Another good case is *Konitzer v. Frank*, No. 03-cv-717, 2010 U.S. Dist. LEXIS 45648 (E.D. Wis. May 10, 2010), where a court found that a transgender woman who was denied access to hormone therapy as well as clothing and grooming items like bras and makeup had a valid Eighth Amendment claim.

Another good case is *Tates v. Blanas*, No. CIV S-00-2539 OMP P, 2003 U.S. Dist. LEXIS 26029 (E.D. Cal. Mar. 6, 2003), where the court decided that access to a bra cannot be denied simply because a person is housed in a male facility. The facility, and its medical staff, must weigh the possibility that a bra could be misused as a weapon against any medical or psychological harm denying access to a bra may cause.

But Eighth Amendment arguments aren't always successful. In *Keohane v. Fla. Dep't of Corr. Sec'y*, 952 F.3d 1257 (11th Cir. 2020), the Eleventh Circuit ruled that prison officials who refused to accommodate a transgender person's social transitioning requests did not violate the Eighth Amendment because the request presented serious security concerns and there were conflicting medical opinions on the need for treatment. In *Campbell v. Kallas*, 936 F.3d 536 (7th Cir. 2019), the Seventh Circuit expressed doubt about whether denying people electrolysis and makeup violates the Eighth Amendment. And in *Murray v. U.S. Bureau of Prisons*, 106 F.3d 401 (6th Cir. 1997), the Sixth Circuit rejected the Eighth Amendment claim challenging the denial of hair and skin-care products, stating "cosmetic products are not among the minimal civilized measure of life's necessities."

Because it is very difficult to win cases seeking gender-expression accommodations in court, it is best to speak to a lawyer before trying to file your own lawsuit. A list of legal organizations that serve LGBTQ+ people appears in the Appendix I.

### **Equal Protection Arguments**

Clothing and grooming policies that prevent transgender people from expressing their gender authentically are difficult to challenge under the Equal Protection Clause, even if they seem like obvious gender-based discrimination. In one important case, *Doe v. Mass. Dep't of Corr.*, 17-12255-RGS, 2018 WL 2994403 (D. Mass 2018), a district court did find that discrimination against an incarcerated trans woman on the basis of her transgender status was gender-discrimination under the Fourteenth Amendment, and that her treatment by DOC officials should be compared to treatment of other incarcerated women.

Unfortunately, most courts have compared the treatment of transgender people to the treatment of other people in their facility. This means if no one in a male facility is allowed to have long hair, some courts have said there is no discrimination against a transgender woman in that facility who is also not allowed to have long hair. For instance, in *Wolfe v. Horn*, 130 F. Supp. 2d 648, 654 (E.D. Pa. 2001), a court stated that addressing a transgender woman by her deadname and prohibiting her from wearing makeup or feminine clothing did not violate the Equal Protection Clause since there was no evidence that she was treated differently than other prisoners.

There could be a greater chance of success in a claim about transgender people who are treated differently from other people in their facility. For example, if non-transgender men in a facility are not punished for having

long hair but transgender women in the facility are, the transgender women may be able to state an equal protection claim. The general requirements for an equal protection claim are explained in Section C and Section F Part 2 of this chapter.

Something to keep in mind is that courts disagree about whether equal protection claims based on gender discrimination are subject to the Turner test. If courts in your jurisdiction apply the Turner factors to incarcerated people's gender discrimination claims, an equal protection claim will be much more difficult to win. The Turner test is described in detail in Section A, above.

### **First Amendment Arguments**

Another way you can try to get accommodations for your gender expression is by arguing the clothes you wear, the way you do your hair, and whether or not you shave certain parts of your body are protected First Amendment "speech." Section A of this Chapter talks about freedom of speech and association in prison, so be sure to review.

In *Brown v. Kroll*, No. 8:17CV294, 2018 WL 2363955, at \*10 (D. Neb. May 24, 2018), a court acknowledged that a transgender woman's decision to "chang[e] her name and wear[] a bra as expressions of her transgender identity constitute protected speech under the First Amendment." The Court also explained that if a transgender person was punished or retaliated against by prison officials for engaging in these forms of speech, it could be unlawful First Amendment retaliation. (The woman ultimately lost her case because she could not prove retaliation).

In *Renee v. Neal*, U.S. Dist. LEXIS 158533, 2018 WL 4468968 (N.D. Ind., Sept. 17, 2018) the court acknowledged that a prison's denial to an incarcerated trans woman of access to feminine clothing, feminine hygiene products, makeup, and other items available to people incarcerated in women's prisons might amount to denial of the First Amendment right to freedom of expression. The court allowed Ms. Renee's First Amendment claim to survive summary judgment but also said that prison officials might have "legitimate reasons" under the Turner test for not allowing Ms. Renee to purchase these items.

Unfortunately, under the Turner test courts will generally find that there are many ways to express yourself, and that restrictions on clothing and grooming are reasonably related to prison interests in safety and security. The Turner test is discussed in Section A.

### **d. Gaining Access to Gender-Confirmation Surgery**

Courts are increasingly open to the argument that denying gender-confirmation surgery to people in need can violate the Eighth Amendment. In one very important case, *Edmo v. Corizon, Inc.*, 935 F.3d 757 (9th Cir. 2019), cert. denied, No. 19-1280, 2020 WL 6037411 (U.S. Oct. 13, 2020), an appeals court ordered prison officials in Idaho to provide gender confirmation surgery to a transgender woman who still had severe GD symptoms after spending years on

hormone therapy. The Supreme Court also denied a request from the DOC to review the case.

In *Campbell v. Kallas*, No. 16-CV-261-JDP, 2020 WL 7230235 (W.D. Wis. Dec. 8, 2020), a court ordered prison officials to provide gender confirmation surgery to a transgender woman in Wisconsin whose gender dysphoria did not improve from hormone therapy alone.

And in *Fisher v. Fed. Bureau of Prisons*, 484 F. Supp. 3d 521, 544 (N.D. Ohio 2020), a case involving a transgender woman within the BOP, a court held that denying gender-confirmation surgery to people based on a blanket policy violates the Eighth Amendment.

In *Norsworthy v. Beard*, 87 F. Supp. 3d 1164 (E.D. Cal. 2015) and *Quine v. Beard*, 14-cv-02726-JST (N.D. Cal. 2015), a federal court also ordered gender-confirmation surgery for two transgender women incarcerated in California. At the time of the lawsuits, both plaintiffs were having severe dysphoria symptoms, like psychological pain and self-harm, despite being on hormone therapy for years. Prison psychologists also admitted that surgery was recommended for both women. Following the decisions, Ms. Norsworthy was released, but Ms. Quine became the first transgender woman in the country to receive surgery in prison.

Courts have also allowed cases challenging the denial of gender confirmation surgery to go forward when those denials are made without consulting an expert on gender dysphoria. For example, in *Rosati v. Igbino*, 791 F.3d 1037 (9th Cir. 2015), a court found that a prisoner stated a cause of action under the Eighth Amendment based on denial of request for gender confirmation surgery. A transgender prisoner was only evaluated by a physician assistant rather than someone with experience with gender dysphoria. And in *De'Lonta v. Johnson*, 708 F.3d 520 (4th Cir. 2013), an appeals court stated that prison officials could not refuse surgery to a transgender plaintiff without having her needs evaluated by a gender dysphoria specialist.

Despite these good decisions, surgery cases are still very difficult to win. In *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014), an appeals court rejected a surgery-denial claim from a transgender plaintiff who was already receiving hormone therapy, psychotherapy, electrolysis, and feminine clothing and accessories for her GD. The court stated that it should not second-guess prison healthcare providers who thought the plaintiff's existing GD treatment was adequate.

And in *Gibson v. Collier*, 920 F.3d 212 (5th Cir. 2019), the Fifth Circuit issued a terrible decision upholding Texas's blanket ban on gender confirmation surgery under the Eighth Amendment on grounds that surgery is a "controversial" form of treatment. And in *Williams v. Kelly*, 818 F. App'x 353, 354 (5th Cir. 2020), the Fifth Circuit rejected a surgery claim from a transgender person in Louisiana, based on the Gibson decision. Unfortunately, because these are appellate decisions, surgery cases

brought by people incarcerated in Texas, Mississippi, and Louisiana are almost certain to fail.

Because surgery cases are difficult to bring, it can be helpful to speak to a lawyer before trying to file your own lawsuit. A list of legal organizations you can try reaching out to and who serve LGBTQ+ people appears in the Appendix I. Because cases granting surgery are also a new development, monetary damages may not be available because of qualified immunity. In *Campbell v. Kallas*, 936 F.3d 536 (7th Cir. 2019), although the transgender plaintiff was ultimately able to receive the gender confirmation surgery she requested, the Seventh Circuit stated the right was not yet clearly established as needed for qualified immunity. Qualified immunity is discussed in Chapter Four, Section D, Part 2.

### e. Changing Your Name and Gender Marker

Trans people can seek to change their name and gender markers on state-identification documents like driver's licenses, passports, birth certificates, and social security cards. Unfortunately, a few states ban gender-marker changes on birth certificates altogether.

Changing your name and gender at the same time can be more affordable and convenient, though you can also do so separately.

Below is a general overview of the process, but be sure to read our Appendix E for more resources since name and gender marker rules vary from state to state.

#### **Gender Marker Changes on State ID**

To change your gender on your driver's license, most states will require some sort of doctor's letter stating you have had "appropriate clinical treatment for gender transition." What appropriate clinical treatment means is between you and your doctor, and non-surgical treatment like hormone therapy or counseling is typically sufficient.

Most states do not make you go into detail about the treatment you've received in your letter, but a few states still require proof of some form of surgical treatment in order to change your drivers' license, and most states require proof of surgery to update your birth certificate. The surgeries that qualify here may vary.

In some states, you can also petition for a court order saying that your gender has changed if you provide proof from a doctor about your gender transition. These court orders can help you change your gender on birth certificates and other identity documents, but completing the process may be easiest once you leave prison.

Ohio and Tennessee are the only states that currently ban gender marker changes on birth certificates under all circumstances. If you are from one of those states, you may be able to bring a legal challenge. In 2018, Idaho's ban on gender changes was struck down as unconstitutional under the Equal Protection Clause. *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1139 (D. Idaho 2018). The laws in Ohio and Tennessee may also have changed since the printing of this handbook in 2021.

## Name Changes

The name change process varies from state to state, but it usually requires submitting (1) a court petition explaining why you want to change your name, (2) information about your criminal record, and (3) a copy of your birth certificate. You may also have to “publish” your name change by putting an announcement in your local newspaper, although a transgender person who argued that transgender people were at high risk for hate violence was able to get this “publication” requirement waived. *In re E.P.L.* 26 Misc.3d 336 (Sup. Ct. Westchester Co. 2009). Some states also schedule a short hearing about your name change to ask you a few questions. If this happens, tell the court that you are incarcerated to get advice on how to proceed.

Unfortunately, some states make it difficult for people with felony convictions to change their names, but rules will vary state to state, and depend on your offense. For a list of updated rules, see Appendix E.

If you live in a state that limits name changes, you may be able to bring a court challenge. In *In re Gammett*, Case No. CV-NC-06-03094 (Oct. 3, 2006), an Idaho court ruled that a criminal record alone was not a legitimate reason to deny a name change to an incarcerated transgender woman. *In re Ely*, No. M2000-01937-COA-R3-CV, 2004 WL 383304 (Tenn. Ct. App Mar. 1, 2004), a court in Tennessee did the same. *In re Crushelow*, 926 P.2d 833 (Utah 1996), the Utah Supreme Court found that name change requests from prisoners cannot be denied simply because of general concerns about confusion. And in *In re Riley*, 103 N.E.3d 767 (2018), a transgender woman who was incarcerated for life without parole was able to overturn a decision claiming that her name-change request would violate the public interest or create an administrative burden.

If you are denied a name change specifically because you are transgender, you should be able to appeal. In *Leonard v. Commonwealth*, 821 S.E.2d 551 (2018) and *In re Brown*, 770 S.E.2d 495 (2015), the Virginia Supreme Court struck down lower court decisions that denied name changes to incarcerated transgender people and explained, “the fact that an applicant is transgender and is changing their name to reflect a change in their gender identity cannot be the sole basis for a finding by a trial court that such an application is frivolous and lacks good cause.” *In re Brown*, at 497. In *Norsworthy v. Beard*, 87 F. Supp. 3d 1104 (N.D. Cal. 2015), a court found that prison officials who deny name changes specifically because a person is transgender might violate the Equal Protection Clause.

If you are transgender, providing medical information like a doctors’ note can be useful to explain why you need a name change, but it is not required. So if a judge asks you, you can object. And you should never be forced to prove you’ve had transition-related surgery.

Advocates seeking to make it easier for transgender people to obtain name and gender changes in prisons and jails successfully lobbied for a good law in Delaware that allows for name changes based on gender identity. See Del. Code Ann. tit. 10, § 5901 (2015).

Even if you live in a state where you are able to obtain a legal name change while incarcerated, prisons may refuse to update your name in prison records. Lawsuits challenging these policies usually fail, but positive change is possible through legislation.

California recently passed a law that requires that prison officials to update your prison records to reflect legal name and gender changes, although your deadname may be listed as an alias. Cal. Civ. Proc. Code § 1279.5 (2017).

For more information on the name-change rules that apply in your state, read our Appendix E.

## 6. Your Other Rights in Custody

### a. Your Right to Confidentiality

Courts in the Second Circuit, Third Circuit, Sixth Circuit, and Tenth Circuit have found that disclosing a person’s HIV status can be an unconstitutional privacy violation if it is not reasonably related to a legitimate penological objective. Some good cases barring disclosure to relatives, employers, and other prisoners are: *Herring v. Keenan*, 218 F.3d 1171 (10th Cir. 2000); *Powell v. Schriver*, 175 F.3d 107 (2d Cir. 1999); *Doe v. Delie*, 257 F.3d 309 (3d Cir. 2001); and *Moore v. Prevo*, 379 Fed. App’x 425 (6th Cir. 2010). In *Hunnicut v. Armstrong*, 152 Fed. App’x 34 (2d Cir. 2005), an appeals court found that a person whose mental health issues were discussed in front of other prisoners and non-healthcare staff had adequately alleged a privacy violation. Collectively, these cases establish that prison staff may not disclose a person’s HIV status or psychiatric history without need. Just be sure to cite the Fourteenth Amendment when you’re making your claim. In *Doe v. Chastan*, No. CIV S08-2091-CMK-P, 2008 WL 5423278 (E.D. Cal. Dec. 29, 2008), a court rejected the HIV privacy claim of a plaintiff who tried to bring her claim under the Eighth Amendment.

A handful of courts have also found that a right to privacy exists under the Eighth and Fourteenth Amendment for information concerning a person’s gender identity and sexual orientation, since LGBTQ+ people in custody face a greater risk of assault. In *Powell v. Schriver*, 175 F.3d 107 (2d Cir. 1999), a court ruled that prison officials had a duty to keep a prisoner’s transgender status confidential from the prison population “to preserve...medical confidentiality, as well as [prevent] hostility and intolerance from others.”

In *Thomas v. D.C.*, 887 F. Supp. 1 (D.D.C. 1995), a case involving an Eighth Amendment claim by a gay plaintiff, the court stated, “in the prison context...one can think of few acts that could be more likely to lead to physical injury than spreading rumors of homosexuality.” And in *Sterling v. Borough of Minersville*, 232 F.3d 190 (3d Cir. 1990) and *Johnson v. Riggs*, 2005 WL 2249874 (E.D. Wis. 2005), courts found that disclosing a person’s sexual orientation information could violate Fourteenth constitutional privacy rights as well. However, no violation was found in a case where disclosure of a person’s transgender status was limited to prison medical providers. *Smith v. Hayman*, 2010 WL 9488822 (D. N.J. 2010).

Another useful case to cite may be *Love v. Johnson*, 146 F. Supp. 3d 848 (E.D. Mich. 2015), where a court held that a lawsuit could proceed over a Michigan state policy forcing transgender individuals to have state IDs that did not accurately say their gender. Citing *Powell v. Schriver*, the court agreed that forcing transgender individuals to reveal they are transgender “directly implicates their fundamental right of privacy.”

These cases do not prevent you from disclosing your HIV status or the fact that you are LGBTQ+ to others voluntarily. Also, not all courts have been willing to find constitutional privacy violations. In *Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995), the court found that safety concerns justified disclosure of a prisoner’s HIV status to officers and others like the prison barber. Courts have also been reluctant to find privacy violations where medical information is disclosed to government officials. So in *Doe v. Wigginton*, 21 F.3d 733 (6th Cir. 1994) a court allowed HIV disclosure to other corrections officials, and in *Seaton v. Mayberg*, 610 F.3d 530 (9th Cir. 2010), a court allowed disclosure to the state DA.

For more discussion, visit Chapter 3, Section E.

### b. Access to LGBTQ+-Related Reading Material

The Supreme Court has not specifically addressed a prisoner’s right to reading material with LGBTQ+ related content. Cases relating to prisoners’ right to receive books and magazines generally can help you figure out when you have a right to receive reading materials with transgender content. For information about the general rules that apply, review Section A, Part 1 under the heading, “Access to Reading Materials.”

If you decide to bring a First Amendment lawsuit challenging denial of reading material, prison officials will probably argue that they are banning a publication because it is a threat to safety and order in prison. When prison officials want to stop prisoners from receiving LGBTQ+ material, they may argue that other prisoners will see this material, think the person who has it is LGBTQ+, and target that person for violence.

However, this rationale was rejected in *Espinoza v. Wilson*, 814 F.2d 1093 (6th Cir. 1987), where the plaintiff’s LGBTQ+ identity was not a secret. Courts have also found that bans on mail from LGBTQ-rights organizations are banned under the First Amendment. For example, in *Cole v. Johnson*, 2015 WL 435047 (S.D. Ill. 2015), a court held that a prison needed to deliver the mail to plaintiff or offer a reason as to why it was prohibited because the mail being withheld was from a transgender rights organization, and content-based restrictions on prisoner mail can violate the First Amendment. Still, prison officials may try to make vague arguments about safety and will often win in the case of sexually explicit material.

You may want to reference 2011 BOP Program Statement 5266.11 on incoming publications, which was updated to remove a ban on “homosexual material,” and amended to state that “Publications concerning research or opinions on

sexual, health, or reproductive issues, or covering the activities of gay rights organizations or gay religious groups, for example, should be admitted unless they are otherwise a threat to legitimate institution interests.” While the regulations do not directly address transgender rights and applies only to federal prisons, you may want to mention the guidelines as evidence that bans on any LGBTQ+ materials are improper and do not serve a legitimate purpose.

## J.

### Issues of Importance to Pretrial Detainees

✓ **The Rule:** Jail conditions must not be punitive or an exaggerated response to a security need.

In practice, pretrial detainees have most of the same rights as convicted people. Below we describe some of the biggest differences.

Not everybody who is incarcerated in a prison or jail has been convicted. Many people are held in jail before their trial and are referred to in the Handbook as “pretrial detainees.” As a practical matter, different legal standards for treatment of detainees don’t usually lead to different outcomes for detainees and convicted prisoners. But sometimes the difference matters.

As you know from the above sections, the Eighth Amendment prohibits cruel and unusual punishment. This protection only applies to people who have already been convicted. Since detainees have not been convicted, they may not be punished at all until proven guilty. One legal result of this is that jail conditions for pretrial detainees are reviewed by courts under the Fifth or Fourteenth Amendment Due Process Clause, not the Eighth Amendment prohibition of cruel and unusual punishment.

The most important case for pretrial detainees is *Bell v. Wolfish*, 441 U.S. 520 (1979), which was a challenge to the conditions of confinement in a federal jail in New York. In *Bell*, the Court held that jail conditions that amount to punishment of the detainee violate due process. The Court explained that there is a difference between punishment, which is unconstitutional, and regulations that, while unpleasant, have a valid administrative or security purpose. It held that regulations that are “reasonably related” to the institution’s interest in maintaining jail security are not unconstitutional punishment, even if they cause discomfort. This is why detainees can be put into punitive segregation or SHU.

You can prove that poor conditions or restrictive regulations are unconstitutional punishment in two different ways:



1. by showing that the prison administration or individual guard intended to punish you, or
2. by showing that the regulation is not reasonably related to a legitimate goal. This can be because the regulation doesn't have any purpose or because it is overly restrictive or an exaggerated response to a real concern. On example of a case like this is *Pierce v. County of Orange*, 526 F.3d 1190 (9th Cir. 2008). In that case, a court held there was no legitimate reason for pretrial detainees in SHU to only get 90 minutes of exercise per week.

As with the Turner standard (discussed in Section A) for convicted prisoners, courts defer to jail officials in analyzing what is a "legitimate concern." Security is a legitimate concern of jail officials, too. This is why many jail conditions can be like those in prison.

Although the standard in *Bell* for analyzing the claims of pretrial detainees is well-established, the courts are not in agreement as to whether the content of that standard is actually any different from the content of the Eighth Amendment standard explained in Section F. In *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239 (1983), the Supreme Court held that pretrial detainees have due process rights that are "at least as great" as the Eighth Amendment protections available to prisoners. However, when faced with claims by pretrial detainees, many courts simply compare the cases to Eighth Amendment cases. If you are a pretrial detainee, you should start by reading *Bell v. Wolfish*, and then research how courts in your circuit have applied that standard.

One major and recent difference between pretrial detainees and convicted prisoners is in what state of mind prison officials must show for you to win your claim. In a very important case named *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), the court considered an excessive force claim by a pretrial detainee. The court held that a detainee can win an excessive force claim if the force used against him was objectively excessive. A detainee doesn't need to prove that the officer was malicious or sadistic. This is an easier standard to meet than the standard for convicted prisoners, who have to show intent to cause suffering or punishment.

Some courts have applied *Kingsley's* reasoning to other issues outside the excessive force context. For example, in *Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) a court held that a pretrial detainee bringing a failure-to-protect claim also only needs to show objective unreasonableness. In *Hardeman v. Curran*, 933 F.3d 816 (7th Cir. 2019), a court extended this objective-only standard to a conditions-of-confinement claim brought by pretrial detainees who were forced to live for three days without clean water. In *Gordon v. County of Orange*, 888 F.3d 1118 (9th Cir. 2018) a court applied the objective standard to a pretrial detainee's medical care claim. And in *Darnell v. Pineiro*, 849 F.3d 17 (2d Cir. 2006) a court held that pretrial detainees only need to show objective unreasonableness for a conditions-of-confinement claim.

However, not all the courts agree that *Kingsley* should be extended in this way. An example of a bad decision limiting *Kingsley* is *Whitney v. City of St. Louis, Missouri*, 887 F.3d 857 (8th Cir. 2018).

Unfortunately, not all the recent legal developments for pretrial detainees have been good. In *Florence v. Bd. of Chosen Freeholders of Cty. of Burlington*, 566 U.S. 318 (2012), the Supreme Court decided that it is constitutional to strip search all detainees upon admission to jail even without reasonable suspicion they had contraband. Some lower courts had previously found these kinds of suspicionless searches of detainees unconstitutional. But after *Florence*, those cases are no longer good law.

Despite the Supreme Court's decision in *Florence*, pretrial detainees may have more protection from some types of searches than convicted prisoners. One good case to read is *Lopez v. Youngblood*, 609 F. Supp. 2d 1125 (E.D. Cal. 2009), in which a court held it was unconstitutional to strip search detainees in a group. The jail tried to justify the group strip search as necessary for administrative ease. The court disagreed, stating that administrative burdens and inconvenience do not justify constitutional violations.

The Second Circuit has also stated that pretrial detainees retain a limited expectation of privacy under the Fourth Amendment that protects them from searches that are not done for legitimate security reasons. This means that the jail cannot search your cell looking for evidence to use against you in trial; they can only search for contraband or other risks to jail security. *United States v. Cohen*, 796 F.2d 20 (2d Cir. 1986). Other courts do not agree with the Second Circuit on this.

In a few states, under state law, pretrial detainees retain a similar "limited but legitimate expectation of privacy...[if] the search of the pretrial detainee's cell is...solely for the purpose of uncovering incriminating evidence which could be used against the detainee at trial, rather than out of concern for any legitimate prison objectives." *State v. Henderson*, 271 Ga. 264, 267 (1999). See also *Rogers v. State*, 783 So.2d 980 (Fla. 2001).

One other area in which pretrial detainees may get more protection is around procedural due-process challenges to placement in segregation. Most courts have held that *Sandin v. Connor* (discussed in Section D of this chapter) does not apply to detainees, so they don't need to meet the "atypical and significant hardship" standard. For example, in *Mitchell v. Dupnik*, 75 F.3d 517 (9th Cir. 1996), one appellate court held that pretrial detainees may be subject to disciplinary segregation only after a due process hearing to determine whether they have violated any rule, regardless of whether the conditions in segregation are so serious and unusual as to create a liberty interest. Another good case on this issue is *Williamson v. Stirling*, 912 F.3d 154 (4th Cir. 2018), involving a pretrial detainee held for three years in solitary confinement for one threat.

# K.

## Issues of Importance to Non-Citizens and Immigration Detainees

Since Congress changed the immigration laws in 1996, more and more non-citizens are being held in detention centers or jails during their immigration cases, or while they are waiting for deportation, even though they are not convicted criminals or even pretrial detainees. When a person is held in custody by the Immigration and Customs Enforcement agency (ICE) they are called “immigration detainees” rather than prisoners.

### NOTE FOR NON-CITIZENS SERVING PRISON SENTENCES:

One important thing to be aware of as a non-citizen is that if you have been convicted of certain qualifying crimes (as defined by federal immigration law), you may be deportable after you have served your sentence. Regardless of your immigration status, non-citizens can be removed for criminal convictions. This area of law is complicated, and something you should discuss with an attorney who specializes in immigration law.

If you are ordered removed while serving your criminal sentence or if you are fighting your immigration case while in prison, you could be detained after you have finished serving your sentence and held for an uncertain period of time before you are deported from the country or your immigration case is decided.

As an immigration detainee, you have most of the same constitutional rights to decent treatment as citizens do. Like pretrial detainees, immigration detainees can challenge the conditions of their confinement under the Due Process Clause of the Fifth Amendment, which protects any person in custody from conditions that amount to punishment. See *Wong Wing v. United States*, 163 U.S. 228 (1896).

Immigration detainees in federal facilities may have trouble bringing constitutional claims for money damages because of the changes in *Bivens* actions describe in Chapter 2, Section D. Most of the cases described below involve immigration detainees held in state or local facilities, or suing to change their conditions rather than suing to get money.

The Supreme Court has not yet determined what due process standard should be used to analyze conditions and abuse challenges by people in immigration detention. Some courts have acknowledged that it is not yet clear how immigration detainees’ claims should be treated. In *Preval v. Reno*, 203 F.3d 821 (4th Cir. 2000), the Fourth Circuit reversed a lower court ruling on a case brought by immigration detainees because the district court had dismissed their claims using the standard for pretrial

detainees without giving the detainees the opportunity to argue about the correct standard.

That said, most courts have held that such challenges should be analyzed under the Bell standard for pretrial detainees, discussed above. For an example of this point of view, read *E.D. v. Sharkey*, 928 F.3d 299 (3d Cir. 2019). In *E.D.* the court allowed a female immigration detainee to sue a guard for sexual assault, and the guard’s supervisors for failure to protect. Other recent cases analogizing to pretrial detainees are *Charles v. Orange County*, 925 F.3d 73 (2d Cir. 2019) and *Chavero-Linares v. Smith*, 782 F.3d 1038 (8th Cir. 2015). In considering due process claims by immigration detainees, the courts have stated that the Eighth Amendment sets a floor for those rights. This means that immigration detainees have at least that much protection under the Eighth Amendment. It is not clear if they have more.

If you are an immigration detainee, you may want to argue that you deserve a standard that is more protective of your rights than the standard for pretrial detainees or convicted prisoners because you are a civil detainee and have not gotten the usual protections that courts give defendants in the criminal justice system. Some courts have explicitly stated that the Eighth Amendment “does not set a ceiling” on due process rights. In other words, immigration detainees may get more protection under the Due Process Clause than convicted prisoners get from the Eighth Amendment. This means that some conditions courts find lawful for prisoners, might not be lawful for detainees. *Crosby v. Georgeakopoulos*, No. 03-5232, 2005 U.S. Dist. LEXIS 32238 (D.N.J. June 24, 2005). One case applying a civil standard for due process claims by immigration detainees is *In re Kumar*, 402 F. Supp. 3d 377 (W.D. Tx. 2019).

Although not a case involving immigration detainees, in *Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004), a court decided that conditions for other “civil detainees,” those who have a mental illness or face civil commitment for a sex offense, must be better than conditions for pretrial criminal detainees. If people facing civil commitment are held in the same conditions as criminal detainees, the Ninth Circuit will presume the conditions are punitive, and thus unlawful. If you are an immigration detainee held in a jail or prison, or if your conditions are identical or more restrictive than conditions for pretrial detainees or prisoners, you may want to argue that the court should presume your conditions are punitive and unconstitutional.

You should look at cases from your jurisdiction to see which approach, if any, courts in your area have taken.

You can also argue that, because the correct standard is unclear, the court should appoint an attorney to represent you. You may have a good chance of getting appointed a lawyer if you are an immigration detainee held in a private facility, as that raises multiple complex questions of law. In *Agyeman v. CCA*, 390 F.3d 1101 (9th Cir. 2004), for example, the Ninth Circuit said the lower court abused its discretion when it did not appoint counsel to an immigration detainee who sued a private corporation

because the case was very complex. See also *Sanusi v. Immigration and Naturalization Service*, 100 Fed. Appx. 49 (2d Cir. 2004).

Examples of the types of cases detainees can bring under the Due Process Clause:

- > Restrictive or inhumane conditions of confinement.
- > Use of excessive force by guards.
- > Problems with food, exercise, or sanitation.
- > Failure to provide adequate medical care.

The law is even less clear for non-citizens who are arrested while entering the United States without a valid visa, or who are arrested after entering without inspection. These people are called “inadmissible,” and the government sometimes argues they should get even less legal protection than other non-citizens. One of the first cases to address this issue was *Lynch v. Cannatella*, 810 F.2d 1363 (5th Cir. 1987). In *Lynch*, sixteen Jamaican stowaways claimed that they were abused while in the custody of the New Orleans harbor police. For ten days they were locked in a short-term detention cell without beds, mattresses, pillows, or heaters. Defendants kept them handcuffed and forced them to work while shackled. The police hosed them down with fire hoses, beat them, shot them with a stun gas, and locked them in shipping containers.

When the non-citizens sued, the defendants in *Lynch* argued that “inadmissible” aliens have “virtually no constitutional rights.” The Fifth Circuit disagreed and held that due process protects “persons” whether or not they are citizens or legal residents. The court held that immigration detainees are “entitled under the due process clauses of the Fifth and Fourteenth Amendments to be free of gross physical abuse at the hands of state or federal officials.”

Unfortunately, some courts have taken this language to be the outer limit of due process protection for inadmissible aliens. For an example of this type of reasoning, read *Adras v. Nelson*, 917 F.2d 1552 (11th Cir. 1990). We think that all detainees should be protected from far more than “gross physical abuse,” whether they are inadmissible or deportable, and urge you not to use this standard in your papers. If the defendants in your case use this standard, you could point out that it doesn’t make sense to offer civil immigration detainees less protection than convicted criminals get under the Eighth Amendment.

There are almost no cases addressing the application of the Fourth Amendment’s prohibition on “unreasonable searches and seizures” to immigration detainees. Because searches can be based on similar security concerns in all types of detention, most courts treat prisoners, pretrial detainees, and immigration detainees the same, although those who have not been convicted of a crime may have somewhat more success in challenging the worst searches, like strip or body cavity searches. One unlawful search case involving an immigration detainee is *Al-Shahin v. DHS*, No. 06-5261, 2007 U.S. Dist. LEXIS 75018 (D.N.J. Oct. 4, 2007).

Under Immigration and Customs Enforcement’s (ICE) 2011 Performance-Based National Detention Standards (PBNDS), strip searches in immigration detention centers are prohibited unless there’s a reasonable suspicion of contraband possession. An updated guideline also calls for strip searches to be performed by staff of the same gender as the detainee and for transgender individuals to choose the gender of the staff member conducting a body-cavity search. Like other regulations in this book, these are guidelines rather than binding rules, so you cannot sue to enforce them. Instead, you can use them as evidence of what is reasonable and what is not. When using such guidelines, you should also check to see if your individual facility has a different policy in place.

A 2013 case brought by immigration detainees against the Department of Homeland Security (DHS) and ICE alleged that their First Amendment rights were violated because telephone services are unduly restrictive and expensive, limiting the contact of immigration detainees with counsel. The case, *Lyon v. Immigration and Customs Enforcement*, No. C-13-5878 (N.D. Cal. 2014), was certified as a class action in 2014, and settled in 2016 with ICE agreeing to provide greater access to phones and free pro bono immigration attorneys. More information on the settlement is available at: <https://www.aclunc.org/news/aclu-settlement-ice-will-allow-immigrants-held-detention-use-functional-telephones-contacting>.

Also, similarly to pretrial detainees, the law about placement in segregation without due process may be better for immigration detainees than for convicted prisoners. One good case to read on this issue is *Bromfield v. McBurney*, No. 07-cv-5226RBL, 2008 U.S. Dist. LEXIS 11844 (W.D. Wash. Jan 14, 2008).

### ***Prison Litigation Reform Act (PLRA) and Exhaustion Requirements***

Every circuit court to address the issue has held that the PLRA does not apply to immigration detainees because they are not “prisoners” within the meaning of the Act. This means that the restrictive provisions of the PLRA discussed in Chapter 2, Section E and throughout this handbook do not apply to you, including the exhaustion requirement, filing fees, and three strikes provisions. Some examples of these cases include *Ojo v. INS*, 106 F.3d 680 (5th Cir. 1997); *LaFontant v. INS*, 135 F.3d 158 (D.C. Cir. 1998); *Preval v. Reno*, 203 F.3d 821 (4th Cir. 2000); *Agyeman v. INS*, 296 F.3d 871 (9th Cir. 2002). See also

*Page v. Torrey*, 201 F.3d 1136 (9th Cir. 1999); *Troville v. Venz*, 303 F.3d 1256 (11th Cir. 2002); *Perkins v. Hedricks*, 340 F.3d 582 (8th Cir. 2003) (holding that the PLRA does not apply to people who have been civilly committed).

However, that doesn't mean you can ignore the detention center grievance system or the Immigration and Customs Enforcement (ICE) administrative complaint process. Before Congress passed the PLRA, courts created their own exhaustion requirements, and those may apply to you. The Supreme Court held in *McCarthy v. Madigan*, 503 U.S. 140 (1992), that courts need to balance a person's right to go to court to sue over injustice against an institution's interest in having you use whatever grievance system they have set up. Under this balancing test, there are three arguments you can make to allow you into court before exhausting: (1) if exhaustion would somehow hurt your ability to sue, for example because it might take too long; (2) if the institution's grievance system can't give you what you want, for example money damages; or (3) if the institution is biased or has already decided the issue against you. Still, it is safer to use or try to use any grievance system that ICE or the jail or detention center has before you sue.

## L. Protection of Prisoners Under International Law

Along with the United States Constitution, your state constitution, and federal and state laws, another potential source of protection for prisoners is international law.

Using international law in United States courts can be complicated and controversial so you may not want to attempt it without a lawyer. Some judges may be hostile to even the mention of international law.

International law gets more recognition in the United Nations (UN). Also, many countries in North and South America are part of the Organization of American States (OAS), which has its own human rights system which is talked about below. These different systems have procedures which you might be able to use to help in your case.

The UN or the OAS human rights system might be able to address either your individual case or widespread prison conditions. While these strategies are not binding in the way that court decisions are, they may help bring awareness to your treatment and encourage authorities to address your case. They can be a low-cost supplement to highlight violations of rights. This section will outline some basic facts about international law and provide you with resources in case you want to explore the area further. A very important article to read is William Quigley and Sara Godchaux, *Prisoner Human Rights Advocacy*, 16 *Loy. J. Pub. Int. L.* 359 (2015), available at

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2702550](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2702550). Many of the topics discussed below are drawn from that article, and it goes into more depth.

Also, while you will probably be unable to sue directly under human rights treaties, each treaty has a treaty body that monitors whether the United States is following the rules set out in the treaties. You can contact a human rights group, like Human Rights Watch, and ask for help sending a letter to one of those bodies.

Human Rights Watch is an organization that monitors the conditions in prisons and publishes reports on prisons. They answer mail from prisoners, and they also send free reports that you can use to support your legal claims. Their contact information is in Appendix I.

### 1. Sources of International Legal Protection

There are two main sources of international law: "customary international law" and treaties. Customary international law is unwritten law based on certain principles that are generally accepted worldwide. Treaties are written agreements between countries that set international legal standards. Under Article VI, section 2 of the United States Constitution, treaties are part of the "supreme law" of the land. Customary and treaty-based international law are both supposed to be enforceable in the United States, but this is often controversial.

Customary international law prohibits practices that violate generally accepted human rights standards, such as slavery, state-sponsored murders and kidnappings, torture, arbitrary detention, and systematic racial discrimination. Restatement (Third) of Foreign Relations Law, Section 702 (1987). United States' courts have recognized that some of these practices violate customary international law. For example, in *Filartiga v. Pena-Irala* 630 F.2d 876 (2d Cir. 1980), the court recognized that torture violates customary international law.

Prisoners are guaranteed human rights under many sources of international law, including the 1948 Universal Declaration of Human Rights (UDHR), which guarantees that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The UDHR was the first time that the fundamental rights of people were agreed upon by the international community. The UDHR lays out many basic rights, including rights to life, liberty, and security, and the right to an adequate standard of living. The 1976 International Covenant on Civil and Political Rights (ICCPR) also contains numerous protections for prisoners, including requiring that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

There are two steps for a country to become party to an international treaty: signing and ratifying. The United States has ratified the ICCPR but did so with many exceptions (which are called “reservations”), and Congress has not yet passed laws to implement it. The United States has many reservations to human rights treaties that limit your ability to use them to their full potential. This is one reason why courts will rarely accept arguments based on treaties.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was enacted in 1984 to prohibit intentional infliction of severe physical or mental pain. The U.S. also ratified the Convention on the Elimination of All Forms of Racial Discrimination (CERD), which prohibits racial and ethnic discrimination.

The United Nations has endorsed Standard Minimum Rules for the Treatment of Prisoners. The standards cover prison conditions, including treatment, healthcare, restraints, food, and searches. The rules were updated in 2015 and named the “Nelson Mandela Rules.” They do not have the force of law in the United States, but they are an important reference point.

It is extremely difficult to bring a successful international claim in a United States court. However, some prisoners have found it useful to discuss international standards in suits based on more established domestic law. For example, one state court referred to standards set out in the International Covenant on Civil and Political Rights when deciding that searches of prisoners by guards of the opposite sex violated their rights under the Eighth Amendment. *Sterling v. Cupp*, 625 P.2d 123, 131 n.21 (Or. 1981). The First Circuit Court of Appeals acknowledged that “the Supreme Court and lower federal courts have frequently consulted the ICCPR as an interpretive tool to determine important issues in the area of human rights law.” *Garcia v. Sessions*, 856 F.3d 27, 60 (1st Cir. 2017).

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court struck down the death penalty for the intellectually disabled, noting that the practice was “overwhelmingly disapproved” in the world community. Later, in *Roper v. Simmons*, 125 S. Ct. 1183 (2005), the court relied even more heavily on international law and practice when it struck down the death penalty for juvenile offenders. In fact, even in her dissent from the court’s ruling in *Roper*, Justice O’Connor acknowledged that international law and practice was relevant to the court’s analysis when she observed: “Over the course of nearly half a century, the court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency...At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus.”

## 2. Filing a Complaint to the United Nations Special Rapporteur on Torture

The main way that prisoners can file an individual human rights complaint is directly to the U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Special Rapporteur on Torture). The United Nations has 38 human rights experts who report on specific themes of human rights, and each expert is called a Special Rapporteur. The expert on prison human rights issues is the Special Rapporteur on Torture.

The Special Rapporteur may get involved in cases of prolonged detention without communication, solitary confinement, torturous conditions, denial of medical treatment and nutrition, means of restraint contrary to international standards, and threats of excessive force by officials. The Special Rapporteur on Torture has repeatedly criticized numerous U.S. prison practices, including the use of solitary confinement on many types of people including juveniles, individuals with disabilities, those serving life sentences or on death row, and pregnant and breastfeeding women.

Keep in mind that the Special Rapporteur does not have enforcement power. Filing a complaint with them is not like filing a lawsuit. However, the Special Rapporteurs are an important opportunity for advocacy, organizing, and drawing attention to abuses you have suffered.

Here are a few examples of times when the Special Rapporteur was able to get involved and helped in cases:

In 2009, the Special Rapporteur investigated widespread reports of pregnant women in U.S. jails and prisons being restrained by their ankles and wrists while being transported to the hospital and undergoing childbirth. Since then, many states have passed laws and regulations banning this practice.

In 2010, the Special Rapporteur on Torture was asked to investigate use of electric shock and indefinite restraints in treating juveniles in a residential program in Canton, Massachusetts. The Rapporteur looked into it and asked the U.S. government to investigate and respond. As a result, new regulations were put in place to prevent that type of treatment.

In March 2012, twenty California prisoners and fifteen organizations filed a complaint to the Special Rapporteur on Torture on behalf of 4,000 prisoners held in isolated segregation. The outreach to the Rapporteur was part of a broader organizing effort that included a federal lawsuit by the Center for Constitutional Rights and a peaceful hunger strike by thousands of prisoners to protest solitary confinement. The federal lawsuit and the organizing eventually led to a settlement ending the use of indefinite solitary confinement in California prisons.

Even just getting the Special Rapporteur to ask questions about a prisoner's treatment can sometimes play an important part of a larger advocacy or legal strategy. For example, in 2012, a human rights complaint was filed on behalf of Russell Maroon Shoatz, a Pennsylvania prisoner who had spent twenty-one years in solitary confinement. The Rapporteur also called on U.S. authorities to end solitary confinement of a Louisiana man, Albert Woodfox, after four decades. Woodfox was released in 2016.

Finally, the Rapporteur asked the U.S. to investigate the detention of Daniel Chong by the Drug Enforcement Administration (DEA) who was arrested for smoking marijuana and left handcuffed in a small cell for days without food or water.

If you would like to file a complaint with the Special Rapporteur, you have to fill out a model questionnaire and answer the questions. This can be completed either by you or by representatives. That model questionnaire is attached as Appendix G to this Handbook. The address of the Special Rapporteur is:

Special Rapporteur on Torture  
c/o Office of the High Commissioner for Human Rights  
United Nations Office at Geneva  
CH-1211 Geneva 10, Switzerland

### 3. Sending a Petition to the Inter-American Commission on Human Rights (IACHR)

The United States is a member of the Organization of American States (OAS), and is bound to the provisions of the American Declaration on the Rights and Duties of Man. This is a human rights system that is regional to the Americas, unlike the United Nations or other treaties which are global. The Inter-American Commission on Human Rights is an independent part of the OAS that looks at possible human rights violations in the Americas. Individuals can present petitions to the Commission once available remedies have been pursued and exhausted in domestic courts.

This means that you can only file a complaint to the IACHR after you have gone through the U.S. legal system. Complaints need to be filed six months after exhausting domestic legal remedies or showing that remedies are futile. The IACHR publishes a helpful informational brochure, available at <https://www.oas.org/en/iachr/docs/pdf/howto.pdf>.

Once a petition is filed, the IACHR decides whether or not the petition meets its requirements. If it does, then the IACHR contacts the United States for a response.

**NOTE:** The IACHR process is non-binding, and the United States has a history of not following its obligations under the process. But like the Special Rapporteur mentioned above, the process could be part of bringing attention to your case.

# CHAPTER FOUR:

## Who to Sue and What to Ask for

Now that you know your rights under the Constitution, the next step is figuring out how to put together your lawsuit. You will need to decide what you want the court to do, who to include as plaintiffs, and who to sue.

### A.

#### What to Ask for in Your Lawsuit

If you bring a lawsuit under Section 1983, you can ask for three things: money damages, a declaratory judgment, or an injunction. You don't have to ask for just one—you can ask for two or all three. In the legal world, all three of these options are called “relief.”

- > Money damages are awarded by the court to make defendants pay you money to make up for harm you suffered in the past. Punitive damages may be awarded to punish defendants for especially bad conduct.
- > An injunction is a court order that directs prison officials to make changes in your prison conditions and/or stop ongoing conduct that the court finds to be illegal.
- > A declaratory judgment is when a court makes a decision that explains your legal rights and the legal duties and obligations of the prison officials. However, the court doesn't order the prison to do or stop doing anything. If you get a declaratory judgment and the prison doesn't follow it, you can then ask the court for an injunction to make them do so.

Courts usually issue a declaratory judgment and an injunction together. However, it is also possible for a court to issue only the declaratory judgment and let the prison officials decide what actions will comply with the declaratory judgment.

A court will only issue an injunction if it feels that money damages will not fix whatever has harmed you. For instance, if you have to continue living in the unsafe conditions you sued over, money damages will not make those conditions any safer.

Section B of this chapter talks about injunctions in more detail, including when you can get an injunction, what it can cover, and how to enforce it. Section C of this Chapter explains money damages, Section D explains who you can sue (the “defendants”) and Section E explains settlements.

If you are part of a group of prisoners who want a declaratory judgment and injunctive relief (and sometimes money damages) from a court, you can ask the court to make the lawsuit a class action. This kind of lawsuit joins

together all people who have been harmed in the same way as you at the same prison or jail. There are very specific requirements for bringing a class action lawsuit. These requirements will be discussed in Section F of this chapter.

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When you think about what kind of relief you want, it is important to keep in mind that release from prison or a sentence reduction is not usually available in a Section 1983 or *Bivens* lawsuit. Additionally, you cannot use these kinds of lawsuits to request the reinstatement of good-conduct-time credits that have been unconstitutionally taken from you. *Preiser v. Rodriguez*, 411 U.S. 475 (1973). You can only challenge the fact or the length of your prison sentence through a writ of habeas corpus. A writ of habeas corpus requires that you go through your state court system before seeking relief from a federal court, or through remedies that may be available from the court that sentenced you, like a motion for compassionate release.

A detailed discussion of the writ of habeas corpus is beyond the scope of this Handbook. But see Appendix K for some books and resources on habeas corpus.

### B.

#### Injunctions

An injunction is an order issued by a court that tells the defendant to do or not do some act or acts. The court can order the defendants to stop doing harmful and unconstitutional things to you. It can require the defendants to act in a way that will prevent them from violating your rights in the future. If the defendants don't follow the court's order, as set out in the injunction, they can be held in “contempt” by the court that issued the injunction. Contempt means that the judge can order the defendants fined or jailed.

In considering whether to ask for an injunction in your lawsuit, you should think about the harm you have suffered and identify whether it happened just once, is still happening, or is likely to happen again soon. You may be able to get an injunction if the harm is continuing or is very likely to happen again soon.

The Supreme Court, in *Lewis v. Casey*, 518 U.S. 343 (1996), stated that in order to get an injunction, a prisoner must show “actual or imminent injury.” In this context, “injury” does not have to mean physical damage to your body. It just means that you are, or will be, worse off because of the illegal acts of the prison staff, such as: your mail isn’t sent out, your books are taken away, or you have to live in a strip cell.

### What Is an Injunction?

An injunction is an order issued by a court that tells the defendant to do or not do something. You can get an injunction to stop the defendants from harming you. Or you can get an injunction to make the defendants do something to improve conditions or care in the prison. Sometimes an injunction is referred to as “prospective relief.” You can ask for an injunction if you are experiencing any of the following:

- > Overcrowded, unsafe, or extremely harsh conditions;
- > A pattern of guard brutality or harassment;
- > Inadequate medical care; or
- > Continuing violation of any of your rights.

“Actual or imminent injury” means that you have to show the court that you are being harmed in some way, or that it is likely that you will be harmed very soon. It is not enough to show that there is something wrong in your prison. To get an injunction, you must show that you are being harmed or are likely to be harmed by whatever it is that is wrong.

An injunction is only appropriate if the injury you face is ongoing. For example, if you are currently imprisoned in a severely overcrowded prison, that is a current and ongoing harm, and you can request an injunction.

On the other hand, if the overcrowding just happened for a week or two, and you do not have a good reason to believe that it is likely to happen again in the near future, you should not request an injunction. An example of harm that is not ongoing is being beaten once by a guard. Unless the guard threatens to beat you again, or engages in a pattern of violence, there is nothing that the court can order the prison officials to do that will fix the abuses that you suffered in the past. That situation is better dealt with by asking for money damages.

## 1. Preliminary Injunctions and Permanent Injunctions

Most injunctions are called permanent injunctions. The court can only give you a permanent injunction at the end of your lawsuit. However, lawsuits take a very long time, and many prisoners can’t wait years for the court to decide whether to grant them a permanent injunction. Perhaps you are facing serious injury or even death. In a case like that, you can ask the court for a preliminary injunction. You can get a preliminary injunction much faster than a permanent injunction and it protects you while the court is considering your case and deciding whether or not you will get a permanent injunction.

There are four things that you have to show to win a preliminary injunction:

1. You are likely to show at trial that the defendants violated your rights;
2. You are likely to suffer irreparable harm if you do not receive a preliminary injunction. “Irreparable harm” means an injury that can never be fixed;
3. The threat of harm that you face is greater than the harm the prison officials will face if you get a preliminary injunction; and
4. A preliminary injunction will serve the public interest.

Chapter Five includes sample documents to show how to seek a preliminary injunction.

If you are successful in winning your preliminary injunction, the battle is unfortunately not over. Under the PLRA, the preliminary injunction lasts only 90 days from the date that the court issues it. This usually means that you have to hope that you are able to win your permanent injunction within those 90 days. As stated before, lawsuits take a long time, and it is unlikely that this will happen. You can get the preliminary injunction extended for additional 90-day periods if you can show the same conditions still exist. *Mayweathers v. Newland*, 258 F.3d 930 (9th Cir. 2001).

Even a permanent injunction is not actually permanent under the PLRA. After the first two years of a permanent injunction, defendants can challenge it every year. To keep the injunction, you will have to show that without it, your rights would still be violated. Under the PLRA you will have to convince the court that continuing the injunction is “necessary to correct a current or ongoing violation” of your rights and that you still meet the requirements for an injunction listed above.

But don’t let this stop you from filing for an injunction. It is very likely that if you win an injunction, but are faced with it ending under the PLRA, you will be able to find a lawyer to help you.



## 2. Exhaustion and Injunctions

You must also consider the “exhaustion” requirements of the PLRA. “Exhaustion” means that you must complete your prison’s grievance system or other administrative remedy designated for your problem, such as a disciplinary appeal, before filing a lawsuit. You will learn more about this in Chapter Five, Section A. It is smart to use the prison grievance system while you are working on your lawsuit.

If you have an emergency situation and you do not have time to use the prison grievance system, you can request a preliminary injunction anyway. Usually, you will have to exhaust your prison’s administrative remedies while you are getting relief through the injunction. One case to read on this issue is *Jackson v. District of Columbia*, 254 F.3d 262 (D.C. Cir. 2001). That case states that the court can only protect prisoners with a preliminary injunction while the court waits for them to exhaust grievance procedures. *Fletcher v. Menard Correctional Center*, 623 F.3d 1171 (7th Cir. 2010) is another very good case to read on this issue. There, the court held that a grievance system is not “available” such that you have to exhaust it, if there is no way you could possibly get relief in time to keep you from being injured.

To get a preliminary injunction without having exhausted the prison grievance system, you will have to show the court that if you are forced to wait until after using the prison grievance system to sue, you will be irreparably harmed. Irreparable harm is an injury that would cause permanent injury or damage that cannot be fixed by money or some other form of relief. In your complaint, explain what that harm is. Ongoing pain is an example of irreparable harm, as are many ongoing violations of your constitutional rights.

## 3. Temporary Restraining Orders

There is another means of relief that you can get even faster than a preliminary injunction, called a “temporary restraining order” or “TRO.” Sometimes you can get a TRO before the prison officials are even aware of the lawsuit. These are issued in emergency situations and only last for a short period of time.

A TRO is very difficult to get, especially without a lawyer. Rule 65 of the *Federal Rules of Civil Procedure* sets out the standard for a TRO. To get one you must show that you will suffer “immediate and irreparable injury, loss or damage” if the court doesn’t help you before the other side has a chance to respond.

Chapter Five has a sample TRO request.

# C.

## Money Damages

In a Section 1983 or *Bivens* lawsuit, the court can order prison officials to give you money to make up for the harm you suffered when your rights were violated. You can get money damages instead of, or in addition to, an injunction. You may want an injunction against some of the people you sue and money damages from others, or both. This section explains when and how to get money damages.

### 1. The Three Types of Money Damages

There are three types of money damages. The first type is an award of nominal damages. Nominal damages are frequently just \$1, or some other very small sum of money. Nominal damages are awarded when you have proven a violation of your rights, but you have not shown any actual harm that can be compensated.

You are most likely to win a significant amount of money if you suffered an actual physical injury. The officials who are responsible should pay you for medical and other expenses, for any wages you lost, for the value of any part of your body or physical functioning which cannot be replaced or restored, and for your “pain and suffering.” These are called compensatory damages. The idea behind compensatory damages is to try and get you back to the condition you were in before you were injured.

The third type of damages you may be able to get is punitive damages. To get punitive damages, you need to show that the defendants’ actions were “motivated by evil motive or intent” or involved “reckless or callous indifference to your rights.” In other words, the officials hurt you on purpose or did something so clearly dangerous, they must have known it was likely to hurt you. An example of a prisoner getting punitive damages can be found in *Smith v. Wade*, 461 U.S. 30 (1983). In that case, Mr. Wade had been moved into protective custody in his prison after having been assaulted by other prisoners. A prison guard moved two other prisoners into Mr. Wade’s cell, one of whom had recently beaten and killed another prisoner. Mr. Wade’s cellmates harassed, beat, and sexually assaulted him. The court found that the guard’s conduct in placing Mr. Wade in a situation the guard knew was likely to expose him to serious physical harm satisfied the standard for punitive damages. Mr. Wade won \$25,000 in compensatory damages and \$5,000 in punitive damages.

Not all punitive damage awards require physical assault. Some courts and juries have awarded punitive damages for violations of other constitutional rights based on a showing of “evil intent” by prison officials. One example is *Siggers-El v. Barlow*, 433 F. Supp. 2d 811 (E.D. Mich. 2006). In that case a prisoner received \$200,000 in punitive damages after he was transferred in retaliation for complaining to the warden about a prison official who harassed the prisoner and refused to put in the routine paperwork the prisoner needed to pay his appellate lawyer. The transfer

ended up causing the prisoner to lose a very good prison job and contact with his family. That prisoner also received \$19,000 in compensatory damages.

The point of punitive damages is to punish members of the prison staff who violate your rights and to set an example to discourage other prison staff from acting illegally in the future. Therefore, the court usually won't impose punitive damages for one incident unless you show that the defendants acted especially maliciously. You may also win punitive damages if you show there has been a pattern of abuse or that there is a need to deter similar abuse in the future.

Just because you are able to prove your case and win compensatory damages, does not automatically mean you will win punitive damages. For instance, in *Coleman v. Rahija*, 114 F.3d 778 (8th Cir. 1997), Ms. Coleman was able to win \$1000 in compensatory damages by proving that she was illegally denied medical treatment, but she did not win punitive damages. In that case, Ms. Coleman had a history of premature and complicated pregnancies and was experiencing severe pain and bleeding in connection with her premature labor. Nurse Rahija, the nurse on duty at Ms. Coleman's prison, was aware of Ms. Coleman's medical history. Nurse Rahija examined Ms. Coleman and determined that Ms. Coleman could be in early labor. However, she delayed Ms. Coleman's transfer to a hospital for several hours. The court ruled that Nurse Rahija's actions reached the standard of "deliberate indifference" and therefore violated the Eighth Amendment but were not bad enough to show that she acted with "callous indifference" as required for punitive damages.

Even though you may not always get punitive damages, if you are suing for a violation of your rights and you have to prove deliberate indifference or excessive force to win your claim, it probably makes sense to ask for punitive damages, too. The standards for deliberate indifference and excessive force are discussed in Chapter Three.

## 2. Damages Under the PLRA

If you have not been physically hurt or sexually assaulted, the PLRA makes it harder to get damages. The PLRA states

No federal civil action may be brought by a prisoner confined in a jail, prison, or another correctional facility for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act.

This means that you cannot get money for the way something makes you feel unless you are also seeking money for a physical injury or sexual abuse. Most courts have interpreted this statement to only affect claims for compensatory damages. This interpretation is explained in *Thompson v. Carter*, 284 F.3d 411 (2d Cir. 2002). So in most jurisdictions, you can still bring a claim for nominal or punitive damages for any kind of harm. And you can still try to get an injunction. Other cases to read on this issue are *Harris v. Garner*, 190 F.3d 1279 (11th Cir. 1999) (injunctive relief) and *Royal v. Kautzky*, 375 F.3d 720 (8th

Cir. 2004) and *Calhoun v. DeTella*, 319 F.3d 936 (7th Cir. 2003) (nominal and punitive damages). Some of these courts have explained their interpretation by saying that otherwise, this section of the PLRA would be unconstitutional.

However, a few courts have held that this provision of the PLRA also bars punitive damages for emotional injuries. In *Al-Amin v. Smith*, 637 F.3d 1192 (11th Cir. 2011), for example, a court ruled against punitive damages in the absence of physical injury.

Another area in which courts disagree is whether a claim of a constitutional violation is a claim for "mental or emotional injury." Courts are split about whether violations of your constitutional rights are eligible for compensation if there isn't physical injury. About half of the circuits, including the Third, Eighth, Tenth, and Eleventh, are stricter about the physical injury requirement. That means that you can't get compensation unless you were physically injured or meet the exact requirements of a 'sexual act' under the *Violence Against Women Act* (available at 18 U.S.C. § 2246).

On the other hand, the Second, Sixth, Seventh, Ninth, and District of Columbia Circuits are less strict about the physical injury requirement. Harms from violating your constitutional rights are a form of injury that are not simply mental or emotional and therefore they are not excluded by the PLRA. Two good cases that explain the difference between constitutional and emotional injuries are *King v. Zamira*, 788 F.3d 207, 213 (6th Cir. 2015) and *Aref v. Lynch*, 833 F.3d 242 (D.C. Cir. 2016).

There are a lot of cases on this issue. One example is *Canell v. Lightner*, 143 F.3d 1210 (9th Cir. 1998). In that case, the Ninth Circuit stated that the plaintiff was "not asserting a claim for 'mental or emotional injury.' He is asserting a claim for a violation of his First Amendment rights. The deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show or any mental or emotional injury he may have incurred. Therefore, § 1997e(e)[of the PLRA] does not apply to First Amendment claims regardless of the form of relief sought."

Other good cases on this issue are *Robinson v. Page*, 170 F.3d 747 (7th Cir. 1999); *Thompson v. Carter*, 284 F.3d 411 (2d Cir. 2002); and *Cockroft v. Kirkland*, 548 F. Supp. 2d 767 (N.D. Cal. 2008). As one court explained, because "First Amendment violations rarely, if ever, result in physical injuries, construction of the PLRA against recovery of damages would defeat congressional intent and render constitutional protections meaningless. If § 1997e(e) is applied to foreclose recovery in First Amendment actions, it would place the First Amendment itself "on shaky constitutional ground." *Siggers-El v. Barlow*, 433 F. Supp. 2d 811, 816 (E.D. Mich. 2006).

## Money Damages

- > You can get nominal damages if your rights have been violated.
- > You can get compensatory damages to make up for physical, sexual, or other harm you were caused.
- > You can get punitive damages to punish guards or other officials who hurt you on purpose.

Other courts have disagreed with this approach and state that the PLRA bars damages for constitutional claims. One example is *Allah v. Al-Hafeez*, 226 F.3d 247 (3d Cir. 2000), where the court held that a complaint about denial of religious services was only mental or emotional. Similarly, in *Sisney v. Reisch*, 674 F.3d 839 (8th Cir. 2012) a court would not give compensatory damages to a Jewish prisoner for denial of a requests to eat meals in a succah. And in *Pearson v. Welborn*, 471 F.3d 732 (7th Cir. 2006) a court denied damages for isolation without a physical injury.

Different courts have different standards as to what qualifies as physical injury. The physical injury has to be greater than “de minimis” which means “very minor,” but it does not have to be severe. For example, in a case called *Siglar v. Hightower*, 112 F.3d 191 (5th Cir. 1997), a guard twisted a prisoner’s ear, and it was bruised and sore for three days. The court held that this was not enough of a physical injury. However, the court noted that a prisoner does not need to show a “significant” injury. Many courts do not have clear precedent on what kind of injury is enough. Some good cases holding less-then-severe injury is enough are: *Oliver v. Keller*, 289 F.3d 623 (9th Cir. 2002), *Grenning v. Miller-Stout*, 739 F.3d 1235 (9th Cir. 2014), *Taylor v. Stevens*, 946 F.3d 211 (5th Cir. 2019), and *Payne v. Parnell*, 246 Fed. Appx. 884 (5th Cir. 2007).

Another important PLRA category is sexual abuse cases. In 2013 Congress passed the *Violence Against Women Act*, which changed the rules under the PLRA to make some types of sexual abuse count for damages. Before, it was difficult for victims of sexual abuse in prison to get compensation if they didn’t have physical signs of the abuse. A “sexual act” is defined by 18 U.S.C. § 2246(2) as intercourse, oral sex, intentional penetration, or intentional touching (not through clothing) of the genitals of a person younger than 16. That means that these types of abuse don’t need to meet the physical injury requirement under the PLRA.

Sexual assault that does not meet this definition will be considered under the “physical injury” requirement. Courts have taken different approaches about whether inappropriate touching meets the physical injury requirement. For example, in *Woods v. United States*, No. 1:14-cv-00713, 2015 U.S. Dist. LEXIS 175855 (N.D. Ala. Dec. 11, 2015), a court said that sexual pat downs and inappropriate touching don’t meet the PLRA’s physical injury requirement or the definition of a “sexual act.” But another court in *Cleveland v. Curry*, No. 07-cv-02809-NJV, 2014 U.S. Dist. LEXIS 22402 (N.D. Cal. Feb. 21, 2014) said

that “any type of sexual assault is ‘always’ deeply offensive to human dignity. . . . [P]laintiffs seeking compensatory damages for the violation of certain constitutional rights are not subject to the PLRA’s physical injury requirement.” *Id.* at 24.

### 3. Deciding How Much Money to Ask For

It is difficult to decide how much in compensatory and/or punitive damages you should request from the court. You should think carefully about asking for huge amounts of money, like millions of dollars, because the judge may be less likely to take your claim seriously if you do not ask for an appropriate amount. You can estimate a number for your compensatory damages by thinking about what your injury cost you. For example, try and come up with the amount of medical expenses you are likely to face in the future, or wages you have lost or will lose because you cannot work. Also, think about the effect your injury has had on your life. How long have you suffered? Are you permanently injured? In what specific ways were you harmed? You can look up cases in your circuit involving injuries that are similar to your own and see what the court awarded those prisoners.

## D.

### Who You Can Sue

In your complaint you have to name at least one defendant. But if you want, you can name more than one. You should include all of the people or entities that were responsible for the harm that you suffered. You must have a good reason to sue someone. People who were not involved in violating your rights cannot be sued under Section 1983 for damages.

Every defendant you sue must have acted “under color of state law” as you learned in Chapter Two, Section A, Part 2. What this means is that each prison official who was responsible for your injury must have acted while working at your prison or otherwise “on duty.” This can include anyone who is involved in running your prison. You can sue the people who work in your prison, such as guards, as well as the people that provide services to prisoners, such as nurses or doctors.

You have to prove that each defendant in your case acted or failed to act in a way that led to the violation of your rights. This is called “causation.” For example, if a guard illegally beats you and violates your rights, they cause your injury. The guard’s supervisor could also be liable for violating your rights if you can show that the supervisor made or carried out a “policy” or “practice” that led to the violation of your rights. So let’s say that the prison warden, who is the supervisor of the guard who beat you, instructed their guards to beat prisoners anytime that they did not follow orders. In this instance, the warden didn’t actually beat you themselves, but they are responsible for creating a policy that led to the beatings.

Sometimes, a supervisor may also be sued for ignoring or failing to react to a widespread health or safety problem. For example, if the warden was aware that guards refused to let prisoners eat on a regular basis and did not do anything to stop it, you might be able to sue the warden as well as the guards, arguing all of them were deliberately indifferent.

In 2009 the Supreme Court decided a case called *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), that may limit the ways in which supervisors can be sued for ignoring illegal action. Some courts are interpreting *Iqbal* to limit a plaintiff's right to sue a supervisor who ignored illegal action by a guard they supervised. Other courts have found that ignoring illegal action is still a ground for suit after *Iqbal*. This issue is discussed in more detail in Part 2 of this section.

You also have to decide whether you are suing a defendant in their "individual capacity," "official capacity," or both. If you are suing for damages under Section 1983, you should sue defendants in their individual or personal capacity. You are still saying that they acted under color of law, but you are seeking damages against them personally. If you are suing for injunctive relief under Section 1983, you should sue the defendants in their official capacity. You can sue defendants in both their individual and official capacities if you are asking for both damages and injunctive relief.

There are legal differences between who you can sue in an action for an injunction and who you can sue for money damages. A discussion of these differences follows below. It is important to keep in mind that you can sue for an injunction and money damages together in one lawsuit.

If you don't know the name of a guard or other prison official who has harmed you, you can sue one or more "John Doe" defendants. If you sue a John Doe, you will need to find out their identity as soon as possible, before the statute of limitations runs out on your claim. You can do this by asking the court for "Doe discovery." Discovery is explained below.

## 1. Who to Sue for an Injunction

The purpose of an injunction is to change conditions in your prison by making prison officials take some action or stop doing something that violates your rights. In this kind of lawsuit, you need to sue the officials in charge.

You cannot sue a state or a state agency directly. This means you can't sue "The New York State Department of Correctional Services" or New York State itself for either an injunction or for money damages. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984).

## Naming Your Defendants:

- > Sue prison guards or administrators in their "individual capacity" if you want money damages.
- > Sue prison guards or administrators in their "official capacity" if you want an injunction.

If you want both, sue everybody in their "individual and official capacities."

You will learn where to state that you are suing someone in their individual or official capacity in Chapter Five.

But, when you sue state-employed prison officials in their official capacities, this can force the state and its state agencies to respect your rights. For that reason, you need to sue the person at the prison who has the ability to make whatever change you want. This might be the warden, or a counselor, or a unit manager. If you are asking for an injunction, make sure you sue high-ranking officials at your prison, and mention the titles of the prison officials who you are suing as well as their names.

Although you can't sue a state, you can sue a municipality directly for an injunction. A "municipality" is a city, town, county, or other kind of local government. This is called a "Monell claim" because it first succeeded in an important case called *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 659 (1978). You can sue a city, or any other municipality, for an injunction or damages where the violation of your rights was the product of a city's official policy or unofficial custom. *Pembaur v. Cincinnati*, 475 U.S. 469 (1986). Be warned that proving a policy or custom is hard unless the policy is actually written down.

You are unlikely to win against a municipality if your injury was the result of one specific event or was caused by only one prison or jail official. You will be in a better position to win against a municipality if you can show that the municipality was guilty of a pattern of abuse that resulted in the violation of your rights or if it had a policy that caused the violation.

Remember that you can still get an injunction against the prison or jail officials even if you can't get one directly against the municipality. Name everyone who you want to hold liable.

## 2. Who to Sue for Money Damages: The Problem of "Qualified Immunity"

If you want to sue for money damages, you have to sue the prison officials who violated your rights in their individual capacity (personally). As with injunctions, you cannot sue your state or the prison itself.

The biggest hurdle in suing prison officials for money damages is the doctrine of qualified immunity. Qualified immunity is a form of legal protection given to government officials. If a court rules that the prison officials you are suing are protected by qualified immunity, that will be the

end of your lawsuit for damages. However, qualified immunity does not protect defendants from an injunction!

To overcome qualified immunity and to get money damages, your complaint (explained in detail in Chapter Five) must include facts that show that:

- > Your constitutional rights were violated;
- > The right that was violated was “clearly established”; and
- > The defendant was personally responsible for the violation of your rights. This is called the “personal involvement” requirement.

For a right to be clearly established, prison officials must have fair warning that their actions in a situation were illegal. Prison officials are allowed to make reasonable mistakes. A prison official may act illegally and still be free from liability if they couldn’t be expected to know better because the law in that area is unclear. However, an official can be held responsible if they knew (or should have known) that they were acting illegally. The main Supreme Court cases on this topic are *Saucier v. Katz*, 533 U.S. 194 (2001) and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Most states will require you to show that a reasonable prison official would know that their actions were unconstitutional. *Prison Legal News v. Lehman*, 397 F.3d 692 (9th Cir. 2005). You should cite to cases that are similar to yours to show that the prison and guards should have known (or did know) that they were violating your rights. The prison or guards are going to argue that the law is not clearly established and you want to show laws, prison regulations, or cases to prove that it is. *Taylor v. Riojas*, 141 S. Ct. 52 (2020) is a good recent Supreme Court case on this issue. There, the Court held that no reasonable officer could possibly think it was lawful to put a prisoner in a cell covered in feces.

The personal involvement requirement means that you can only get damages from officials or guards who actually personally violated your rights. Prison supervisors or other high-level officials (like the state prison commissioner) cannot be held liable for a violation of your rights just because they are responsible for supervising or employing the guards who actually violated your rights. Holding a supervisor responsible just because they are a supervisor is called “respondeat superior” and it is not allowed in Section 1983 claims.

Before 2009, the law was clear that you can hold supervisors responsible on the following theories:

- > The supervisor directly participated in the violation;
- > The supervisor learned of the violation of your rights and failed to do anything to fix the situation;
- > The supervisor created a policy or custom allowing or encouraging the illegal acts; or
- > The supervisor failed to adequately train or supervise their subordinates.

One case discussing this kind of liability is *Colon v. Coughlin*, 58 F.3d 865 (2d Cir. 1995). In *Colon*, the court held that a letter from a prisoner to the prison superintendent was not enough to establish the superintendent’s personal involvement. In another case, *Valdes v. Crosby*, 450 F.3d 1231 (11th Cir. 2006), the court allowed suit against a warden who had been warned by the previous warden about a correctional officer’s violent behavior. *Hardy v. District of Columbia*, 601 F. Supp. 2d 182 (D.C. Dist. 2009) is a case that talks about supervisory liability for failure to supervise or a lack of training.

Since the Supreme Court’s decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), most courts still allow these forms of liability, but a few courts are more restrictive. One bad case on this is *Dodds v. Richardson*, 614 F.3d 1185 (10th Cir. 2010). Good cases to read include: *Peatross v. City of Memphis*, 818 F.3d 233 (6th Cir. 2016), *Haywood v. Hathaway*, 842 F.3d 1026 (7th Cir. 2016) and *Starr v. Baca*, 652 F.3d 1202 (9th Cir. 2011).

Some public officials have what is called absolute immunity. Unlike qualified immunity, absolute immunity is a complete bar to lawsuit. Because of this doctrine, you cannot sue a judge, a legislator, or anyone else acting “as an integral part of the judicial or legislative process” no matter what they have done.

You may also be worried that the prison officials you want to sue do not seem to have enough money to pay you. But in most cases any money damages that the court orders the prison officials to pay will actually be paid by their employers: the prison, the state, or the state agency that runs the prison. This is called “indemnification.”

Finally, although there are different rules as to which remedies you can ask for from specific defendants, you can still ask for an injunction and money damages in the same complaint. For example, you can sue a guard in their individual capacity (for money damages) and their official capacity (for an injunction) in the same lawsuit.

### 3. What Happens to Your Money Damages

If you win money damages, the PLRA contains rules that may affect your award before you get it. The PLRA states: “[A]ny compensatory damages...shall be paid directly to satisfy any outstanding restitution orders pending against the prisoner. The remainder...shall be forwarded to the prisoner.”

This means that if you are awarded compensatory damages after a successful suit, any debts you have towards the victim of your crime will be automatically paid out of your award before you get your money. This rule does not apply to punitive damages.

The PLRA also states that if you are awarded damages, “reasonable efforts” will be made to notify the “victims of the crime” for which you were convicted. There have been very few rulings regarding these provisions so far, so it is hard to say whether and how they will be implemented.

Most states have “Son of Sam” laws, which aim to keep people convicted of certain crimes from making money by writing books or otherwise publicizing their crimes. Some states’ laws are so broad they could be used to seize money won through a lawsuit. So you should check to see if your state has one of these laws, and what it does.

In one recent and important case, *Williams v. Marinelli*, 987 F.3d 188 (2d Cir. 2021), the State of Connecticut took it upon itself to pay the money damages a prisoner won against a prison guard, but then paid a huge portion of the money to the state instead of to the prisoner, under a state statute allowing the state a lien to recoup some costs of incarceration. The court ruled that Section 1983 preempts the state statute, and the prisoner was entitled to collect his money from the guard.

## E.

### Settlements

Before a judge rules on your case, you may consider “settlement,” which means both parties involved give in to some of each other’s demands and your suit ends without a trial. In a settlement, you can get the same type of relief, like money or a policy change, as you could get if your case went to trial. As a plaintiff, it is always your decision whether to settle your lawsuit or not. No one, not even the judge or your attorney, can force you to settle.

The PLRA creates some rules on settlements. Settlements which order the prison to do something or stop doing something are often called “consent decrees.” Consent decrees must meet strict requirements: the settlement must be “narrowly drawn,” necessary to correct federal law violations, and do so in the least intrusive way. The court will need to approve of the settlement and make sure PLRA restrictions are enforced. This means that a court can only approve a consent decree if there are evidence or admissions by the defendants that your rights were violated by the prison officials. This can be a difficult task.

Some prisoners have been successful in having their consent decrees approved by a court when both the prisoner and the officials being sued agree that the decree meets all of the PLRA requirements. There is no guarantee that this will work in all cases.

Parties can enter into “private settlement agreements” that may not meet PLRA standards, but these agreements cannot be enforced by federal courts. They can only be enforced in a state court. Private settlement agreements are very risky if your rights are being violated.

The PLRA does not restrict settlements that only deal with money. If you are not asking for an injunction, then the restrictions discussed above do not apply.

## F.

### Class Actions

One person, or a small group of people, can sue on behalf of all other people who are in the same situation. This is called a “class action.” The requirements for a class action are found in Rule 23 of the *Federal Rules of Civil Procedure*. Rule 23 is part of Title 28 of the *United States Code* (U.S.C.), which you can request from your law library. (Chapter Seven explains more about how to use statutes and law books.) Unfortunately, courts generally don’t allow prison class actions to proceed without a lawyer to represent the class.

Rule 23(a) requires:

1. The class must be so large that it would not be practical for everyone in it to bring the suit and appear in court;
2. There must be “questions of law or fact common to the class”;
3. The claims made by the people who bring the suit must be similar to the claims of everyone in the class; and
4. The people who bring the suit must be able to “fairly and adequately protect the interests of the class.”

Additionally, Rule 23(b) requires that any one of (1), (2) or (3), below, is true:

1. Bringing separate actions would create a risk of:  
(A) different rulings for different individual class members that would lead to contradicting standards of conduct for the other side; or  
(B) rulings for individuals that, as a practical matter, would dictate the rights of other class members not in the case or harm their ability to protect their interests;
2. The party who doesn’t want it to be a class action has acted the same toward everyone in the class, so that final injunctive relief or declaratory relief is appropriate for the class as a whole; or
3. The court finds that there are more questions of law or fact common to class members than questions affecting only individuals, and that a class action is better than an individual case for fairly and quickly deciding the case. The Court will consider:
  - A. the class members’ interests in individually controlling their own case;
  - B. whether any other case about the same issue has already been started by class members;
  - C. whether it would be a good thing to keep all cases about the issue in one court; and
  - D. whether the case will be hard to manage as a class action.

A class action has two big advantages. First, any court order will apply to the entire class. Anyone in the class can ask the court to hold the officials in contempt of court and fine or jail them if they disobey the court order. If the suit were not a class action, prisoners who were not a part of the suit would have to start a new suit if prison officials continued to violate their rights.

Second, a class action for injunctive relief cannot be dismissed as “moot” just because the prisoners who start the suit are released from prison, transferred to a prison outside the court’s jurisdiction, or because the prison stops abusing those particular prisoners. The case will still be alive for the other prisoners in the class. *Sosna v. Iowa*, 419 U.S. 393 (1975). “Moot” means that the problem you are complaining about has stopped happening and is not likely to happen to you again. You can lose a case by it becoming “moot.” The problem of “mootness” is discussed more in Chapter Six, Section D.

A class action has one very big disadvantage. If you lose a class action after the class has been certified, in some situations the court’s decision can bind all the class members, so other prisoners who are part of the class cannot bring their own challenges.

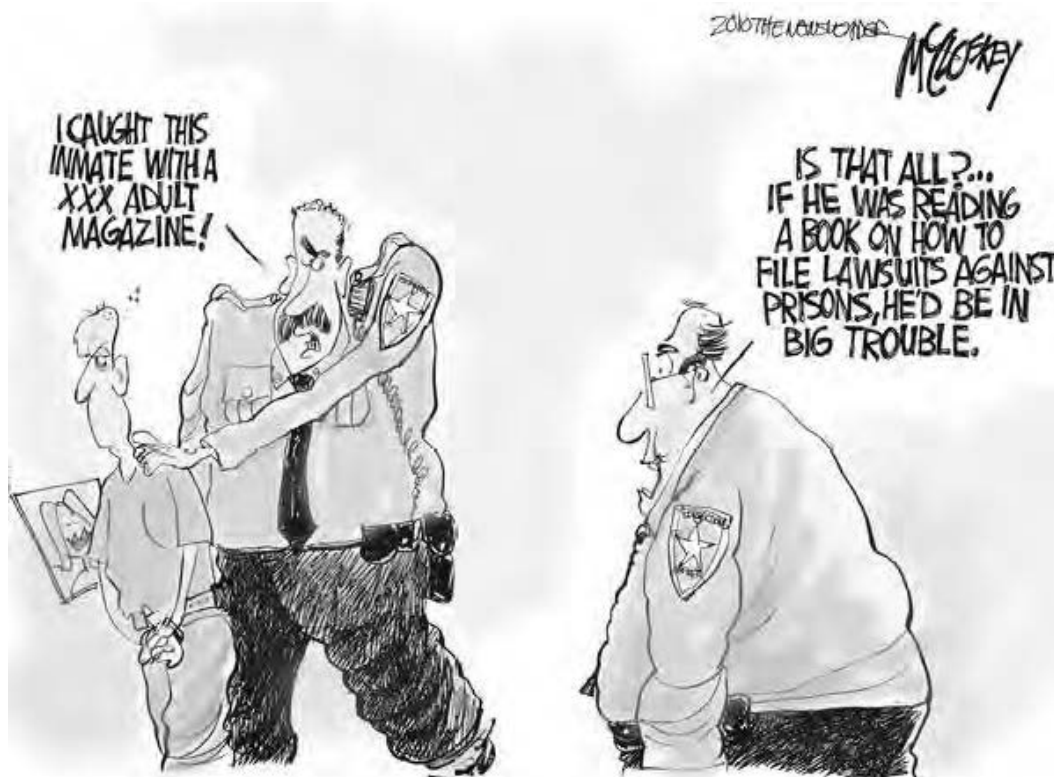
In contrast, if you lose a suit that is not a class action, you merely establish a bad “precedent.” Other prisoners can still raise the same legal issues in another suit, and they may be able to convince a different judge to ignore or overrule your bad precedent. Chapter Seven explains how precedent works.

This is why the *Federal Rules* requires that the people who bring a class action must be able to “fairly and adequately protect the interests of the class.” Protecting the interests of a class requires resources that are not available to prisoners, such as a staff of investigators, access to a complete law library, and the opportunity to interview potential witnesses scattered throughout the state. It is possible for a court to decide that your case meets all the requirements for a class action and appoint a lawyer to represent you and the class, but this is very, very rare.

A better approach might be to start a suit under Section 1983 for yourself and a few other prisoners and send copies to some lawyers to see if they’ll help. If a lawyer agrees to represent you or the court appoints a lawyer, your lawyer can “amend” your legal papers to change your suit into a class action.

> Chapter One, Section D, explains how to try and find a lawyer.

> Chapter Five, Section C, Part 3 explains how to ask the court to appoint a lawyer to represent you.



Cartoon by Jim McCloskey, *The News Leader*, Staunton, VA

# CHAPTER FIVE:

## How to Start Your Lawsuit

This chapter explains how to start a lawsuit under Section 1983 or *Bivens*. It explains what legal papers to file as well as when, where, and how to file them, and it provides forms and examples to guide your writing. It also explains what to do in an emergency when you need immediate help from the court.

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Section F .....	Signing Your Papers

The next chapter, Chapter Six, discusses what happens after a suit is started. Neither chapter gives all the rules or procedures for this kind of suit. These details are in the *Federal Rules of Civil Procedure*. The *Federal Rules* can be found in Title 28 of the *United States Code* (U.S.C.). There is an annotated version of the U.S.C., called the *United States Code Annotated* (U.S.C.A.), which gives short summaries of important court decisions which interpret each rule. The U.S.C. will only have the text of the *Federal Rules*, but the U.S.C.A. will give some explanation and cases and is probably more helpful to you. Chapter Seven explains how to use the U.S.C.A. and other law books.

The *Federal Rules* are not too long, and they are very important. When we refer to a specific rule in this Handbook, you should read the rule if you possibly can. The rules are revised every few years, so be sure to check the “pocket parts” in the back of the books in the U.S.C.A. or read a current copy of the paperback.

You may find reading the rules frustrating since they are written in very technical language, and even lawyers and judges can’t always agree on what they mean. For this reason, you may want to refer to a book that explains the *Federal Rules* and explains the court decisions that interpret the *Rules*. If your library has it, a good book to look up questions in is Wright and Miller’s *Federal Practice and Procedure*. You may also want to read the Advisory Committee notes which are printed in some editions of the *Rules*. These notes explain the purpose of the *Rules* and how they are supposed to work.

In addition to the *Federal Rules*, each U.S. District Court issues “Local Rules of Practice,” which are based on the *Federal Rules*. The Local Rules cover details of procedure that may be different in each particular district. You can get a copy from the clerk of the U.S. District Court for

each district, but you may have to pay a small fee. You may want to request these rules when you write the court to get forms which is explained in Section C. Look in Appendix M to find the address of your District Court. Or, if you have a friend or relative with internet access, they can download the rules for free from the specific District Court’s website. Some courts have “*pro se*” offices with lots of information to help people filing lawsuits on their own.

## A.

### When to File Your Lawsuit

If you are trying to stop an official policy or practice within the prison, you will, of course, want to act as quickly as possible. If a prison rule has been issued or an official decision has been made, you do not need to wait until the new procedure is put into effect. You can sue right away to block it as long as you have first completed all internal grievance processes.

If your goal is to get money damages for an abuse that has already ended, you may not be in such a hurry. But it is usually best to get your suit going before you lose track of important witnesses or evidence.

**TIP:** Before you start writing your complaint, request the following documents from your District Court:

- > The District Court’s Local Rules;
- > Forms for a Section 1983 *pro se* action;
- > *In Forma Pauperis* forms;
- > Forms for Appointment of Counsel.

### 1. Statute of Limitations

For suits asking for money damages, there is a “statute of limitations” which sets a deadline for how long you can wait after the events you are suing about occurred before you start your suit. If you do not file your case before this deadline, your case is “time-barred,” which means your case will be dismissed.

To meet a statute of limitations, you need to file your suit before the deadline. As long as you file on time, it is OK if your case lasts past the deadline. The deadline for a Section 1983 suit is determined by your state’s general personal injury statute. *Owens v. Okure*, 488 U.S. 235, 236 (1989). This same rule applies to *Bivens* actions brought by federal prisoners. In some states, the statute of limitations is as short as one year, but most states give two or more



years. Statutes of limitations can change, so always check current state statutes to make sure. To figure out the statute of limitations in your state, look in the “civil code” or “civil procedure” section of the state code (your state’s collection of laws).

If you expect to get out of prison fairly soon—for example, you already have a parole date—then you might be better off waiting until you are out before you start a suit that is only for damages. You will obviously have more freedom to get your suit together when you’re out, and you may have access to a more complete law library. You may be able to raise the money to hire a lawyer, and prison officials will have a harder time getting back at you for filing a suit. Also, most sections of the PLRA, in particular the exhaustion, and the limitation on damages for emotional injury, do not apply to suits filed by people who have been released from prison.

You do not have to worry about the statute of limitations if you are asking for an injunction. However, if you want an injunction you need to start and finish your suit while you are inside prison. If you do not, then your case may be dismissed as “moot,” which is explained in Chapter Six, Section D.

If you file your complaint within the statute of limitations, you can usually later file an “amended complaint” to add new claims that arose from the same factual situation that you alleged in your complaint even if the statute of limitations has run out. However, you may have trouble if you try to add new defendants after the statute of limitations has expired. Read Rule 15(c) in the *Federal Rules of Civil Procedure* to learn whether your new complaint will “relate back” to your first filing.

## 2. Exhaustion of Administrative Remedies

The PLRA states that “[n]o action shall be brought with respect to prison conditions ... by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C.A. § 1997e(a).

This provision is known as the “exhaustion” requirement, and it means that you have to use any available administrative remedy. This is usually the prison grievance system, but if some other administrative complaint system is designated for your kind of complaint, you must use that. Information about some states’ grievance procedures can be found in Appendix E.

You must complete exhaustion before you file your lawsuit. If you have not used your prison’s grievance system and you try to sue a prison official about anything they have done to you, the court will almost always dismiss your case. Not only do you have to file a grievance, but you also need to wait for a response, and appeal that response as far up as possible. If prison officials fail to respond in the amount of time stated on the grievance form, you may be able to treat that as a denial and appeal immediately. Read the grievance policy carefully and follow it to the letter.

It doesn’t matter if you believe your prison’s grievance system is inadequate, unfair, or futile. You may know that nothing is going to change by filing a grievance, but you still need to do it. Your case will be dismissed if you do not.

Very rarely, exhaustion may not be required if you can show that the grievance system was not “available” to you such that you were unable to file a grievance through no fault of your own. *Ross v. Blake*, 136 S. Ct. 1850 (2016). For instance, in *Tuckel v. Grover*, 660 F.3d 1249 (10th Cir. 2011), a court held that the administrative grievance system is not “available” when a guard threatens a prisoner with harm, such that they are afraid to use the system. If you are in SHU without access to grievance forms, or if a prison official told you not to file a grievance, the court may decide to excuse the exhaustion requirement in your case. However, courts are very skeptical of these claims and show very little mercy, so you must go through the grievance process unless you are truly unable.

The language of the PLRA says that the exhaustion requirement applies to cases regarding “prison conditions.” Although “prison conditions” sounds like it might only include claims about things like inadequate food or dirty cells, in a case called *Porter v. Nussle*, 534 U.S. 516 (2002), the Supreme Court held that “prison conditions” means everything that happens in prison, including single incidents of guard brutality or inadequate medical care. Under another important Supreme Court case, *Booth v. Churner*, 532 U.S. 731 (2001), you have to use the prison’s grievance system even if it does not offer the type of relief you would like to sue for. The prisoner in that case, Timothy Booth, wanted money damages and the administrative grievance system at his prison did not allow money damages. The Court decided that even though Mr. Booth’s prison administrative grievance system could not award him money damages, Mr. Booth was still forced to go through the entire administrative grievance process before coming to court to seek money damages.

In the U.S. Supreme Court Case, *Jones v. Bock*, 549 U.S. 199 (2007), the Court stated that prisoners do not need to show in their complaint that they have exhausted all grievance procedures. If defendants want to claim you did not exhaust and your case should therefore be dismissed, they must raise non-exhaustion in their answer to your complaint, or in a motion to dismiss or a motion for summary judgment. The Court also said that when a prisoner brings a case with both exhausted and unexhausted claims, the court must let the exhausted claims move forward without dismissing the entire suit. The court can only dismiss the unexhausted claims.

You should always try to be as detailed as possible in your grievances. You should mention all the issues and facts you want to sue about and try to comply with all the prison’s grievance rules and deadlines, even if they don’t make any sense.

To be safe, you should also name everyone who you think is responsible and who you may want to sue. If your prison grievance system requires you to name everyone and you don't, a court may not let you sue that person. Even if your prison grievance system does not require that you name the responsible people you still need to provide enough information for the prison to investigate. Often this means that you need to state in the grievance who did the things you complain about.

If the court does dismiss your case or one of your claims for "failure to exhaust," it will probably be a "dismissal without prejudice," which means that you can exhaust your remedies and then re-file as long as the statute of limitations has not expired. The dismissal will probably not be considered a "strike" against you (For more about "strikes" see Section C, Part 2 of this Chapter).

Exhaustion can take a while, and if the statute of limitations is running, it could expire or leave you with very little time to file suit after exhausting. In most jurisdictions, courts have held that the limitations period is "tolled" (suspended) during exhaustion, though they don't agree on why. Try to find out whether the statute of limitations is tolled for exhaustion in your jurisdiction and state. Federal courts usually "borrow" state law tolling rules. Generally, you should figure out when the last day you can file suit is and file well in advance of it. The exception is if you are going to be released before the statute of limitations expires. In that case it is worth waiting until after release so you can file without being subject to the PLRA.

## B.

### Where to File Your Lawsuit

You will file your lawsuit at the federal trial court, called a "district court." This is where all Section 1983 and *Bivens* cases start. Some states, such as Alaska, only have one district. Others have several. New York, for example, is composed of four districts: the Northern, Western, Eastern, and Southern Districts of New York. In total, there are 94 district courts. For more information on district courts, look at Chapter 7, Section A. What district you should file in is determined by the law of "venue." The main venue rule for a Section 1983 or *Bivens* lawsuit is Section 139(b) of Title 28 of the *United States Code*.

It is usually easiest to file in the district "in which the claim arose." That is, you should file in the district that includes the prison where your rights were violated. To determine what district this is and to get the address of the district court, locate your state in Appendix M and then check to see which district covers the county your prison is in.

You do not have to say in your complaint why you decided to file in a particular district. It is up to the defendants to challenge your choice of venue if they think you filed in the wrong place. However, the district court often will return your papers if the judge decides you sued in the

wrong court. For this reason, we have included a sentence on "venue" in our sample complaint in Section C, Part 1 of this chapter.

**TIP:** Always be sure to send the court clerk a letter stating that your address has been changed if you are transferred to a different prison or released while your case is going on.

## C.

### How to Start Your Lawsuit

As you will see, a lawsuit requires a lot of paperwork. There are two basic papers for starting any federal lawsuit: a summons and a complaint. They are described in Part 1, below.

If you have little or no money, you will also want to request that the court allow you to sue "*in forma pauperis*," which is Latin for "as a poor person." Filing that way gives you more time to pay the court filing fee. *In forma pauperis* papers are described in Part 2.

You will also probably want to ask the court to appoint a lawyer for you, and this is described in Part 3.

Eventually, you may want to submit declarations to present additional facts in support of your complaint. Declarations are described in Part 4 of this section.

Lawyers sometimes write legal papers a certain way, which is different from how people ordinarily write. But don't be intimidated! This does not mean that you need to use legal language or try to sound like a lawyer. It is best to just write simply and clearly. Do not worry about using special phrases or fancy legal words.

This chapter will include forms for some of the basic documents that you will need. There are additional forms in Appendix D and a sample complaint can be found in Appendix B. The forms and examples in this chapter show only one of the many proper ways to write each type of paper. Feel free to change the forms to fit your case. If you have access to copies of legal papers from someone else's successful Section 1983 lawsuit, you may want to follow those forms instead.

If you need a legal paper that is not covered by this chapter, Chapter Six, or Appendix B or D, you may want to see if your prison library has a book of forms for legal papers. Two good books of forms for federal suits are *Moore's Manual-Federal Practice Forms* and *Bender's Federal Practice Forms*. Some U.S. District Courts have special rules about the form your legal papers should follow—like what kind of paper to use, what line to start typing on and what size type to use. You will find these rules in the Local Rules you request from your district court. Some courts have more rules than others, and unfortunately the rules vary a lot from court to court.

Most district courts also have a packet of forms that it will send for free to people in prison who want to file actions *pro se* (without a lawyer). You can write a letter to the court clerk explaining that you are in prison and are requesting forms for a 42 U.S.C. § 1983 action. Most courts require you to use their forms if they have them. Even if your court does not, if you can get these forms, use them. They are the easiest way to file a complaint! With or without the forms, you will need to be sure to include all of the information described below. It is a good idea to request both the Local Rules and the Section 1983 forms before you start trying to write your complaint.

**PRACTICE TIP:** Some court forms may have a question asking if you have exhausted administrative remedies. Remember from Section A of this chapter that you do not have to plead exhaustion in your complaint. Unless your exhaustion situation is completely straightforward (you are positive you exhausted all remedies completely) it may be best to leave this part blank or write in it that it is not necessary to plead exhaustion; you will prove it if the defendants raise it. Two good cases on this issue are *Miles v. Corizon Med. Staff*, 766 Fed.Appx. 626 (10th Cir. 2019) and *Torns v. Mississippi Dept. of Corrections*, 301 Fed.Appx. 386 (5th Cir. 2008).

Generally, you should type if you can. Large 12- or 14-point type is best. Check with the local court rules to see if you need to use a particular type or length of paper. Type or write on only one side of each sheet and staple the papers together.

**REMEMBER:** the easiest way to write a complaint is to ask the court for a form and use that!

Try to follow the forms in this chapter and the Local Rules for your district. But don't let these rules stop you from filing your suit. Just do the best you can. If you can't follow all the rules, write the court a letter that explains why. For example, you can tell the court that you were not allowed to use a typewriter or you could not get the right paper. The courts should consider your case even if you do not use the correct form or you have to write by hand.

Be sure to put your name and address at the top left corner of the first page of your complaint and any motion you submit. All the prisoners who bring the suit should sign the complaint and every motion.

## 1. Summons and Complaint

You start a Section 1983 suit by mailing two legal documents called a "complaint" and a "summons" to the appropriate U.S. District Court. Both documents will also have to be "served" or given to the defendants. Service is very important and is explained in Section D of this chapter.

### The Complaint

The complaint is the most important document in your lawsuit. In it, you describe your lawsuit. You explain who you are (plaintiff), who you are suing (defendant or defendants), what happened (factual allegations), what laws give the court the power to rule in your favor (legal claims), and what you want the court to do (relief). If your complaint does not meet all the requirements for a Section 1983 or *Bivens* lawsuit, your suit could be dismissed at the very start.

Getting all the right facts down in your complaint can be difficult, but it is very important. Chapter Seven has some legal research and writing tips that may help you write your complaint.

Below we explain each part of a complaint. In Appendix B, you will find an example of a complaint in a made-up case. We recommend that you read the form complaint, explanation, and sample complaint before you try to write your own. Yours should be on a full sheet of paper (like the sample in Appendix B), not in two columns like the complaint form explained here.

You can copy the parts of this form that are appropriate for your suit and add your own facts to the italicized sections. If part of a paragraph here doesn't apply to your suit, don't include it. Each paragraph in your complaint should be numbered, starting with the number "1." The letters (A) through (J) in grey by each section should not be included in your complaint. They are just there for your reference, so that you will be able to tell which part of the complaint we are talking about in the explanation below.

**The Complaint Form:**

UNITED STATES DISTRICT COURT (A)

<p>Names of all the people: bringing the suit,</p> <p style="text-align: center;">Plaintiff[s],</p> <p style="text-align: center;">v.</p> <p>Names of all the people the suit is against, individually and in their official capacities,</p> <p style="text-align: center;">Defendant[s]</p>	<p style="text-align: center;"><b>COMPLAINT</b></p> <p>Civil Action No. _____</p>	

**I. JURISDICTION & VENUE (B)**

1. This is a civil action authorized by 42 U.S.C. Section 1983 to redress the deprivation, under color of state law, of rights secured by the Constitution of the United States. The court has jurisdiction under 28 U.S.C. Section 1331 and 1343 (a)(3). Plaintiff seeks declaratory relief pursuant to 28 U.S.C. Section 2201 and 2202. Plaintiff’s claims for injunctive relief are authorized by 28 U.S.C. Section 2283 & 2284 and Rule 65 of the Federal Rules of Civil Procedure.
2. The [name of district you are filing your suit in] is an appropriate venue under 28 U.S.C. Section 1391 (b)(2) because it is where the events giving rise to this claim occurred.

**II. PLAINTIFFS (C)**

3. Plaintiff, [your full name], is and was at all times mentioned herein a prisoner of the State of [state] in the custody of the [state] Department of Corrections. He/she is currently confined in [name of prison], in [name of City and State].

**III. DEFENDANTS (D)**

4. Defendant, [full name of head of corrections department] is the [Director/Commissioner] of the state of [state] Department of Corrections. He/she is legally responsible for the overall operation of the Department and each institution under its jurisdiction, including [name of prison where plaintiffs are confined].
5. Defendant, [warden’s full name] is the [Superintendent / Warden] of [name of prison]. He/she is legally responsible for the operation of [name of prison] and for the welfare of all the inmates in that prison.
6. Defendant, [guard’s full name] is a Correctional Officer of the [state] Department of Corrections who, at all times mentioned in this complaint, held the rank of [position of guard] and was assigned to [name of prison].
7. Each defendant is sued individually and in his [or her] official capacity. At all times mentioned in this complaint, each defendant acted under the color of state law.

**III. FACTS (E)**

8. State IN DETAIL all the facts that are the basis for your suit. You will want to include what happened, where, when, how, and who was there. Remember that the judge may know very little about prison, so be sure to explain the terms you use. Divide your description of the facts into separate short paragraphs in a way that makes sense—by time, date, or event.
9. You may want to include some facts that you do not know personally. It may be general prison knowledge or it may be information given to you by people who are not plaintiffs in your lawsuit. It is OK to include this kind of information, but you need to be sure that each time you give these kinds of facts, you start the paragraph with the phrase, “Upon information and belief.” If you include such facts, you must have a good-faith basis for believing them to be true.
10. You can refer to documents, affidavits, and other materials that you have attached at the back of your complaint as “exhibits” in support of your complaint. Each document or group of documents should have its own letter: “Exhibit A,” “Exhibit B” etc.

#### IV. LEGAL CLAIMS (F)

11. The [state the violation, for example, beating, deliberate indifference to medical needs, unsafe conditions, sexual discrimination] violated plaintiff [name of plaintiff]'s rights and constituted [state the constitutional right at issue, for example, cruel and unusual punishment, a due process violation] under the [state the number of the Constitutional Amendment at issue, like Eighth or Fourteenth] Amendment to the United States Constitution.

12. The plaintiff has no plain, adequate, or complete remedy at law to redress the wrongs described herein. Plaintiff has been and will continue to be irreparably injured by the conduct of the defendants unless this court grants the declaratory and injunctive relief which plaintiff seeks.

#### V. PRAYER FOR RELIEF (G)

WHEREFORE, plaintiff respectfully prays that this court enter judgment granting plaintiff:

13. A declaration that the acts and omissions described herein violated plaintiff's rights under the Constitution and laws of the United States.

14. A preliminary and permanent injunction ordering defendants [name defendants] to [state what it is you want the defendants to do or stop doing].

15. Compensatory damages in the amount of \$\_\_\_\_ against each defendant, jointly and severally.

16. Punitive damages in the amount of \$\_\_\_\_ against each defendant\_\_\_ and the amount of \$\_\_\_ against defendant \_\_\_\_\_.

17. A jury trial on all issues triable by jury

18. Plaintiff's costs in this suit

19. Any additional relief this court deems just, proper, and equitable.

Dated: \_\_\_\_\_(H)

Respectfully submitted,

*Prisoners' names and addresses*

#### VERIFICATION (I)

I have read the foregoing complaint and hereby verify that the matters alleged therein are true, except as to matters alleged on information and belief, and, as to those, I believe them to be true. I certify under penalty of perjury that the foregoing is true and correct.

Executed at [city and state] on [date]

*Signature*

Type name of plaintiff

#### Explanation of Form:

**Part (A)** is called the "caption." It looks strange, but it is how courts want the front page of every legal document to look. There is no one right way to do a caption, so you should check your court's Local Rules to see what they want. The top line is the name of the court. You will have already figured out where you are filing your lawsuit by reading Section B of this chapter, and referring to Appendix M. If you are suing in the Western District of New York, where many New York prisons are, you would insert those exact words "Western District of New York" where the blank is. In the example in Appendix B, the prisoners are suing in the Northern District of Illinois.

Inside the caption box, you need to put the full names of all the plaintiffs, and the full names and titles of all the defendants. Think carefully about the discussion in Chapter Four about who you can sue. Remember to write that you are suing them in their "official capacity," if you

want injunctive relief, and their "individual capacity" if you want money damages. The plaintiffs and defendants are separated by the letter "v" which stands for "versus" or "against." Across from the box is the title of your document. Each document you file in your case will have a different title. This is a "Complaint," so title it that. Under the title is a place for your civil action number. Leave that line blank until you are assigned a number by the court. You will get a number after you file your complaint.

**Part (B)** is a statement of the court's jurisdiction (paragraph 1) and venue (paragraph 2). Jurisdiction really means the "power" to decide the case. Federal courts are courts of "limited jurisdiction." This means they can only hear cases that Congress has said they should hear. For the purposes of a complaint, all you have to understand about jurisdiction is what statutes to cite. If you are filing a *Bivens* action instead of a Section 1983 action, say so in the first

sentence. All prisoners bringing Section 1983 or *Bivens* suits should cite 28 U.S.C. Section 1331 and 1343 (a)(3) in this paragraph. The other statutes you cite depend on what kind of case you are bringing

- > If you are seeking declaratory relief (see Chapter Four, Section A), you should include a sentence stating, “Plaintiffs seek declaratory relief pursuant to 28 U.S.C. Section 2201 and 2202.”
- > If you are seeking injunctive relief (see Chapter Four, Section B) you should include a sentence stating, “Plaintiff’s claims for injunctive relief are authorized by 28 U.S.C. Section 2283 & 2284 and Rule 65 of the *Federal Rules of Civil Procedure*.”
- > If you have included state law claims in your complaint, you should include a sentence stating, “The court has supplemental jurisdiction over plaintiff’s state law claims under 28 U.S.C. Section 1367.”
- > If you are including *Federal Tort Claims Act* claims (explained in Chapter 2, Section C) you should include a sentence stating: Plaintiffs’ *Federal Tort Claims Act* claims are authorized by 28 U.S.C. Section 1346.

**Part (C)** is a list of the plaintiffs in the lawsuit. This may just be you. Or you may have decided to file suit with other prisoners who are having or had similar problems. In this paragraph, you should tell the court who you are, and where you are incarcerated. If you are bringing an equal protection claim (described in Chapter Three), you may also want to include your race, ethnicity, or gender. Each plaintiff should get their own paragraph. If there are differences in each plaintiff’s situation then you need to note that. For example, one plaintiff could have been released since the event occurred. If you or any of the other plaintiffs were transferred from one facility to another since the events occurred, indicate where you were at the time of the event and where you are now.

**Part (D)** is a list of potential defendants and their titles. Those listed are just examples. You may sue more people or less people, so delete or add additional paragraphs in your complaint. The defendants may be all guards, or all supervisors. As explained above, you will need to put careful thought into who you are suing, and whether to sue them in their official or individual capacity. Only sue people who were actually involved directly or indirectly in violating your rights! You will also want to include a statement for each defendant of their role at the prison. Generally, this just means stating a defendant’s job duties. You must be sure to include the statement in the final paragraph of this section: that “at all times, each defendant acted under color of state law.” (See Paragraph 7 in the form complaint). As you may remember from Chapter Two, Section A, this is one of the requirements for Section 1983 actions.

**Part (E)** is the factual section of your complaint. It is very important and can be very rewarding if done well. It is your chance to explain what happened to you. In this section, you must be sure to state (or “allege”) enough facts to meet all the elements of your particular claim. This can be

a very big task. We would suggest that you start by making lists of all the claims you want to make and all the elements of each claim.

For example, in Chapter Three, Section F, Part 1, you learned that an Eighth Amendment claim based on guard brutality requires a showing that:

- > you were harmed by a prison official;
- > the harm caused physical injury (necessary for money damages under PLRA); and
- > the guard’s actions were not necessary or reasonable to maintain prison discipline.

This means that in your complaint, you will need to state facts that tend to show that each of these three factors is true. It is fine to state a fact that you believe is true but don’t know to be true through personal knowledge, as long as you write “upon information and belief” when stating it as a fact.

This is the section where you can refer to “exhibits” if you have any you want to include. However, you don’t have to include exhibits, and sometimes they can do more harm than good. If the only purpose of an exhibit is to establish a fact, you can just state (“allege”) that fact in the complaint. If you do want to include exhibits, the rest of this chapter will give you some idea of the types of documents you can submit as exhibits and how to number them. Then, when you write the factual section of your complaint, you can use phrases like “Refer to Exhibit A” to help illustrate and support your facts.

In the factual section, you must include facts that show how each defendant was involved in the violation of your rights. If you do not include facts about a certain defendant, the court will probably dismiss your claim against that person. (Refer to Chapter Seven for more legal research and writing tips.)

**Part (F)** is where you state your legal claims and explain which of your rights were violated by each defendant. You should have one paragraph for each individual legal claim. For example, if you feel that prison officials violated your rights by beating you and then denying you medical care, you would want to list these two claims in two separate paragraphs. If all the defendants violated your rights in all the claims, you can just refer to them as “defendants.” If some defendants violated your rights in one way, and others in another way, then refer to the defendants individually, by name, in each paragraph. Here is an example:

- > Defendant Greg Guard’s use of excessive force violated plaintiff’s rights and constituted cruel and unusual punishment under the Eighth Amendment of the United States Constitution.
- > Defendants Ned Nurse, Darla Doctor and Wilma Warden’s deliberate indifference to plaintiff’s serious medical needs violated plaintiff’s rights and constituted cruel and unusual punishment under the Eighth Amendment of the United States Constitution.

Paragraph 12 is only necessary if you are applying for declaratory or injunctive relief. You should include that sentence in any complaint that requests an injunction or a declaratory judgment.

**Part (G)** is where you tell the court what you want it to do. You can ask for a declaration that your rights were violated, an injunction, money damages, costs, and anything else the court thinks is fair. What is written there is just an example.

Include Paragraph 13, requesting a declaratory judgment, if that is at least part of the relief you want.

Include Paragraph 14, requesting injunctive relief, only if you are eligible for injunctive relief. You should review Chapter Four, Section B on injunctive relief before writing this part. If you request an injunction, spend some time thinking about what it is you actually want the prison to do or stop doing. Be creative but also specific. Make sure that the injunction you request is related to a continuing violation of your rights. In the example in Appendix B, Plaintiff Abdul does not ask for an injunction, because his rights were only violated once. Plaintiff Hey, however, is experiencing continuing violence, so it is appropriate for him to seek an injunction.

You need paragraphs 15 and 16 if you are requesting money damages. Review Chapter Four, Section C on damages before writing this section. You should think carefully about how much money you want in compensatory and punitive damages. If you cannot figure out how much to ask for, just request compensatory and punitive damages without including a dollar amount.

**Part (H)** is where you sign and date the complaint. You must always sign a legal document.

**Part (I)** is a “verification.” This part is optional. You do not have to verify a complaint, but it is best if you do. If you verify your complaint, you can use your complaint as evidence if the defendants file a motion for summary judgment against you (see Chapter Six, Section F) or to support your request for a temporary restraining order (see Section E of this chapter). When you verify a complaint, you are making a sworn statement that everything in the complaint is true to the best of your knowledge. Making a sworn statement is like testifying in court. If you lie, you can be prosecuted for perjury.

Remember, you need to tell the truth in an “unverified” complaint as well.

### Amended Complaints:

If you want to change your complaint after you have filed it, you can submit an “amended complaint” which follows the same form as your original complaint but with “Amended Complaint” as the title. An amended complaint must be about the same basic events. You might want to amend a complaint if you want to change who some of the defendants are, ask the court to do slightly different things, add or drop a plaintiff, or change your legal claims. You also might discover that you need to make some changes in order to avoid having your complaint dismissed. See Chapter Six, Section C.

When and how you can amend your complaint is governed by Rule 15 of the *Federal Rules of Civil Procedure*. You have a right to amend one time before the defendants submit an Answer (explained later in this Chapter) in response to your complaint or move to dismiss. You need the court’s permission, or the consent of the defendants, to submit a second amended complaint or to submit any amendment after the prison officials have filed an Answer or moved to dismiss. According to Rule 15(a) in the *Federal Rules of Civil Procedure*, the court should grant permission “freely... when justice so requires.”

You might also want to change your complaint to tell the court about something that happened after you filed the complaint. The guards might have beaten you again, taken your books, or put you in an isolation cell. This is called a “supplemental complaint.” Your right to file a supplemental complaint is governed by Rule 15(d) in the *Federal Rules of Civil Procedure*. The court can let you submit a supplemental complaint even if your original complaint was defective. The supplemental complaint also follows the same form as your original complaint but you will use “Supplemental Complaint” as the title.

### The Summons:

Along with your complaint, you must submit a “summons” for the court clerk to issue. The summons notifies the defendants that a lawsuit has been started against them and tells them how much time they have to answer to avoid having a judgment entered against them. A summons is much easier than a complaint.

You will notice that the caption (Part A) is the same as the one you did for your complaint. All you need to do is follow this form:

IN THE UNITED STATES DISTRICT COURT FOR THE (A)

Names of all the people bringing the suit,

Plaintiff[s],

v.

Names of all the people the suit is against,  
individually and in their official capacities,

Defendant[s]

**SUMMONS**

Civil Action No. \_\_\_\_\_

TO THE ABOVE-NAMED DEFENDANTS:

You are hereby summoned and required to serve upon plaintiffs, whose address is [your address here] an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service, or 60 days if the U.S. Government or officer/agent thereof is a defendant. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Clerk of the Court

Date: \_\_\_\_\_

Leave the date line under "Clerk of the Court" blank, the clerk will fill it out for you. We explain how this works in Section D of this chapter.

**2. In Forma Pauperis Papers**

As of December 2020, the federal courts charge \$350 for filing a lawsuit. There is also a \$52 "administrative fee" that applies to cases that don't get *in forma pauperis* status. These fees often increase each year, so be sure to try and check with the court before you file. They are usually posted on a court's website, so you can ask a family member or friend to check if that is easier. It costs more if you want to appeal the court's decision. If you can't afford these fees, you will usually be allowed to pay them in installments by proceeding "*in forma pauperis*," which is Latin for "as a poor person." If you are granted this status, court fees will be taken a little at a time from your prison account. Before the PLRA, the court could let you proceed without paying for filing or service. However, this is no longer possible. Now you must eventually pay the entire filing fee (but not service fees) even if you are allowed to proceed *in forma pauperis*. If you win your suit, the court will order the defendants to pay you back for these expenses.

The legal basis for suing *in forma pauperis* is Section 1915 of Title 28 of the *United States Code*. To request this status, you will need to file an Application to Proceed *In Forma Pauperis*. You must request this form from the district court clerk before filing your complaint because each court has a different application.

You will also need to file a Declaration in support of your application. The form for this Declaration will probably be sent to you in the *pro se* packet, but in case it is not, use the following example.

The court clerk should send you paperwork to fill out regarding your prison account. You will also need to file a certified copy of your prison account statement for the past six months. Some prisoners have experienced difficulty getting their institution to issue this statement. If you are unable to get a copy of your prison account statement, include in your Declaration an explanation of why you could not get the account statement.

Again, only use the example Declaration below if you cannot get the Declaration form required by your district court clerk's office. If you have to use this Declaration, copy it exactly, and fill in your answers, taking as much space as you need.

**NOTE:** This is only the Declaration that you send along with your Application to Proceed *In Forma Pauperis*; it is not the actual Application, which you need to request from your district court



**In Forma Pauperis Declaration:**

IN THE UNITED STATES DISTRICT COURT FOR THE (A)

-----X  
Name of the first plaintiff, et al.,  
  
Plaintiff [s],  
  
v.  
  
Name of the first Defendant, et al.  
  
Defendant[s]  
-----X

**DECLARATION IN SUPPORT OF MOTION TO  
PROCEED IN FORMA PAUPERIS**

Civil Action No. \_\_\_\_\_

I, \_\_\_\_\_, am the petitioner / plaintiff in the above entitled case. In support of my motion to proceed without being required to prepay fees or costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore, and that I believe I am entitled to redress.

I declare that the responses which I have made below are true.

1. If you are presently employed, state the amount of your salary wage per month, and give the name and address of your employer \_\_\_\_\_. **(B)**
2. If you are not presently employed state the date of last employment and amount of salary per month that you received and how long the employment lasted.
3. Have you received, within the past twelve months, any money from any of the following sources:
  - a. Business, profession or form of self-employment? YES\_\_\_ NO \_\_\_
  - b. Rent payments, interest or dividends? YES\_\_\_ NO \_\_\_
  - c. Pensions, annuities, or life insurance payments? YES\_\_\_ NO \_\_\_
  - d. Gifts or inheritances? YES\_\_\_ NO \_\_\_
  - e. Any form of public assistance? YES\_\_\_ NO \_\_\_
  - f. Any other sources? YES\_\_\_ NO \_\_\_

If the answer to any of questions (a) through (f) is yes, describe each source of money and state the amount received from each during the past months \_\_\_\_\_.

4. Do you have any cash or money in a checking or savings account? \_\_\_\_\_. If the answer is yes, state the total value owned. **(C)**
5. Do you own any real estate, stock, bonds, notes, automobiles, or other valuable property (including ordinary household furnishings and clothing)? \_\_\_\_\_. If the answer is yes, state the total value owned. \_\_\_\_\_.
6. List the person(s) who are dependent on you for support, state your relationship to those person(s), and indicate how much you contribute toward their support at the present time. \_\_\_\_\_.
7. If you live in a rented apartment or other rented building, state how much you pay each month for rent. Do not include rent contributed by other people. \_\_\_\_\_. **(D)**
8. State any special financial circumstances which the court should consider in this application.  
\_\_\_\_\_.

I understand that a false statement or answer to any questions in this declaration will subject me to the penalties of perjury.

I declare under penalty of perjury that the foregoing is true and correct.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

-----  
(your signature)

-----  
Date of Birth

-----  
Social Security Number

### Explanation of Form:

In **Part (A)**, you can use a slightly shortened version of the caption you used for your complaint. You only need to list the first plaintiff and defendant by name. The rest are included by the phrase “et al.” which is Latin for “and others.” You only need to add “et al.” if there is more than one plaintiff or defendant. However, be aware that if there is more than one plaintiff in your lawsuit, each plaintiff needs to file their own Application to Proceed *In Forma Pauperis* and Declaration.

In **Part (B)**, if you have never been employed, just say that. If you have a job in prison, state that.

In **Part (C)**, you should include any money you have in a prison account.

Some of these questions may sound weird or not apply to you—**Part (D)** for example. However, answer them anyway. Like for question 7, just state that you do not live in an apartment.

### Costs of Filing Your Lawsuit:

Although the judge does not have to let you sue *in forma pauperis*, they almost always will if you show you are poor and your suit has a legal basis. You do not need to be absolutely broke. Even if you are given *in forma pauperis* status, you will still have to pay some money to the court.

Section 1915(b)(1) of Title 28 of the *U.S. Code* directs the judge to compare your monthly deposits and the average balance for your prison account. The judge will see which amount is larger—your monthly deposits or your prison account’s average balance. Then, the judge will decide that you must pay twenty percent (20%) of the larger amount right away. If twenty percent is less than \$350 then Section 1915(b)(2) states that you must pay twenty percent of the monthly deposits to your account until the \$350 is paid. If the court decides you are not poor or your suit is “frivolous,” it will return your legal papers and you will have to find a way to pay the full amount.

There are lots of benefits to gaining *in forma pauperis* status. You may avoid having to pay witness fees for depositions and at trial. If you appeal, you may not have to pay the costs of preparing transcripts. In addition, some courts have used Section 1915 to appoint a lawyer to represent a prisoner in a Section 1983 suit and even to pay the lawyer’s expenses. This is discussed in Part 3 of this section.

Unfortunately, *in forma pauperis* status affects only a very small part of the expense of your lawsuit. It will not pay for postage or for making photocopies, and it will not cover the costs of “pretrial discovery,” which is discussed in Chapter Six, Part E. However, you may be able to recover these expenses from the defendants if you win.

### The Problem of Three Strikes:

The “three strikes provision” of the PLRA states:

*In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section [in forma pauperis] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.*

28 U.S.C.A. § 1915(g). This provision means that if you have had three complaints or appeals dismissed as “frivolous,” “malicious,” or “failing to state a claim,” you cannot proceed *in forma pauperis*. This means you will have to pay the entire filing fee up front, or your case will be dismissed. The only way to get around “three strikes” is to show you are in imminent danger of serious injury.

The PLRA is very specific about what dismissals count as strikes: these are dismissals for “frivolousness,” “maliciousness,” or “failure to state a claim.” Frivolous means that the court believes your suit is not serious or has no chance of winning. In legal terms, the court believes that your case has “no legal merit.” “Malicious” means that the court believes you are filing your suit only to get revenge or do harm to others, rather than uphold your rights. Failure to state a claim means that the court could not find any cause of action in your suit, which means that the facts you included in your complaint, even if true, do not amount to a violation of your rights.

A case dismissed on some other ground is not a strike unless the court dismissing it says that the action is frivolous, malicious, or failing to state a claim. A summary judgment is not a strike. A “partial dismissal”—an order that throws out some claims but lets the rest of the case go forward—is not a strike. A case that you voluntarily withdraw will usually not be considered a strike. A dismissal is not a strike if it is impossible to tell what the basis for the dismissal was. Dismissal in a habeas corpus action is not a strike.

Dismissals may be strikes even if you didn’t have *in forma pauperis* status for the case. Cases filed or dismissed before the PLRA was enacted have also been counted as strikes. It used to be the law that dismissals would not count against you until you exhausted or waived all your appeals, but that is no longer the case. In *Coleman v. Tollefson*, 575 U.S. 532 (2015) the Supreme Court held that strikes go into effect when they are entered.

The “three strikes provision” does not apply when a prisoner is in “imminent danger of serious physical injury.” “Imminent” means something is about to happen. To meet this requirement, the threatened injury does not need to be so serious as to be an Eighth Amendment violation. A risk of future injury is enough to invoke the imminent danger exception.

In conclusion, the “three strikes provision” means you will need to think more carefully about whether any litigation you may bring is well-founded and worth it. Once you are given a third strike, you will have to pay the entire filing fee of \$350 up front before you can file a new lawsuit.

### 3. Request for Appointment of Counsel

The *in forma pauperis* law, 28 U.S.C. § 1915(e)(1), allows a U.S. District Judge to “request an attorney to represent any person unable to afford counsel.” On the basis of this law, district judges have appointed lawyers for prisoners who filed Section 1983 suits on their own. Generally, when deciding whether or not to appoint a lawyer for you, the court will consider:

- > How well can you present your own case?
- > How complicated are the legal issues?
- > Does the case require investigation that you will not be able to do because of your imprisonment?
- > Will credibility (whether or not a witness is telling the truth) be important, so that a lawyer will need to conduct cross-examination?
- > Will expert testimony be needed?
- > Can you afford to hire a lawyer on your own?

These factors are listed in *Montgomery v. Pinchak*, 294 F.3d 492, 499 (3d Cir. 2002). In *Pruitt v. Mote*, 503 F.3d 647 (7th Cir. 2007), the court identified the question as whether, given the difficulty of the case, actually and legally, the specific plaintiff would be able to present it in a way that makes sense to the judge or jury without help from a lawyer.

Unfortunately, appointment is usually at the “discretion” of the judge, which means that if a judge doesn’t want to appoint you an attorney, they don’t have to, and you are unlikely to be able to challenge that by an appeal. On the other hand, there have been a few rare cases in which a court held that a judge abused this discretion. In *Greeno v. Daley*, 414 F.3d 645 (7th Cir. 2005), the court of appeals decided that the judge abused his discretion because the plaintiff’s case would likely require expert testimony and the plaintiff would have to serve process on seven defendants. Another good case like this is *Dewitt v. Corizon*, 760 F.3d 654 (7th Cir. 2014). In *Parham v. Johnson*, 126 F.3d 454, 461 (3d Cir. 1997), another court of appeals said that “where a plaintiff’s case appears to have merit and most of the aforementioned factors have been met, courts should make every attempt to obtain counsel.” In general, whether you will be appointed counsel has a lot to do with how strong your case looks to a judge. If the judge thinks your case has no merit, they will not want to appoint counsel.

The best procedure is to request appointment of counsel at the same time you request *in forma pauperis* status. If you can get an appointment of counsel form from the district court, use that form. If there is no form for this request in the *pro se* packet, use the following form:

IN THE UNITED STATES DISTRICT COURT FOR THE

-----X  
Name of the first plaintiff, et al., :  
Plaintiff[s],  
v.  
Name of the first defendant, et al.,  
Defendant[s]  
-----X

**MOTION FOR APPOINTMENT OF COUNSEL**

Pursuant to 28 U.S.C. § 1915(e)(1) plaintiff (or plaintiffs) moves for an order appointing counsel to represent them in this case. In support of this motion, plaintiff states:

1. Plaintiff is unable to afford counsel. He has requested leave to proceed *in forma pauperis*.
2. Plaintiff's imprisonment will greatly limit his ability to litigate. The issues involved in this case are complex and will require significant research and investigation. Plaintiff has limited access to the law library and limited knowledge of the law. **(A)**
3. A trial in this case will likely involve conflicting testimony, and counsel would better enable plaintiff to present evidence and cross examine witnesses.
4. Plaintiff has made repeated efforts to obtain a lawyer. Attached to this motion are ----- **(B)**

WHEREFORE, plaintiffs request that the court appoint -----, a member of the ----- Bar, as counsel in this case. **(C)**

-----  
Date

-----  
Signature, print name below

-----  
Address

**Explanation of Form:**

The caption at the top is the shortened form explained above, but here the title will be, "Motion for Appointment of Counsel."

In **Part (A)**, you can include any facts in this motion that you think will help convince the court that you need a lawyer. For example, you could add that you are in administrative segregation, that your prison doesn't have a law library, or that it takes weeks to get a book. If you have limited formal education, you could state that too.

In **Part (B)** you need to describe the evidence that you will attach to show that you have tried to get a lawyer. Copies of letters lawyers have sent you, or you have sent them (if not confidential), should be enough.

Courts generally enlist lawyers to represent prisoners from the court's own sources. If you want to suggest a particular lawyer, you can do so, but there is no guarantee the lawyer will be appointed or considered. Only include **part (C)**,

asking for a specific lawyer, if there is a lawyer who you know and trust. If you do have a relationship like this, list the lawyer's name and the state where they are admitted to practice law.

If the judge decides to appoint a lawyer for you, they do not have to appoint the one you suggest, but this may well be the easiest and most convenient thing for the judge to do. And it is obviously very important that the lawyer appointed for you be someone you can trust, who is clearly on your side.

If the court denies your request at that time, or simply ignores it, be sure to try again after the court has denied the prison's Motion to Dismiss your complaint and again after their Motion for Summary Judgment. These motions are explained in Chapter Six, Sections C and F. The court may be more willing to appoint counsel after it has ruled that you have a legitimate case. To renew your motion, use the same form as above.

## D.

### How to Serve Your Legal Papers

---

Besides sending your summons and complaint to the district court, you also have to “serve” both papers on each defendant in the case. The way to serve papers is explained in Rule 4 of the *Federal Rules of Civil Procedure*.

You can have a friend or family member serve papers for you, or you can pay the U.S. Marshals office or a professional process server to do it. One of the advantages to gaining *in forma pauperis* status is that Rule 4(c) of the *Federal Rules of Civil Procedure* directs that your complaint will be served quickly and without cost by the U.S. Marshals Service.

You should know that if you ask for *in forma pauperis* status at the start of your suit, your legal papers will not be served on the defendants—and so your suit will not begin—until the court decides whether you can sue *in forma pauperis*.

While most courts grant *in forma pauperis* status quickly and routinely, some courts take a long time. This is a serious problem. If you discover that the court in your district has long delays, or your motion to proceed *in forma pauperis* is denied, you could try one of the following methods to serve your complaint.

1. If you can raise the money, pay the \$350 filing fee yourself and have someone outside the prison serve your papers for free. Rule 4 of the *Federal Rules of Civil Procedure* describes how to do this and allows any person older than 18 who is not a party to the lawsuit to serve papers.
2. Another way to deal with the service of process fee is that you can ask the defendants to waive service under Rule 4(d) of the *Federal Rules of Civil Procedure*. You do this by mailing them a Request for Waiver of Service. Make sure you save copies of both the Notice of Lawsuit and Request for Waiver of Service of Summons (one document) and the Waiver of Service of Summons. When you send these documents, make sure to include a copy of your complaint, a stamped envelope or other prepaid means to return the waiver, and an extra copy of the request. If the defendant does not agree with your request to waive service, then you may later be able to recover the costs of personal service by a professional process service or a marshal.

The summons and complaint are the only documents you have to serve on defendants in this special way. However, it is very important to request the Local Rules from the district you plan to file in because different courts have different rules about filing and serving documents after the case has started. Different courts require different numbers of copies. You should follow the Local Rules whenever possible. In general, you will need to send the original of each document and one copy for each defendant to the clerk of the court for the U.S. District Court for your district. Also include two extra copies—one for the judge and one for the clerk to endorse (showing when and where it was filed) and return to you as your official copy. The court will have a marshal deliver a copy to each defendant unless you ask that someone else be appointed to deliver them.

Be sure to keep your own copy of everything you send the court in case your papers are lost in the mail or misplaced in the clerk’s office. If you cannot make photocopies, make copies by hand. If you are concerned about the safety of your documents, you might want to consider sending a copy of them to someone you trust on the outside. Try to always have a copy you can get access to easily.

## E.

### Getting Immediate Help from the Court

---

Ordinarily a federal lawsuit goes on for months or years before the court reaches any decision. But you may need help from the court long before that. A U.S. District Court judge has the power to order prison officials to stop doing certain things while the judge is considering your suit. The judge can do this by issuing a Temporary Restraining Order (TRO) or a Preliminary Injunction, or both.

Chapter Four, Section B explains when you are eligible for a preliminary injunction. If you decide to go ahead and try to get a preliminary injunction or a TRO, you will need to follow the instructions below.

If you think you meet all the tests for immediate help from the court, submit a “Temporary Restraining Order and Order to Show Cause for a Preliminary Injunction.” You can do this in one motion, and you can use this example:

IN THE UNITED STATES DISTRICT COURT FOR THE

----- X  
Name of first plaintiff in the case, et al.,  
Plaintiff[s],  
v.  
Names of first defendant in the case, et al.,  
Defendant[s]  
----- X

**ORDER TO SHOW CAUSE FOR A PRELIMINARY  
INJUNCTION & A TEMPORARY RESTRAINING**  
Civil Action No. \_\_\_\_\_

Upon the complaint, the supporting affidavits of plaintiffs, and the memorandum of law submitted herewith, it is:

ORDERED that defendants [names of defendants against who you are seeking a preliminary injunction] show cause in room \_\_\_ of the United States Courthouse, [address] on the \_\_\_ day of \_\_\_, 20\_\_\_, at \_\_\_ o'clock, why a preliminary injunction should not issue pursuant to Rule 65(a) of the *Federal Rules of Civil Procedure* enjoining the defendants, their successors in office, agents and employees and all other persons acting in concert and participation with them, from [state the actions you want the permanent injunction to cover].

IT IS FURTHER ORDERED that effective immediately and pending the hearing and determination of this order to show cause, the defendants [names of defendants against whom you want temporary relief] and each of their officers, agents, employers, and all persons acting in concert or participation with them, are restrained from [state the actions you want the TRO to cover].

IT IS FURTHER ORDERED that the order to show cause, and all other papers attached to this application, be served on the aforesaid Plaintiffs by [date].

[Leave blank for the judge's signature]

Dated: [leave blank]

United States District Judge

**Explanation of Form:**

If you want a TRO, include the parts of this form that are more darkly shaded. If you do not want a TRO and are only asking for a preliminary injunction leave the darker parts out.

You will notice that you are supposed to leave some blanks in this document. That is because it is an order that the judge will sign, and you are just writing a draft for the judge to make it easier. The judge will fill in the information about times and places.

The most difficult part of the document is where you have to fill in why you want a preliminary injunction and/or a TRO. You should limit what you ask for in the TRO to the things that the prison officials have to stop doing immediately. Include in your request for a preliminary injunction everything you want the court to order the prison staff to stop doing while the court is considering your case.

There are other documents you must send to the court. You will also need to give or send copies of all these documents to all of the defendants. The supporting documents you need to attach to both the court's and defendant's copies are:

> A declaration which states how you tried to notify the defendant that you're applying for a TRO, like by giving a copy of the documents to the warden. Or, your declaration can explain why you shouldn't have to notify the defendant. The declaration should also state in detail exactly what "immediate and irreparable injury, loss, or damage will result" if the court does not sign your TRO. The quote is from Rule 65 of the *Federal Rules of Civil Procedure*, which governs TROs and preliminary injunctions. A court will often consider an ongoing violation of your constitutional rights to be an "irreparable injury." Submit your declaration and your "TRO and Order to Show Cause" together with your summons, complaint, and *in forma pauperis* papers.

> You also need to submit a short "memorandum of law." A memorandum of law is a document in which you cite legal cases and argue that your situation should be compared to or distinguished from these cases. For this, you will need to do legal research and writing, explained in Chapter Seven. You will want to find cases similar to yours in which prisoners got TROs or preliminary injunctions. Cite a few cases that show that the officials' actions (or failures to act) are unconstitutional. Also explain how you meet the test for temporary relief.

If the judge signs your TRO and Order to Show Cause, the prison staff will be restrained for at least 10 days. They will have to submit legal papers to show why the court should not issue a preliminary injunction that will be in force through the suit. You will be sent a copy of their legal papers and get a chance to respond to them.

The judge should consider the legal papers submitted by both sides. They are not supposed to meet with lawyers representing prison officials unless they appoint a lawyer for you or order prison officials to bring you to court to argue your own case.

**REMEMBER:** Political pressure and media publicity may be as important as your suit itself, and they may help you win your suit. Send copies of your legal papers to prison groups, legislators, other public officials, newspapers, radio, TV, etc. Enclose a brief note explaining what your suit is about and why it is important.

Under Rule 65(c) of the *Federal Rules of Civil Procedure*, a plaintiff who requests a TRO or a preliminary injunction is supposed to put up money as “security” to repay the

defendants for any damages they suffer if it later turns out that they were “wrongfully enjoined or restrained.” This is up to the judge’s discretion, which means they will look at your situation and decide whether or not you should have to pay. Some judges will not make people who file *in forma pauperis* pay. In *Miller v. Carlson*, 768 F. Supp. 1331, 1340 (N.D. Cal 1991), for example, the plaintiffs were poor people who received AFDC (Aid for Families with Dependent Children) so the judge did not make them pay security. Look for more decisions in your circuit and cite those cases in your memorandum of law, and ask the court not to require security from you.

Declarations

To get immediate help you will need to submit the type of declaration described above. You may also want to use declarations from other prisoners in support of your request, or later in your case. A “declaration” is a sworn statement of facts written by someone with personal knowledge of those facts, which is submitted to the court in a certain form. The following is an example of what a declaration might look like in the case of *Hey v. Smith*, which we used as an example in the sample complaint found in Appendix B.

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS

```

-----X
Hey, et al.,
    Plaintiff[s],
      v.
Smith, et al.,
    Defendant[s]
-----X
  
```

**DECLARATION OF SAM JONES**  
Civil Action No. 09-cv-86

Sam Jones hereby declares:

I have been incarcerated at Illinois State Prison since 2005. Since March of 2006 I have been housed in Block D. I am currently in cell 203, which is directly next to cell 204. Walter Hey and Mohammed Abdul are currently in cell 204 and have been for several months.

On June 30, 2009, I saw Officer Thomas approach cell 204, and enter the cell. A few minutes later, I heard loud voices, a thud, and heard Walter Hey cry out. It sounded like He was in pain.

A few days later, I noticed Warden Smith standing in front of Hey and Abdul's cell, looking in. He remained there for approximately 5 minutes, and then left.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Colby, IL on July 15, 2009.

Sam Jones

If your suit has several plaintiffs, each of you should make out a separate statement of the details of all the facts you each know. This statement does not need to be “notarized.” Just put at the bottom: “I declare under penalty of perjury that the foregoing is true and correct. Executed on (date) at (city and state).” Then sign. This can also be called a “declaration under penalty of perjury.” It is acceptable in any federal court. States may have similar provisions which would be applicable in state courts.

The declaration is made and signed by the person who knows the relevant facts. This could be anyone: it does not have to be from you or another plaintiff. It is helpful to submit declarations from other people who were witnesses to events that you describe in your complaint or who know facts that you need to prove. These declarations may be important when prison officials move for summary judgment against you. Summary judgment is explained in Chapter Six, Section F.

You can submit declarations from plaintiffs or other people along with your complaint, but you do not need to, and it is frequently a bad idea to do so. Declarations and other evidence like letters from prison officials, copies of rules, and any other relevant documents will be most helpful later in your case if you need to defend against a motion.

### Importance of Declarations:

It is always helpful to gather declarations. If there are people who are witnesses to events that you describe in your complaint, or who know facts that you need to prove, ask them to fill out and sign a declaration, so you will have it when you need it.

Remember to include your Civil Action Number, if you have received one, on any papers filed after your initial complaint.

## F.

### Signing Your Papers

All documents that you submit to the court must be signed by you personally if you are not represented by a lawyer. Rule 11 of the *Federal Rules of Civil Procedure* requires that you sign your name, your address, your email address, and telephone number. Obviously, you might not have all of these, and it is fine to just include your name, prison ID number, and the address of your prison.



# CHAPTER SIX:

## What Happens After You File Your Suit

### A.

#### Short Summary of a Lawsuit

Filing your lawsuit is only the beginning. You must be prepared to do a lot of work after you file the complaint to achieve your goal. Throughout the suit, it will be your responsibility to keep your case moving forward or nothing will happen. This chapter will explain what may happen after you file the complaint and how to keep your case moving.

Once you send your complaint and summons to the court, the court clerk will give you a civil action number. You need to write this number in the case caption of all documents you file related to your case.

Next you will have to deal with a series of pretrial procedures. The PLRA creates several roadblocks for prisoners. You may have to deal with a waiver of reply and screening by the district court. Both of these issues are described in Section B of this chapter.

Once you make it through these two hurdles, a defendant has a certain period of time after they are served with your complaint to submit a motion to dismiss, a motion for a more definite statement (asking that you clarify some part of your complaint), a motion for an extension of deadline, or an answer. The amount of time depends on what process you used to serve your complaint and is explained in Rule 12 of the *Federal Rules of Civil Procedure*. Each defendant must eventually submit an answer, unless the judge dismisses your complaint in regard to that defendant. The answer admits or denies each fact you state. It can also include affirmative defenses.

When your case progresses to discovery, each side can get more information from the other through document requests, interrogatories, depositions, and other forms of pretrial discovery. Each side can submit additional declarations from people who have relevant information. Finally, each side can file motions for summary judgment which ask the judge to decide the case, or some part of the case, in its favor without a trial.

If the case goes to trial, you and your witnesses and defendants, and their witnesses, will testify in court and be cross-examined. Both sides may submit exhibits. If you request money damages, you can have that issue decided by a jury.

Whichever side loses in the district court after trial or summary judgment has a legal right to appeal to a U.S. circuit court of appeals. There are different courts of appeals in different parts of the country, listed in Appendix M. The appeals court may affirm (agree with) or reverse

(disagree with) the district court's decision. It may also remand, which orders the district court to hold a new trial or to take another look at a certain issue. The side which loses on appeal can ask the U.S. Supreme Court to review the case by filing a "petition for writ of certiorari." The Supreme Court will review this petition but can choose not to consider the case, and usually will only consider cases that it thinks raise a very important legal issue. Very, very few cases are accepted by the Supreme Court.

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This chapter of the Handbook will help you handle the key parts of pretrial procedure: the motion to dismiss, the motion for summary judgment, and pretrial discovery. It will also explain what to do if the court dismisses your complaint or grants the defendants summary judgment against you.

Unfortunately, a discussion of trial is beyond the scope of this handbook, and we cannot describe all pretrial procedures in detail or provide much in the way of strategy and tactics. But you can get a basic understanding of some of the procedures by reading the *Federal Rules of Civil Procedure* and this Handbook. Also, if your case goes to trial, the judge might appoint a lawyer to assist you.

Remember that much of the success of your suit depends on your initiative. If you don't keep pushing, your suit can stall at any number of points. For example, if the defendants haven't submitted an answer, a motion, or some other legal paper after the time limits set by the *Federal Rules of Civil Procedure*, submit a Declaration for Entry of Default. If the court accepts your Declaration, you will receive a Notice of Entry of Default from the court. You then submit a Motion for Judgment by Default. Forms and more information about these procedures are in Appendix D. You probably can't win a judgment this way, but you can keep the case moving.

## Cases Before Magistrate Judges

Many prisoner complaints are given to “magistrate judges.” A Magistrate Judge is a judicial officer who is like a federal judge. Their powers are limited in comparison to a district court judge, but they do much of the work in many prison cases.

Your district court judge can tell the magistrate to decide certain things in your case, like a discovery issue, scheduling, or requests for extensions. If you don’t like what the magistrate says, you can write “objections” to the action within ten days and file them at the district court. However, for decisions like these, it is very hard to get a magistrate’s decision changed.

A district court judge can also ask the magistrate to do important things in your case, like hold a hearing or “propose findings.” You can also file objections to these types of actions. You are more likely to get meaningful review by a district court judge on an issue of importance. Whether or not you file objections, the district court judge will read what the magistrate has written, and then adopt, reject, or modify the magistrate’s findings.

The prison officials may just submit an answer and then do nothing. If this happens, you should move ahead with discovery, which is explained in Section E of this chapter. This will make them realize you are serious about pushing forward your case and may get things moving. If your case stalls after discovery, you can move for summary judgment, which is explained in Section F of this chapter or ask the court to set a date for a trial.

Keep trying at every point to get the court to appoint a lawyer for you. If you don’t have a lawyer, don’t be afraid to keep moving forward *pro se*, which means “on your own behalf.” You can also try writing the court clerk and prisoners’ rights groups when you don’t know what to do next. The worst thing is to let your suit die.

## B.

### Dismissal by the Court and Waiver of Reply

Once you have filed your complaint, the court is required to “screen” it. This means the court looks at your complaint and decides, without giving you the chance to argue or explain anything, whether or not you have any chance of winning your case. The PLRA requires the court to dismiss your complaint right then and there if it:

1. is “frivolous or malicious;”
2. fails to state a claim upon which relief may be granted; or

3. seeks money damages from a defendant who is immune from money damages.

If the court decides that your complaint has any one of these problems, the court will dismiss it “*sua sponte*,” without the defendant even getting involved. “*Sua sponte*” is Latin for “on its own.”

Hopefully, if the court does dismiss your case, it will note that it is doing so “without prejudice” or “with leave to amend.” This is OK. It means you can change your complaint and fix whatever problems the court brings to your attention. If the court dismisses your lawsuit without saying anything about amending, you can ask the court for permission to fix your complaint by filing a Motion for Leave to Amend. An example is in Appendix D. A court should not deny you at least one chance to amend, and maybe more, if it is possible for you to fix whatever the court thinks is wrong with your complaint. *Shomo v. City of New York*, 579 F.3d 176 (2d Cir. 2009) is one case in which a court talks about how important it is to give *pro se* prisoners a chance to amend their complaint.

If you think the court made a mistake, instead of amending, you may want to quickly respond with a Motion for Reconsideration. In this short motion, all you need to do is tell the court why you think they got it wrong. If the error is legal, cite cases or other authority that support your position. If the error is factual, for example the judge wrote that you did not include anything in your complaint about one defendant’s personal involvement, point out where you do that in your complaint. Motions for reconsideration are meant for pointing out things the judge overlooked, not for restating arguments you already made that the court rejected. The time to submit a motion for reconsideration is set forth in courts’ Local Rules, and some are very short—like 14 days.

If your complaint was recommended to be dismissed by a magistrate judge, you can file “objections” to the magistrate’s recommendation which will be reviewed by the district court judge.

If neither of these approaches work, you can appeal. Procedures for appealing are laid out in Section G of this chapter.

The other hurdle created by the PLRA is something called a waiver of reply. A defendant can file a waiver of reply to get out of having to file an answer or other motions. When a defendant does this, the court reviews your complaint to see if you have a “reasonable opportunity to prevail on the merits.” If the court thinks you have a chance at winning your lawsuit, it will order the defendants to either file a Motion to Dismiss or an Answer. If the court doesn’t do this, you can file a motion asking the court to order the defendants to reply.

## C.

### How to Respond to a Motion to Dismiss Your Complaint

If you get through the first hurdles, the next legal paper you receive from the prison officials may be a Motion to Dismiss your suit. Motions to dismiss are based only on what is in your complaint, not on documents or other evidence from Defendants. Motions to dismiss are different than Motions for Summary Judgment, which is based on Defendants' version of the facts and usually happen after discovery. Rule 12(b) of the *Federal Rules of Civil Procedure* explains some of the grounds for a motion to dismiss. Defendants may give a number of reasons. One reason is sure to be that you did not "state a claim upon which relief can be granted," which means defendants think that what you are complaining about does not violate the law.

The motion to dismiss is a written request that the judge end your suit, without you getting the chance to get discovery, or go to trial. Attached to the motion will be a memorandum of law (also called a "brief") which gives the defendant's legal arguments for dismissing your suit. Each court has different rules about how long you have to respond to this motion, but usually you will have at least two or three weeks to file an opposition to the defendant's motion to dismiss. The opposition is a memorandum of law that responds to the defendant's arguments. If you need more time, send the judge a letter explaining why and asking for a specific number of extra weeks. If you can, check the Local Rules to see if the court has any specific requirements for time extensions. If you cannot find any information, just send the letter and send a copy to the prison officials' lawyer.

Chapter Seven explains in more detail how to research and write your opposition, so be sure to read it before you start working. After you read the suggestions in Chapter Seven, you may want to try to read all of the cases that the defendants use in their memo. If you read these cases carefully, you may come to see that they are different in important ways from your case. You should point out these differences. You can also try to find cases the defendants have not used that support your position.

To support their motion to dismiss, the prison officials can make all kinds of arguments which have been dealt with in other parts of this Handbook. They may say you failed to exhaust administrative remedies (see Chapter Five, Section A), or that you cannot sue top prison officials who did not personally abuse you (see Chapter Four, Section D). They may claim you sued in the wrong court ("improper venue"—see Chapter Five, Section B) or that your papers weren't properly served on some of the defendants (see Chapter Five, Section D). They may say the issues in your lawsuit are now "moot" (see Section D of this chapter).

The prison officials may also argue against your constitutional claims. They might say that you failed to state a proper claim because the actions you describe do not deny you due process or equal protection, or are not cruel and unusual punishment. Your memorandum of law should respond to whatever arguments the government makes.

Unfortunately, writing a memorandum of law requires quite a bit of legal research and writing. Because time to do this research might be an issue for you, you can prepare for this memorandum before you even receive the motion to dismiss. Research cases that are both helpful and harmful to your case. There is a chance that defendants will use some of them and you will have already done a lot of your research.

Defendants might point out something that is wrong with your case that you want to fix, instead of defending against the motion to dismiss. Under rule 15(a) of the *Federal Rules of Civil Procedure*, you have the right to amend your complaint once without anyone's permission as long as you do so within twenty-one days of serving it or within twenty-one days of defendants answering or filing a motion to dismiss. If these time periods have passed, or if you have already amended once, Rule 15 allows you to ask the defendants to consent to your filing an amended complaint or ask the court for permission to amend. Courts are supposed to give you permission "freely" when "justice so requires." Ask for consent first, and if you don't get it, file a Motion for Leave to Amend in which you describe your proposed changes or attach the proposed amended complaint.

One thing you will have going for you is that in considering the defendant's motion to dismiss, the judge must assume that every fact you stated in your complaint is true. The judge must then ask: if all those facts are true, is it plausible that the defendants violated your rights? If any combination of the facts stated in your complaint might qualify you for any form of court action under Section 1983, then the judge is legally required to deny the prison officials' motion to dismiss your complaint. In making this decision, courts are supposed to treat unrepresented parties, including prisoners, more leniently than people who are filing a suit with a lawyer. In considering a motion to dismiss, a *pro se* complaint should be held to less strict standards than a complaint drafted by a lawyer.

It is important to remember in writing your opposition that defendants have to deal with the facts as you put them in your complaint. For example, if you stated in your complaint that you were "severely beaten" by two guards, yet the defendant says in his motion to dismiss that an "inadvertent push" doesn't amount to cruel and unusual punishment, you should tell the court in your memo that you did not allege an "inadvertent push," you alleged a severe beating, and that is what the court has to assume is true.

Sometimes defendants support motions to dismiss by submitting factual materials such as affidavits, declarations, or documents. You should ask the court not to consider

this “extrinsic evidence,” since a motion to dismiss is supposed to consider only the adequacy of the complaint.

Send three copies of your memo to the court clerk (one will be returned to you to let you know they accepted your papers) and one copy to each defendant’s lawyer. Usually, all the prison officials are represented by one lawyer from the office of the attorney general of your state. The name and office address of that lawyer will be on the motion to dismiss.

In some cases, after the parties exchange memoranda of law, attorneys for both sides appear before the judge to argue for their interpretation of the law. However, when dealing with a case filed by a prisoner *pro se*, most judges decide motions based only on the papers you send in, not on arguments in person. In the rare case that a judge does want to hear argument, many federal courts now use telephone and video hook-ups or hold the hearing at the prison. It is quite hard to get a court to order prison administrators to bring you to court, because the PLRA requires that courts use remote access techniques “to the extent practicable.”

**NOTE:** If you defeat the prison officials’ motion to dismiss your complaint, ask again for appointed counsel. Follow the procedure in Chapter Five, Section C, Part 3. The judge is more likely to appoint a lawyer for you at this stage of your case. You may also want to reach out to lawyers to try to get representation. Lawyers may be more likely to agree to help you once you have gotten past a motion to dismiss.

If the judge does decide to dismiss your complaint, they must send you a decision stating the grounds for their action. The judge may or may not dismiss your case with leave to amend. Either way, you can appeal from that decision. Section G of this chapter explains what else you can do if the court dismisses your complaint.

Instead of (or before) a Motion to Dismiss, you may receive a motion for extension of time from the defendants. A motion for extension of time (or “enlargement”) gives the other side more time to file an answer or motion. One extension is usually automatic. If your situation is urgent, write the court to explain the urgency and ask that the prison officials not get another extension.

You may also receive a letter or motion asking the court to treat your case as related to another previously filed case. Check out what the other suit is about, who is bringing it, and what judge is considering it. This could be a good or bad thing for you, depending on the situation. If you think you’d be better off having your suit separate, submit an affidavit or memorandum of law in opposition to the motion to relate. Say clearly how your suit is different and why it would be unfair to join your suit with the other one. For example, the facts might get confused.

## D.

### The Problem of Mootness

One argument that prison officials often raise, either in their motion to dismiss or later on, is that you have no legal basis for continuing your suit because your case has become “moot.” This is only a problem if you are asking for injunctive or declaratory relief. If you are asking for money damages, your case cannot become moot.

A case may be moot if, after you have filed your suit, the prison stops doing what you complained about, releases you on parole, or transfers you to a different prison. The prison officials can ask the court to dismiss your case as moot, saying there is no longer anything the court can order the prison to do that would affect you.

For example, imagine you sue the prison for injunctive relief because they are not providing medical care for your diabetes. In your suit, you ask the court to order the prison to provide you with adequate medical care in the future. Then, after you file your complaint, the prison starts to provide you with medical care. The prison can argue that your case is moot because the only remedy you asked for has already been given to you by the prison.

The good news is that the defendants will have the burden of proving that the case is really moot. This is a heavy burden, since they must show that there is no reasonable expectation that the violations of your rights will happen again. There are five arguments you may be able to make to defeat the prison’s efforts to get your case dismissed because of mootness:

> If you have asked for money damages, your suit can never be moot. You have a right to get money for injuries you suffered in the past as long as you sue within the period allowed by the statute of limitations. This does not just apply to physical harm: if you have been denied your constitutional rights, it is an “injury” for which you might be able to get money damages. For more on damages, read Chapter Four, Section C.

> A violation of your rights may not be moot if it is “capable of repetition, but evading review.” In other words, the court will allow you to continue your case in a situation where the illegal action will almost always end before the case could get to court. Imagine that a prisoner wants to sue to force the prison to improve conditions in administrative segregation. By the time the prisoner actually gets into court, however, they have been moved back to general population. This case should not be dismissed as moot because it is “capable of repetition,” meaning they could get put in administrative segregation again, and it “evades review” because they might never stay in segregation long enough to get to trial.

To meet this test, the condition must be reasonably likely to recur. Most courts have not applied this exception when a prisoner is transferred to another

prison, since it is only “possible” and not “likely” that he will be transferred back. *Oliver v. Scott*, 276 F.3d 736, 741 (5th Cir. 2002). Transfer may not moot your case, however, if the department or officials whom you sued are also in charge of the new prison. *Scott v. District of Columbia*, 139 F.3d 940, 942 (D.C. Cir. 1998).

> Sometimes, being transferred away from where the violation happened does not make your suit moot. Courts have found that a state-wide policy that violated your constitutional rights in one facility may still violate your rights in the new facility. See *Pugh v. Goord*, 571 F.Supp.2d 477 (S.D.N.Y. 2009) and *Oliver v. Scott*, 276 F.3d 736 (5th Cir. 2002).

> If you get a lawyer and file a “class action” suit on behalf of all the prisoners who are in your situation and the class is certified, your suit will not be moot as long as the prison continues to violate the rights of anyone in your class. If you are paroled or transferred, the court can still help the other members of your class. Section F of Chapter Four discusses class action lawsuits. Remember that it is very hard to bring a class action without an attorney.

> If any negative entries have been put in your prison records because of your suit or the actions you are suing about, you may be able to avoid mootness by asking the court to order the prison officials to remove (or “expunge”) these entries from your records. The federal courts have held that a case is not moot if it could still cause you some related injury. If you can show that there are documents in your prison records which could affect you in the future, asking the court to expunge them can keep your case from becoming moot. A few cases good cases to read on this issue are *Anyanwutaku v. Moore*, 151 F.3d 1053, 1057 (D.C. 1998), *Kerr v. Farrey*, 95 F.3d 472, 476 (7th Cir. 1996) and *Dorn v. Mich. Dep’t of Corr.*, 2017 WL 2436997 (W.D. Mich. June 6, 2017).

> You can argue that just because the prison has stopped doing something illegal or has reversed a policy does not mean that the court can’t review the case. You may have a strong argument if you can convince the judge that the prison has just changed course to avoid litigation. You can quote the U.S. Supreme Court that “voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case.” *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979). This argument against mootness has been successful in several Section 1983 claims brought by prisoners. Two examples to read are *Burns v. PA Dep’t of Corrections*, 544 F.3d 279 (3d Cir. 2008) and *Aref v. Holder*, 953 F. Supp. 2d 133 (D.C. Cir. 2013). The prison officials must show that there is no reasonable expectation that the violations will recur. They must also show that the relief or changes in policy that they put in place have completely fixed the constitutional violation, and the effects it may have had.

## E.

### Discovery

If you have made it past the defendant’s motions for dismissal, there is a better chance that the court will appoint an attorney to assist you. If so, you can use this section of the Handbook to understand what your lawyer is doing, to help them do it better, and to figure out what you want them to do. If you do not have a lawyer, this section will help you get through the next stage on your own—but what you will be able to do will be more limited.

The next major activity in your suit will be discovery. Rules 26-37 of the *Federal Rules of Civil Procedure* explain “discovery” tools that both parties in a lawsuit can use. You should begin by reading through those rules. Some of the rules, like Rule 26, set out different requirements for *pro se* prisoners than for others. It is also very important to read the corresponding Local Rules from the district your case is in, as many courts have made important changes to the federal rules.

#### The Importance of “Discovery”

- > Uncover factual information about the thing that happened to you.
- > Collect evidence to use at “summary judgment” or your trial.
- > Force the defendants to explain their version of the facts and provide you with the evidence they plan to rely on.

Discovery helps you to get important information and materials from the other party before the case goes to trial. If you don’t have a lawyer at this stage, you will need to spend a lot of time thinking about what facts you will need to prove at trial and coming up with a plan about how to find out that information. The Southern Poverty Law Center’s litigation manual for prisoners, *Protecting Your Health & Safety*, has a very helpful chapter on developing discovery strategies. You will find information on ordering that book in Appendix K.

#### 1. Discovery Tools

There are four main discovery tools: depositions, interrogatories, production, and inspection. This Handbook gives you only a brief introduction to these techniques. The details of how they work are in the *Federal Rules of Civil Procedure*.

A deposition is a very valuable discovery tool. You meet with a defendant or a potential witness, that person’s lawyer, and maybe a court reporter. You or your lawyer ask questions which the “deponent” (the defendant or witness you are deposing) answers under oath. Because the witness is under oath, they can be prosecuted for

perjury if they lie. The questions and answers are tape-recorded or taken down by the stenographer.

A deposition is very much like testimony at a trial. In fact, you can use what was said at a deposition in a trial if the deponent (1) is a party (plaintiff or defendant), (2) says something at the trial which contradicts the deposition, or (3) can't testify at the trial. Despite these benefits, you should BEWARE: a deposition is very hard to arrange from in prison because it can be expensive and involves a lot of people. If you want to take more than ten depositions, you will have to ask the court for permission.

Some courts don't allow *pro se* prisoners to take depositions. If you have no lawyer, you might try a "Deposition Upon Written Questions" (*Federal Rules of Civil Procedure* Rule 31). You submit your questions in advance, as with interrogatories, but the witness does not send back

written answers. The witness has to answer in their own words, under oath, before a stenographer who writes down the answers.

Interrogatories are written questions which must be answered in writing under oath. Under *Federal Rules of Civil Procedure* Rule 33, you can send up to 25 questions to each of the other parties to the suit. If you need more than 25, you can ask the court for permission to serve more.

**PRACTICE TIP:** you may want to start discovery with document requests, as they tend to provide the most helpful evidence. Interrogatory responses are written by defense lawyers and are frequently less helpful.

You can use the following example to write interrogatories of your own.

IN THE UNITED STATES DISTRICT COURT FOR

-----X  
Name of first plaintiff in the case, et al.,  
Plaintiff[s],  
v.  
Names of first defendant in the case, et al.,  
Defendant[s]  
-----X

**PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANTS**  
Civil Action No. \_\_\_\_\_

In accordance with Rule 33 of the *Federal Rules of Civil Procedure*, Plaintiff requests that Defendant [Defendant's name] answer the following interrogatories under oath, and that the answers be signed by the person making them and be served on plaintiffs within 30 days of service of these interrogatories.

If you cannot answer the following interrogatories in full, after exercising due diligence to secure the information to do so, so state and answer to the extent possible, specifying your inability to answer the remainder and stating whatever information or knowledge you have concerning the unanswered portions.

These interrogatories shall be deemed continuing, so as to require supplemental answers as new and different information materializes.

[List your questions here...and be creative and as detailed as possible. ]

> If you have a guard brutality case, you may want to ask questions about how long the specific guard has worked at the prison, where they are assigned, what their duties are, what they remember of the incident, what they wrote about the incident in any reports, whether they have ever been disciplined, and more.

It is also a good idea to take the opportunity to try to find out who else might be a helpful witness. You could ask the defendant to:

> State the name and address or otherwise identify and locate any person who claims to know of facts relevant to the conduct described in these interrogatories.

### **COST OF DISCOVERY \$:**

Although interrogatories are fairly cheap, other forms of discovery require money. If the court lets you tape record depositions instead of hiring a certified court reporter (*Fed.R.Civ.P.* Rule 30(b)(2)), you still need a typed transcript of the entire tape if you want to use any of it at the trial of your suit. Discovery expenses are included in the costs you will be awarded if you win, but federal courts generally refuse to advance money for discovery. You will have to find some other way to pay for transcription.

You can also ask for documents. For example, you could include the following as a question:

> Identify and attach a copy of any and all documents relating to prison medical center staff training on the proper treatment of prisoners with hepatitis C.

or

> Identify and attach a copy of any and all documents showing who was on duty in cell block B at 9 p.m. the night of August 18, 2009.

At the end of your questions, you should date and sign the page and type your full name and address below your signature.

A person who is just a witness, but not a party, cannot be made to answer interrogatories. However, they can voluntarily answer questions in an affidavit. To get an affidavit from someone in another prison, you may need a court order.

The third discovery tool is “Document Production.” If you want to read documents such as letters, photos, or written rules that the prison officials have, ask for production of those items under *Federal Rules of Civil Procedure Rule 34*. There are no limits to the number of document requests you can make, but you should be reasonable in what you ask for, or the defendants will object. You can use the following form:

IN THE UNITED STATES DISTRICT COURT FOR THE

-----X  
Name of first plaintiff in the case, et al.,  
in the case, et al  
  
Plaintiff[s],  
v.  
Names of first defendant in the case, et al.,  
Defendant[s]  
-----X

**PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS**  
Civil Action No. \_\_\_\_\_

Pursuant to Rule 34 of the *Federal Rules of Civil Procedure*, Plaintiff requests that Defendants [put defendants' full names here] produce for inspection and copying the following documents:

[List the documents you want here, some examples follow]

1. The complete prison records of all Plaintiffs.
2. All written statements (originals or copies) identifiable as reports about the incident on August 18, 2009, made by DOCS employees, and/or witnesses.
3. Any and all medical records of Plaintiff from the time of his incarceration in Fishkill Correctional Institution through and including the date of your response to this request.
4. Any and all rules, regulations, and policies of the New York Department of Corrections about treatment of prisoners with diabetes.

Dated: \_\_\_\_\_

Signed: \_\_\_\_\_

You can also get inspection of tangible things, like clothing or weapons, and a chance to “copy, test, or sample” them. And you have a right to enter property under the defendants' control,—such as a prison cell, exercise yard or cafeteria, to examine, measure, and photograph it. Defendants may object to these types of requests as creating a security concern. If they do, this can give you a nice reason to renew your request for appointment of a lawyer to represent you.

You can use any combination of these techniques at the same time or one after the other. If you have new questions or requests, you can go back to a defendant for

additional discovery. You can also use informal investigation to find out important information. You can talk to other prisoners and guards about what is going on.

You can use state and federal *Freedom of Information Act* and *Public Records Act* laws to request prison policies and information. Each state has different rules about what information is available to the public. Of course, prison officials may use various tactics to interfere with your investigation. Try to be creative in dealing with these problems.

## 2. What You Can See and Ask About

The *Federal Rules* puts very few limits on the kind of information and materials you can get through discovery and the number of requests you can make. *Federal Rules of Civil Procedure* Rule 26(b)(1) states that you can get discovery about anything “relevant” to your case and “proportional to the needs of the case.” “Relevant” means somehow related to what you are suing about. You have a legal right to anything which is in any way “relevant” to any party’s claim or defense. This includes anything relevant to any defense offered by the prison officials.

You will need to spend some time thinking through what you actually need to prove your case, and what kind of evidence you may be able to get. Describe what you want as specifically as possible in all your discovery requests, or defendants are likely to object.

A judge will decide whether a discovery request is proportional by considering the importance of the issues in your lawsuit, the amount of money at issue, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

You can demand information that the rules of evidence would not allow you to use at a trial so long as the information “appears reasonably calculated to lead to the discovery of admissible evidence.” This just means that the information could possibly help you to find other information that you could use at trial.

The people you are suing must give you all the “non-privileged” information that is available to them. (The issue of “privilege” is explained below.) If you sue a top official, discovery includes what that person’s subordinates know and the information in records available to him. This could possibly even include information that is only held by a party’s attorney, if you can’t get that information any other way. *Hickman v. Taylor*, 329 U.S. 495 (1947).

Defendants may try to get out of having to deal with your requests by arguing that they are not proportional under the reasons listed above. They may argue that your request would cost the prison a lot of money and wouldn’t be very helpful to you. However, as one judge explained, “the federal courts reject out of hand claims of burdensomeness which are not supported by a specific, detailed showing, usually by affidavit, of why weighing the need for discovery against the burden it will impose permits the conclusion that the court should not permit it.” *Natural Resources Defense Council v. Curtis*, 189 F.R.D. 4, 13 (D.D.C. 1999). In other words, the defendants can’t avoid discovery by just stating it will be too difficult. They have to really prove it.

Even when defendants can show that producing the requested information would be very expensive and difficult, the court may not let them off the hook if the information is truly essential for your lawsuit. For example, in *Alexander v. Rizzo*, 50 F.R.D. 374 (E.D. Pa. 1970), the court ordered a police department to compile information

requested by plaintiffs in a Section 1983 suit even though the police claimed it would require “hundreds of employees to spend many years of man hours.” The burden and expense involved was not “undue” because the information was essential to the suit and could not be obtained any other way.

## 3. Privilege

You may not be able to discover material that is protected by a legal “privilege,” such as the attorney-client privilege. A “privilege” is a rule that protects a certain type of information from discovery. There are several types of privileges, including the attorney-client privilege, attorney work product privilege, and the husband-wife privilege. Explaining all these privileges is too complicated for us to attempt here. However, it is important for you to know that prison officials cannot avoid discovery of relevant information merely by claiming it is “confidential.” *Beach v. City of Olathe, Kansas*, 203 F.R.D. 489 (D. Kan. 2001). If the prison officials claim information is privileged, they have the burden of identifying the specific privilege at issue and proving that the particular information is in fact privileged. A judge may order the privileged information to be “redacted” from the documents provided to you. This means that information covered by any privilege mentioned above will be blacked out.

Information which would be considered “confidential” under state law may still have to be disclosed if, after examining it privately (“in camera”), the judge decides it is very important for your suit. *King v. Conde*, 121 F.R.D. 180, 190 (E.D.N.Y. Jun. 15, 1988). If the material is confidential, the judge may keep you from showing the information to anyone else or using it for any reason besides your suit.

## 4. Some Basic Steps

Usually, in a prison suit, you start with document production and interrogatories and then move to depositions. The documents you get in response to a motion for production can lead you to other useful documents, potential witnesses, and people you might want to depose. Some of the kinds of documents that have been obtained from prison officials include: policy statements, prison rules and manuals, minutes of staff meetings, files about an individual prisoner (provided they sign a written release), and incident reports filed by prison staff.

You can use interrogatories to discover what kinds of records and documents the prison has, where they are kept, and who has them. This information will help you prepare a request for production. Only people you have named as defendants can be required to produce their documents and records. Wardens, associate wardens, and corrections department officials have control over all prison records. If your suit is only against guards or other lower-level staff, however, you may have to set up a deposition of the official in charge of the records you need and ask the court clerk to issue a “subpoena” which orders the official to bring those records with him to the deposition. See *Federal Rules of Civil Procedure* Rule 45.



That said, as mentioned before, some courts do not allow prisoners to take depositions.

Interrogatories are also good for statistics which are not in routine documents but which prison officials can compile in response to your questions. Examples are the size of cells, the number and titles of books in the library, and data on prisoner classification, work release, and punishments. If your suit is based on brutality or misbehavior by particular prison employees, you can also use interrogatories to check out their background and work history, including suits or reprimands for misbehavior. If you are suing top officials for acts by their subordinates, you should find out how responsibilities relevant to your case are assigned within the prison and the Corrections Department and how, if at all, these responsibilities were fulfilled in your case.

## 5. Some Practical Considerations

Interrogatories have two big drawbacks:

1. you can use them only against people you have named as defendants, and
2. those people have lots of time to think out their answers and go over them with their lawyers.

As a result, interrogatories are not good for pressing officials into letting slip important information they're trying to hide. You won't catch them giving an embarrassing off-the-cuff explanation of prison practices or making some other blunder that you can use against them.

Depositions are much better for this purpose. You can take the deposition of any person with relevant knowledge. The deponent can't know the questions in advance and must answer them right away. Regular depositions, however, are

much less practical than interrogatories for a prisoner suing *pro se*. Judges are unlikely to order the authorities to set up a deposition within the prison or allow you to conduct one outside.

## 6. Procedure

The procedure for getting interrogatories and document production is fairly simple. Just send your questions and your requests for production to the lawyer for the prison officials, usually the deputy attorney general. Send separate requests and questions for each defendant. You don't need to send your interrogatories to the court.

The prison officials must respond within 30 days unless the court or the parties agree otherwise. The officials may ask the judge for a "protective order" which blocks some of your questions or requests because they are irrelevant, privileged, or not proportional. They have to submit a motion to avoid responding to your requests. There is then an opportunity for memoranda of law and a court hearing.

If prison officials fail or refuse to answer questions or requests which are not covered by a protective order, you may need to submit a motion for an order compelling discovery. Many courts have Local Rules requiring the parties to try to work out discovery disputes on their own before filing a motion, through something called a "meet and confer." Obviously, this is very hard to do if you are in prison and have no lawyer. You may want to try writing to the defendant's lawyers setting out your discovery concerns first, before you file a motion. If this does not work, explain how you tried to "meet and confer" in your motion.

In your motion, you indicate what they refused and why you need it. Use the following example:

THE UNITED STATES DISTRICT COURT FOR

-----X  
Name of first plaintiff in the case, et al.,  
Plaintiff[s],  
v.  
Names of first defendant in the case, et al.,  
Defendant[s]  
-----X

**MOTION FOR AN ORDER  
COMPELLING DISCOVERY**  
Civil Action No. \_\_\_\_\_

Plaintiffs move this court for an order pursuant to Rule 37(a) of the *Federal Rules of Civil Procedure* compelling Defendants [list defendants who failed to fully answer interrogatories] to answer fully interrogatories number [list unanswered questions], copies of which are attached hereto. Plaintiffs submitted these interrogatories, pursuant to Rule 33 of the *Federal Rules of Civil Procedure* on [date] but have not yet received the answers.

[OR]

Plaintiffs move this court for an order pursuant to Rule 37(a) of the *Federal Rules of Civil Procedure* compelling Defendants [list defendant who did not produce documents] to produce for inspection and copying the following documents: [list requested documents that were not produced]. Plaintiffs submitted a written request for these documents, pursuant to Rule 34 of the *Federal Rules of Civil Procedure* on [date] but have not yet received the documents.

Dated: \_\_\_\_\_

Signed: \_\_\_\_\_

Type name and address

## 7. Their Discovery of Your Information and Material

Prison officials can and generally will use discovery against you. You must respond to discovery requests unless the defendants are asking for information that is irrelevant or privileged. If you don't have an attorney, then the privilege that is most important for you to know about is the 5th Amendment right against self-incrimination. You can refuse to answer a question in a deposition or an interrogatory if it might amount to admitting that you have committed a crime for which you could face charges. However, if you refuse to answer questions about matters relevant to the case, the case may be dismissed as a result.

Under Rule 30(a) of the *Federal Rules of Civil Procedure*, a prisoner can only be deposed with leave of the court. If defendants ask to depose you, you may want to ask the judge to put off the deposition until after they reconsider your request for appointed counsel. Put in another request for appointment of counsel and see if the judge will at least appoint a lawyer to represent you at the deposition.

If you are deposed, it is important to stay calm and answer questions directly and honestly. You do not need to volunteer any information. You should also warn any witnesses you may have that the attorney general's office probably will depose them once you've revealed their identities.

You must be notified in advance of any deposition scheduled in your case. If you have a lawyer, they are entitled to be present, to advise and consult with your witness, and ask them questions that become part of the official record of the deposition after the defendants have finished. The witness has a right to talk with your lawyer beforehand. The witness can also refuse to talk about your suit outside the deposition with anyone from the prison or the attorney general's office.

## F. Summary Judgment

At some point, the prison officials will probably submit a motion for summary judgment. Be sure to read about the rules and procedure for summary judgment in Rule 56 of the *Federal Rules of Civil Procedure*. Defendants can ask for summary judgment along with their motion to dismiss your complaint or at some later time. You can also move for summary judgment. Your motion will be discussed separately at the end of this section.

## 1. The Legal Standard

“Summary Judgment” means the judge decides some or all of your case without a trial. Through summary judgment, a court can throw out part or all of your case. Under Federal Rule 56(a), to win on summary judgment, the prison officials have to prove to the judge there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law. In other words, the judge finds that there is no point in holding a trial because both you and the defendants agree about all the important facts and the judge can use those facts to decide that the defendants should win.

This test is very different from the test which is applied in a motion to dismiss your complaint. When the judge receives a motion to dismiss, they are supposed to look only at your complaint. In a motion to dismiss, the judge asks: could you win a judgment in your favor if you could prove in court everything you say in your complaint? When the judge receives a motion for summary judgment, however, they look at evidence presented by both sides, including affidavits, and ask: is there is any real disagreement about the important facts in the case?

The first part of the test for a motion for summary judgment that is important to understand is what is meant by “a genuine issue.” Just saying that something happened one way, when the prison says it happened another way, is not enough: You need to have some proof that it happened the way you describe. Sworn statements (affidavits or declarations), photographs, deposition transcripts, interrogatory responses, and copies of letters or documents count as proof because you or the prison officials could introduce the documents as evidence, and the people making sworn statements (including you) could testify if there were a trial in your case.

An “unverified” Complaint or Answer is not proof of any facts. It only says what facts you or the prison officials are going to prove. If you “verify” your complaint, however, then it counts the same as a declaration. See Chapter Five, Section C, Part 1 for more on verification.

If prison officials give the judge evidence that important statements in your complaint are not true and you do not give the judge any evidence that your statements are true, then there is no real dispute about the facts. The judge will see that the prison officials have submitted evidence about their version of the facts and that you have not. The judge can then end your case by awarding summary judgment to the prison officials.

On the other hand, if you give the judge some evidence that supports your version of the important facts, then there is a real dispute. The prison officials are not entitled to summary judgment and your case should go to trial.

For example, if you sue guards who you say locked you up illegally, the guards could submit affidavits swearing they didn’t do it and then move for summary judgment. If you do not present evidence supporting your version of what happened, the guards’ motion might be granted. But if you present a sworn affidavit from yourself or a witness who

saw it happen, the guards’ motion for summary judgment should be denied.

A good way to think about a “genuine issue” is whether the judge can tell, by the evidence presented by you and the prison, that you disagree with specific facts the prison officials are relying on.

The second important part of the test is that the “genuine issue” explained above must be about a “material fact.” A material fact is a fact that is so important to your lawsuit that it could determine whether you win or lose. If the prison officials can show that there is no genuine issue (or disagreement, as discussed above) over any material fact, then the court may grant them summary judgment. To know whether a fact is “material,” you have to know what courts consider when they rule on your type of case.

Imagine a prisoner sues a guard for excessive force. As you know from Chapter Three, one of the most important facts in an excessive force claim is whether there was a legitimate need for the guard to use force against you. In your complaint, you write that you were quietly sitting in your cell when the guard entered and began to beat you for no reason. The guard submits an affidavit swearing that they only entered your cell after they saw you attack your cellmate, and that they used only the force necessary to pull you off your cellmate. Imagine they submit a declaration from your cellmate supporting their story. The question of why the guard entered your cell is a material fact. If you don’t provide any evidence to support your version of what happened, like an affidavit of your own, a declaration by another witness, or a doctor’s report showing your injuries were inconsistent with a guard merely pulling you off another inmate, the court may decide there is no “genuine issue of material fact” and dismiss your complaint.

*Strope v. Collins*, 492 F. Supp. 2d 1289 (D. Kan. 2007), provides a helpful example. In that case, two *pro se* prisoners sued various officials at Lansing Correctional Facility for violating their First Amendment right to receive information in prison, and their Fourteenth Amendment right to procedural due process after defendants censored magazines containing nudity. Defendants moved for summary judgment before any discovery had occurred. You’ll remember from Chapter Three that a prison regulation which denies a prisoner books or magazines is valid if it is reasonably related to a “legitimate penological interest,” decided by the Turner Test. The judge denied summary judgment on the First Amendment claim because there wasn’t yet a factual record allowing for Turner analysis.

However, the court granted summary judgment on the procedural due process claim because both parties agreed that the prisoners were provided notice of the censorship, and under the law, notice is all the process that is required. Had the prisoners filed a verified complaint or an affidavit stating they did not receive notice of the censorship, this might have presented a genuine issue of material fact.

In deciding summary judgment, a court isn't supposed to decide which party is telling the truth or compare the strength of evidence. If there is a real dispute, the court should just deny summary judgment. In reality, however, if the prison officials moving for summary judgment have a lot of evidence, like witness statements and medical records, and all you have is a verified complaint, you may lose summary judgment. So you should try to present as much evidence as you can to the court, and not just rely on a verified complaint.

When the judge considers a motion for summary judgment, they are supposed to view the evidence submitted by both sides "in the light most favorable to the party opposing the motion." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 160 (1970); see also *Curry v. Scott*, 249 F.3d 493, 505 (6th Cir. 2001). If defendants in your case move for summary judgment against you, you are the "opposing party." This means that as the opposing party you get the benefit of the doubt if the meaning of a fact could be interpreted in two different ways.

## 2. Summary Judgment Procedure

If prison officials move for summary judgment, you will then have a chance to submit your own evidence in opposition: declarations, deposition transcripts, interrogatory responses, and other evidence. You need to submit all your evidence, and a memorandum explaining what you are submitting within 21 days or ask for an extension. The memorandum of law should summarize your evidence and explain how it supports each point that you need to prove. Check Chapter Three for the requirements of your claim. Be sure to repeat the major cases which support your argument that the prison officials violated your federal constitutional rights. Your memorandum should also point out to the judge all the specific facts that show there are material issues in dispute.

Most courts have Local Rules about summary judgment, and one thing they may require is a numbered statement of undisputed facts. Read your Local Rules carefully to understand what is required. If you don't submit a statement of undisputed facts, the court may treat it as if you are accepting the defendants'.

Defendants may try to move for summary judgment before you have had a chance to get discovery against them. It also may be difficult for you to get declarations, especially from prisoners who have been transferred to other prisons or placed in isolation. If this is a problem, write a declaration to the judge explaining what facts you think you can get, how you want to get them, how those facts will create a genuine issue of material fact, any effort you have already made to get them, and why that effort was unsuccessful.

### Examples of Evidence or Proof of What You Say in Your Complaint:

- > Affidavits and Declarations
- > Photographs
- > Interrogatory Responses
- > Deposition Transcripts
- > Copies of Letters
- > Copies of Documents
- > Your Verified Complaint

Under Rule 56(d) of the *Federal Rules of Civil Procedure*, the judge can deny the prison officials' motion for summary judgment because you cannot get the declarations you need or because you haven't yet had access to discovery. The judge can also order that you should have more time to get the declarations you need. This means the judge puts off ruling on the motion. Some courts have been very supportive of the fact that prisoners may need extra time to get declarations. *Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004), is a good case explaining this rule.

The judge also has the power under Rule 56(d) to "issue any other appropriate order." This could include ordering prison officials to let you interview witnesses or write to prisoners in other prisons.

## 3. Summary Judgment in Your Favor

You also have a right to move for summary judgment in your favor. You may want to do this in a case where everyone agrees that the prison is following a particular policy and the only question for the court is whether that policy is legal.

For example, suppose your complaint says that you were forced to let prison officials draw your blood to get your DNA and put it in a DNA database. The prison officials admit they are doing this but deny that it is illegal. You may move for summary judgment on your behalf. Since the material facts are agreed on, the judge should grant you summary judgment if they agree with your interpretation of the law. On the other hand, if your suit is about brutality, prison conditions, or denial of medical care, you usually will have to go to trial since what actually happened is bound to be the major issue.

**NOTE:** If you defeat the prison officials' motion for summary judgment, be sure to renew your request for appointment of counsel. Follow the procedure outlined in Chapter Four, Section C, Part 3. The judge is much more likely to appoint a lawyer for you at this stage of your case, as you are most likely going to trial. You may also want to consider approaching attorneys with your case at this point even if you tried before and didn't have any luck. Since summary judgment is a big hurdle to clear, some attorneys might see it as a sign that your case has the potential to win.

# G.

## What to Do If Your Complaint Is Dismissed or the Court Grants Defendants Summary Judgment

The sad truth is that people in prison file thousands of Section 1983 cases every year, and the vast majority of these are dismissed at one of the three stages described in Sections B, C, and F of this chapter. This may happen to you even if you've detailed all your claims and present a great argument. It may happen even if you work very hard on your papers and follow every suggestion in this Handbook perfectly. The important thing to remember is that you don't have to give up! You can choose to keep fighting. You have already learned how to file an amended complaint in Section C, and the next few pages tell what else you can do if your case is dismissed or the court grants summary judgment in favor of the defendants.

### 1. Motion to Alter or Amend the Judgment

Your first option is to file a motion to alter or amend the judgment under *Federal Rules of Civil Procedure* Rule 59(e). This motion must be filed within 28 days after entry of judgment. Include a memorandum of law that cites the cases from your circuit.

You can only make this kind of motion if the court dismisses your complaint after denying leave to amend or grants summary judgment to the defendants. Like motions to reconsider, motions to alter or amend the judgment are intended to call the court's attention to matters it overlooked, not to restate arguments the court rejected.

### 2. How to Appeal the Decision of the District Court

If you lose your motion to alter the judgment, or if you decide not to make one, you can appeal to the U.S. Court of Appeals for your district. You begin your appeal by filing a Notice of Appeal with the clerk of the U.S. District Court whose decision you want to appeal. Follow the form in

Appendix D. If you filed a motion to alter under Rule 59(e), file your Notice of Appeal within thirty days after the court denies your motion to alter. Otherwise, file your notice within thirty days after the order or judgment was entered by the district court judge.

The appeals process is governed by the *Federal Rules of Appellate Procedure*. These rules are supposed to be in your prison library, included as part of Title 28 of the *United States Code* (U.S.C.). There is an annotated version of the U.S.C. called the *United States Code Annotated* (U.S.C.A.) which gives summaries of important court decisions which interpret the *Federal Rules of Appellate Procedure*. The U.S.C. will only have the text of the *Federal Rules* while the U.S.C.A. will give some explanation and cases, and is probably more helpful to you. Chapter Seven explains how to use the U.S.C.A. and other law books. Some of the books listed in Appendix K give more information on the appeals process.

If you sued *in forma pauperis*, you can appeal *in forma pauperis*, unless the district court finds that your appeal is not taken "in good faith." If the district court decides this, you have to send to the appeals court *in forma pauperis* papers like those you sent to the district court, except that you should explain the basis of your appeal. Submit these papers within 30 days after you are notified that the district court ruled that your appeal was not in good faith.

Soon after you receive a notice that your appeal has been transferred to the court of appeals, submit another Motion for Appointment of Counsel. Use the form in Chapter Four, Section C, Part 3, for requesting counsel but change the name of the court and state the basis of your appeal. If you have to submit new *in forma pauperis* papers, send them together with the motion for counsel.

Along with your Motion for Appointment of Counsel, submit a Memorandum of Law which presents all your arguments for why the appeals court should reverse the decision of the district court, for example, because the district court got the law wrong. If the appeals court thinks your appeal has merit, it is more likely to appoint a lawyer for you. Otherwise, you may get a summary dismissal of your appeal.

# CHAPTER SEVEN:

## The Legal System and Legal Research

If you've had to do legal research before, you know how confusing it can be. Sometimes the whole legal system seems designed to frustrate people who are not familiar with the law and to make them totally dependent on lawyers. The law could be written and organized in a way that allows ordinary people to understand it and use it. The National Lawyers Guild, the Center for Constitutional Rights, and other groups are engaged in a political struggle to make the law accessible to the people.

### Chapter Seven: Table of Contents

Section A.....	The Importance of Precedent
Section B.....	Legal Citations – How to Find Court Decisions and Other Legal Material
Section C.....	Legal Writing

This chapter is only a general introduction to legal research for a prison lawsuit. It does not explain how to research other legal problems you face, and it does not go into every detail that could be useful for a Section 1983 or *Bivens* suit. Some of the information in this chapter may only be useful for people in prisons that have law libraries with actual law books. These days, many state prisons, local jails, and the federal system have gotten rid of their law libraries and instead provide people in prison with access to an electronic law database provided by LexisNexis. The Lexis system provided to people in prison is less thorough and user-friendly than the system Lexis provides to lawyers outside prison. If your prison does not have a law library, and you have become skillful at using Lexis in your prison, and you want to share some tips with us that might be helpful for other people in prisons without law libraries, please write to us, and we will consider using your information in future editions of the JLH.

If you plan to do a lot of research, you will probably want to read some more books. A good, detailed explanation of all types of legal research is a book called Cohen and Olson's *Legal Research in a Nutshell*, which might be in your prison library. If not, see Appendix K for information on how to order a copy.

Technical legal terms are defined in *Ballentine's Law Dictionary* and *Black's Law Dictionary*, one of which is supposed to be in your prison library. The detailed rules for every kind of legal citation are in a paperback called *The Bluebook: A Uniform System of Citation*. There is information about ordering *The Bluebook* in Appendix K.

## A.

### The Importance of Precedent

To understand how to make legal arguments, it is important to understand our court system. This section focuses on the federal court system. Every state has its own state court system, which is separate from the federal system.

#### 1. The Federal Court System

The federal court system is not separated by state, but rather by "districts" and "circuits." A federal suit begins in a United States district court. District courts are the trial courts of the federal system. In total there are 94 U.S. district courts. Some states, such as Alaska, only have one district. Others have several. New York, for example, is composed of four districts: the Northern, Western, Eastern, and Southern Districts. District courts all have the name of a state in them, like the "Eastern District of New York."

Someone who loses in a district court has a legal right to appeal to a United States circuit court of appeals. The courts of appeals are divided into regions called "circuits." There are 11 circuits in the United States that have number names. Washington, D.C. is just known as the "D.C. Circuit" and does not have a number. Each circuit court contains a number of district courts. For instance, the "First Circuit" includes all the districts in Maine, New Hampshire, Massachusetts, Rhode Island, and Puerto Rico.

Someone who loses in a court of appeals can ask for review by the United States Supreme Court. This is called "petitioning for certiorari." Generally, the Supreme Court can decide which decisions it wishes to review. If the Supreme Court decides to review a case, it is called "granting cert.," and if they refuse to review, this is called "denying cert."

#### 2. How Judges Interpret Laws on the Basis of Precedent

Most of the claims we have talked about in this book are based on one of the Constitutional Amendments, which are reprinted in Appendix N at the back of this book. Amendments are very short and they are written in very broad and general terms. Courts decide what these general terms mean when they hear specific lawsuits or "cases." For instance, you probably already know that the Eighth Amendment prohibits "cruel and unusual punishment." However, there is no way to know from those four words exactly which kinds of punishments are allowed and which

aren't. For instance, you may think to yourself that execution is very "cruel and unusual." But execution is legal in some states. To understand how judges interpret "cruel and unusual punishment," you need to read cases in which other people, in the past, argued that one type of punishment or another was "cruel and unusual" and see how they turned out.

Each court decision is supposed to be based on earlier decisions, which are called "precedent." To show that your constitutional rights have been violated, you point to good court decisions in earlier cases and describe how the facts in those cases are similar to the facts in your case. You should also show how the general principles of constitutional law presented in the earlier decisions apply to your situation.

Besides arguing from favorable precedent, you need to explain why bad court decisions which might appear to apply to your situation should not determine the decision in your case. Show how the facts in your case are different from the facts in the bad case. This is called "distinguishing" a case.

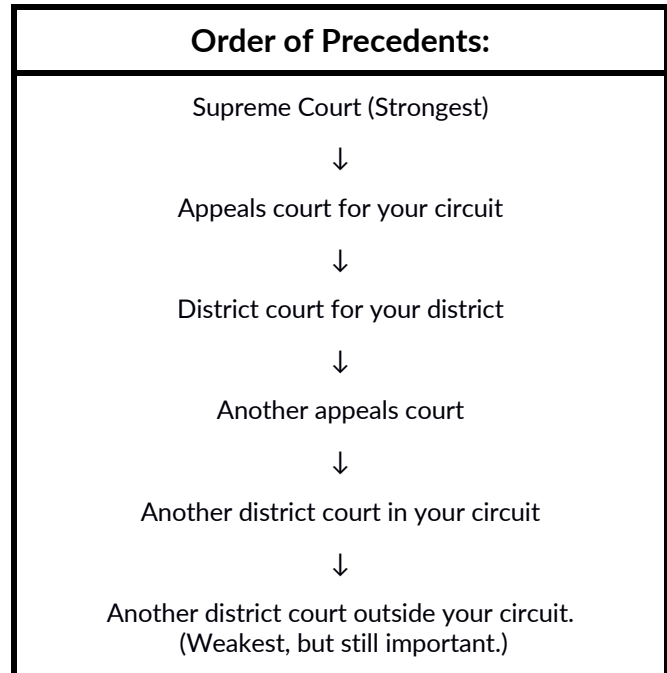
The most important precedent is a decision by the U.S. Supreme Court. Every court is supposed to follow this precedent. The next best precedent is a decision of the appeals court for the circuit in which your district court is located. This is called "binding precedent" because it must be followed by every district court in the circuit.

The third-best precedent is an earlier decision by the district court which is considering your suit. This may be by the judge who is in charge of your suit or by a different judge from the same district court.

Some questions in your case may never have been decided by the Supreme Court, a circuit court, or your district court. If this is the case, then you can point to decisions by U.S. appeals courts from other circuits or by other U.S. district courts. Although a district court is not required to follow these kinds of precedents, it should consider them seriously. This is called "persuasive authority."

One complication is that you should only cite cases which remain "good law." Good law means that a case has not been reversed on appeal or overruled by a later case. For example, in Chapter Three we wrote at length about *Overton v. Bazzeta*, 539 U.S. 126 (2003), a Supreme Court case about prisoners' rights to visits. Before that case reached the Supreme Court, it was first heard by a district court which found that Michigan's prison visit policy violated prisoners' constitutional rights. The case was then appealed by the prison officials to the Sixth Circuit Court of Appeals. The Sixth Circuit agreed with the district court that the plaintiffs' constitutional rights were being violated and wrote a wonderful decision. The Sixth Circuit decision is reported at *Overton v. Bazzeta*, 286 F.3d 311 (6th Cir. 2002). However, that decision was then appealed to the Supreme Court, which "granted cert." and overturned those good decisions. Because the Supreme Court came to a different conclusion, you cannot rely on most of the

parts of the earlier Sixth Circuit or district court opinions that the Supreme Court reversed.



Sometimes it is hard to tell from reading a decision whether the whole thing has been reversed or not. Sometimes, part of a lower-court decision remains good law even when another part is reversed on appeal. If only one part of the case is appealed while other claims are not, the portion of the lower-court decision that was not appealed is still good law. You can cite it. And, of course, if a case is affirmed on appeal, meaning that the appellate court agrees with what the district court said, the district court decision is still good law and you can cite to it. In that example, however, you may want to cite to the appellate decision instead, as an appellate decision is higher up in the order of precedent.

Let's go back to the *Overton v. Bazzeta* example. In that case, plaintiffs argued before the district court that Michigan rules restricting visits violated their First and Eighth Amendment rights as well as procedural due process. They had a trial at the district court and won. The appellate court "affirmed" or agreed with that decision. When the Supreme Court decided to hear the case, it decided to review the First and Eighth Amendment claims. It went on to reverse on those claims, holding that Michigan's policies did not violate the First and Eighth Amendments. So, the Supreme Court decision does not affect the lower courts' procedural due process decision. That part of the Sixth Circuit opinion is still "good law."

How do you find out if a case is still good law? Electronic databases that lawyers use outside of prison make it very easy to tell if a case is still good law, but doing your research in a prison law library may be harder. "Shepard's" books or online material tell you whether any court has made a decision that affects a case that you want to rely on. They also list, to the exact page, every other court decision which mentions the decision you are checking. To

research federal cases, you need *Shepard's Federal Citations*. For paper versions, a booklet that comes with each set of citations explains in detail how to use them. It is very important for you to read that booklet and follow all of the directions.

When you use *Shepard's Citations*, it is often called "Shepardizing." Shepardizing a decision is the only way you can make sure that decision has not been reversed or overruled. It can also help you find cases on your topic. Be sure to check the smaller paperback "advance sheets" which come out before each hardbound volume.

**REMEMBER:** It will not help your case to cite a decision that has been reversed on appeal! Make sure to Shepardize ALL cases you want to rely on.

### 3. Statutes

Federal courts use the same method to interpret laws passed by the U.S. Congress. These laws are called "statutes." Judges interpret the words in these laws in court cases. This method also governs how judges apply the *Federal Rules of Civil Procedure*, which are made by the U.S. Supreme Court. Since statutes and rules are more specific than provisions in the Constitution, they leave less room for judicial interpretation.

### 4. Other Grounds for Court Decisions

Sometimes no precedent will be very close to your case, or you will find conflicting precedent from equally important courts. Other times there may be weak precedent which you will want to argue against. In these situations, it helps to explain why a decision in your favor would be good precedent for future cases and would benefit society in general. This is called an argument based on "policy."

You can refer to books and articles by legal scholars to back up your arguments. Sometimes when a judge writes an opinion to explain their decision, they will set forth their views about a whole area of law relevant to that decision. Although the judge's general views do not count as precedent, you can quote their view in support of your arguments just as you would quote a "legal treatise" or an article in a "law review." A "legal treatise" is a book about one area of the law, and a "law review" is a magazine or journal that has essays about different parts of the law written by legal scholars.

## B.

## Legal Citations – How to Find Court Decisions and Other Legal Material

When you make a legal argument, you should always back it up by citing the names of the cases you are referring to. Every decision in a case has an official "citation," which is the case name, followed by a bunch of letters and numbers that tell you where you can find a copy of the decision. Case citation is a very picky and frustrating activity, but it is very important to making a legal argument. Before you worry about how to cite to a case, the first thing you need to deal with is finding a case.

### 1. Court Decisions

#### Reported Decisions

Court decisions are published in books called "Reporters" or "Reports." All U.S. Supreme Court decisions are in the *United States Reports*, which is abbreviated "U.S." They also are in the *Supreme Court Reporter*, abbreviated "S.Ct" and the *United States Supreme Court Reports Lawyers Edition*, abbreviated "L.Ed." or "L.Ed. 2d." These different reporters all have the same cases, so you can just use whichever version your prison law library has.

Decisions of the U.S. Circuit Courts of Appeal are in the *Federal Reporter*. As of 2020, there are three series of the *Federal Reporter*: the first series is abbreviated "F." the second series is abbreviated F.2d, and the third series is abbreviated F.3d. All new cases are in the third series.

U.S. District Court decisions are in the *Federal Supplement*, abbreviated "F. Supp.," the *Federal Supplement Second Series*, abbreviated "F. Supp. 2d," or F. Supp. 3d. Others are in the *Federal Rules of Decisions*, cited as "F.R.D."



## How to Read a Case

When a judge decides a case, they write a description of the facts of that case, the law the judge used to get to their decision, and the reason they decided one way or the other. When you first start reading cases, you may have trouble understanding them, but be patient, and follow these suggestions to get as much as possible from the case.

**The Summary** – Many times when you look up a case in a book, the first thing you will see under the name of the case is a short paragraph stating who won the case.

**Key Number Links** – Directly under the summary, you may see numbered paragraphs with headings and little pictures of keys. These paragraphs are there to help you with your research. They set out general rules of law that you will encounter in the case.

**The Syllabus** – The syllabus is a summary of the “holding” or decision in a Supreme Court case. It may help you get a sense of what the case is about, but be careful—it was not actually written by the Judge, and you cannot cite it on your brief.

**The Facts** – After the syllabus, you will see the name of the judge or judges who decided the case in capital letters and the names of the attorney as well. After that comes the actual official opinion. Most judges start out an opinion by stating the facts—who sued who, over what. Read the facts carefully, you will need to use them if you want to show how the case is like or unlike your situation.

**Legal Reasoning** – Most of what you read in a case is legal reasoning. The judge will state general legal rules, or holdings from past cases and explain them. This part of a case can be very complicated and difficult, but the more you read, the more you will understand.

**The Holding** – The holding is the actual decision in a case. After the judge goes through the facts and the legal reasoning, they will apply the law to the facts, and state the outcome of the case. It is important to figure out what the holding is so you know whether the case hurts you or helps you.

As we wrote earlier, every decision has an official “citation,” which is the case name, followed by a bunch of letters and numbers that tell you where you can find a copy of the decision. The citation also explains what court made the decision and in what year. For example, this is:

### A typical Supreme Court citation:

*Johnson v. Avery*, 393 U.S. 483 (1969)

> “*Johnson v. Avery*” is the name of the case. Usually, the case name comes from the last name of the person who brings the suit and the last name of the person being sued. The name of the plaintiff always comes first at the trial level, but the names can switch order after that, depending

on which party is appealing. You should always italicize or underline the case name.

> “393” is the number of the volume of *United States Reports* in which you can find the case.

> The “U.S.” indicates that the decision can be found in *United States Reports*.

> “483” is the page number in volume 393 on which the decision begins.

> “1969” is the year the decision was announced.

If you want to quote from a decision, or refer to reasoning used in the decision, you will also need to include the page number where your point appears in the decision. This is called a “pin cite” or “jump cite” and you put it between the page number the decision begins on and before the date of the decision. In the following example, “485” is the pin cite:

*Johnson v. Avery*, 393 U.S. 483, 485 (1969)

Sometimes a U.S. Supreme Court decision will be cited to all three sets of reports, like:

*Johnson v. Avery*, 393 U.S. 483, 89 S.Ct. 797, 21 L.Ed. 2d 718 (1969).

You can cite all three if you want, but it is usually not required. The “U.S.” citation is the important one. Do not give only a “S.Ct.” or L.Ed.” citation without also giving the U.S. citation, unless the decision has not yet been reported in U.S. or you cannot find it. If this happens, cite the case as: *Johnson v. Avery*, \_\_\_ U.S. \_\_\_, 89 S.Ct. 747, 21 L.Ed. 2d 718 (1969). If you have only S.Ct. or only L.Ed., put what you have after “\_\_\_U.S. \_\_\_.”

The “S.Ct.” stands for *Supreme Court Reporter* and the “L.Ed.” stands for *Lawyer’s Edition*.

### A typical Circuit Court citation is:

*United States v. Footman*, 215 F.3d 145 (1st Cir. 2000)

This decision is in volume 215 of the *Federal Reporter*, third series, starting on page 145. The information in parentheses tells you that this decision is from the First Circuit, and that it was decided in the year 2000.

### A typical District Court citation is:

*Bracewell v. Lobmiller*, 938 F. Supp. 1571 (M.D. Ala. 1996)

This decision is in volume 938 of the *Federal Supplement* and starts on page 1571. It was issued in 1996 by the U.S. District Court for the Middle District of Alabama.

### Unpublished Decisions

Not every district court or circuit court decision is reported. Some decisions are “unpublished,” which means they do not appear in the official reporters. Unfortunately, a lot of cases about prisoners are unpublished. Not all courts allow you to cite to unpublished cases, and they are

very hard for prisoners to get. To find out whether or not you can use unpublished cases, first look in your district court's Local Rules. Some courts that do allow citation to unpublished cases also require people who cite them to provide copies to the court or the other side. Check your court's Local Rules on this as well.

A publication called *U.S. Law Week*, which may be in the prison law library, prints a few important decisions by various courts before those decisions appear in regular reports. You can use a *Law Week* citation until the decision appears in a reporter. Use the same general form as for reported case, but indicate the court, the case number on the court docket, and the exact date of the decision (not just the year). For example:

*Oswald v. Rodriguez*, 40 U.S.L.W. 3597  
(U.S. June 19, 1972) (No. 71-1369).

Outside of prison, most lawyers no longer use books to find opinions or do legal research. Today, most lawyers use one of two websites that simplify legal research and make many unpublished opinions easily accessible. These web services are called LEXIS and Westlaw. They cost a lot of money, and your prison probably does not give you access to them. Hopefully, internet access to decisions will increase in the future. LEXIS and Westlaw cites look like this.

*Lucrecia v. Samples*, No. C-93-3651-VRW,  
1995 WL 630016 (N.D.Cal. Oct. 16, 1995)

*Farmer v. Hawk*, No. 94-CV-2274, 1996 U.S. Dist.  
LEXIS 13630 (D.D.C. Sep. 5, 1996)

The number that appears after the case name and starts with "No." is the official docket number of the case. As you learned in Chapter Three, every case gets a docket number as soon as the complaint is filed. When you are citing an unpublished case, you need to include the docket number. The next part is the LEXIS or Westlaw citation. It includes the year the case was decided, and a special identification number created by Westlaw or LEXIS. In the parenthesis you will find the abbreviation for the court that decided the case and the date of the decision. When you are citing a published opinion, you only need to include the year the decision was issued. For an unpublished decision, you should include the exact day.

### How to Cite to a Case in your Briefs:

When you want to use a case in a memorandum of law, a brief, or any other legal document, you should put the case cite, as it appears in the examples above, at the end of every sentence that refers to a fact, a legal rule, or a quote that comes from that case. Throughout this handbook, there are many examples that can help you see how this works. For instance, in Chapter Three, we wrote:

*"Courts have allowed censorship of materials that advocate racial superiority and violence against people of another race or religion. Stefanow v. McFadden, 103 F.3d 1466 (9th Cir. 1996); Chriceol v. Phillips, 169 F.3d 313 (5th Cir. 1999)."*

We "cited" the two cases above because they support our statement about courts allowing censorship. Citing a case allows the reader to go look up the case for proof that what the writer has written is true.

Sometimes you also need to include more information about the case. When you refer to a decision which has been appealed, list all the decisions in the case and indicate what each court ruled. For example:

*Gilmore v. Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd sub nom Younger v. Gilmore*, 404 U.S. 15 (1971).

The abbreviation "aff'd" stands for "affirmed." This citation indicates that the U.S. Supreme Court "affirmed" or agreed with the decision of the District Court in the Gilmore case. This happened one year later, under a slightly different name, which is abbreviated "sub nom." The name is different because Younger had replaced Lynch as Attorney General of California, and Gilmore—one of the prisoners who filed the suit—had his name second because he was now defending against Younger's appeal of the district court decision in favor of the prisoners.

As explained above, you might want to cite a decision which has been reversed on appeal if the part of the decision which helps you was not reversed. The citation would look like:

*Toussaint v. McCarthy*, 597 F. Supp. 1388 (N.D. Cal. 1984), *aff'd in part, rev'd in part on other grounds*, 801 F.2d 1080 (9th Cir. 1986).

The abbreviation "rev'd" stands for "reversed." Here the case name was not changed on appeal, so you don't have to include it a second time.

When you cite a Circuit Court decision, you should indicate if the Supreme Court has agreed to review the decision or has refused to review it, if that decision was made in the last three years. For example:

*Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008), *cert. denied*, \_\_U.S. \_\_, 129 S. Ct. 109 (2008).

"Cert" stands for the "writ of certiorari" that the Supreme Court issues when it decides to review lower court decisions. If the Supreme Court had decided to grant a writ of certiorari in *Roe v. Crawford*, the citation would read "cert. granted."

Once you have cited the full name of a case once, you don't have to cite it fully again. Instead, you can use a short form of the official cite. So, instead of writing *Hershberger*

v. *Scaletta*, 33 F.3d 955 (8th Cir. 1994) over and over again, you can just write:

*Hershberger*, 33 F.3d at 960.

Just remember to cite the case in full the first time you use it. Notice that the last number, “960,” is the actual page of the case that you want to refer to, rather than the page on which the case starts. If you cite a case for a second time and you haven’t cited any other cases in between, you can use another, shorter, short form: “Id. at 960.” Id. is an abbreviation for the Latin word “idem” which means “same.”

You may see in a memo or an opinion, “*Hershberger v. Scaletta*, supra at 960” or just “*Hershberger v. Scaletta*, supra.” “Supra” is Latin for “above.” It means that the full citation was given earlier.

You do not have to use words like “supra” and “id.” It is your choice how you want to write your citations. You will probably find it simpler to put the full case name and the full citation each time you refer to a case. This is perfectly fine. But you will need to know the fancy legal words because lawyers like to use them. Remember, whenever you don’t know what a term means, try to get a hold of Black’s Law Dictionary, Ballentine’s Law Dictionary, or any other law dictionary. We also have included a limited glossary in Appendix A of the Handbook.

## 2. Legislation and Court Rules

Besides court decisions, you will also want to find and refer to laws passed by the U.S. Congress, like Section 1983. The main places to find federal statutes are in the *United States Code* (abbreviated U.S.C.) or the *United States Code Annotated* (abbreviated U.S.C.A.). Both sets of books are organized in the same way, except that the “Code Annotated” version summarizes the main court decisions that interpret each statute. It also lists related law review articles and states the history of the statute. In using the *Code* or the *Code Annotated*, be sure to check for paperbound additions in the back of books. These additions update the material in that book.

Citations for statutes follow roughly the same form as citations to court cases. For example:

42 U.S.C. § 1983

refers to title 42 of the *U.S. Code* and Section 1983 of that title. A “title” is a group of somewhat related laws which are collected together. One book of the *Code* or *Code Annotated* may contain several titles or only part of a title, depending on how big that title is.

The *U.S. Code* also includes the *Federal Rules of Civil Procedure* (Fed. R. Civ. P.) and the *Federal Rules of Appellate Procedure* (Fed. R. App. P.). These rules are published as an appendix to Title 42. The *Code Annotated* (U.S.C.A.) annotates each rule the same way it does each statute. It summarizes important court decisions which interpret the rule, etc. The correct way to cite a rule is: “Fed. R. Civ. P. [rule number]” or “Fed. R. App. P. [rule number].”

## 3. Books and Articles

Citations to legal treatises and law review articles follow the same general pattern as statutes and court decisions. For instance:

Betsy Ginsberg, *Out with the New, In With the Old: The Importance Of Section 504 Of The Rehabilitation Act To Prisoners With Disabilities*, 36 *Fordham Urb. L.J.* 713 (2009).

You can tell from this citation that Betsy Ginsberg wrote an article that appeared in volume 36 of the *Fordham Urban Law Journal* on page 713, and that it came out in 2009. You should always give the author’s full name and italicize the name of the article.

Citing a book is relatively easy. You write the author’s full name, the name of the book, the page you are citing too, and the year it was published:

Deborah L. Rhode, *Justice and Gender* 56 (1989)

## 4. Research Aids

Prison law libraries should include books which help you do legal research. The most important books for legal research are *Shepard’s Citations*, which we described above. Some other important books are described below.

### Digests

A “digest” has quotations from court decisions, arranged by subject matter. Every topic has a “key-number.” You look in the subject index to find the key number of your topic. Under that number you will find excerpts from important decisions. The last volume of each digest has a plaintiff-defendant table, so you can get the citation for a case if you only know the names of the parties.

The prison library is also supposed to have the *Modern Federal Practice Digest* (covering all federal court decisions since 1939) and *West’s State Digest* for the state your prison is in. The same key-number system is used in all the books put out by the West Publishing Company, including *Corpus Juris Secundum* (explained below), *Supreme Court Reporter*, *Federal Supplement*, and *Federal Rules Decisions*. Every decision in a West Company Reporter starts with excerpts or paraphrases of the important points in the decision and gives the key number for each point.

### Encyclopedias

Your law library may include *Corpus Juris Secundum*, abbreviated “CJS.” CJS is a legal encyclopedia. It explains the law on each of the key-number topics and gives a list of citations for each explanation. Be sure to check pocket parts at the back of each book to keep up to date.

The explanations in CJS are not very detailed or precise. But they can give you a rough idea of what is happening and lead you to the important cases.

Encyclopedias and digests are good ways to get started on your research, but it usually is not very helpful to cite them

to support arguments in your legal papers. Judges do not consider the opinion of a legal encyclopedia as a solid base for a decision.

## C. Legal Writing

Although the rules explained in this chapter are very complicated, it is important to keep in mind that most judges will understand that you are not a lawyer, and they won't disregard your arguments just because you cite a case wrong. Lawyers spend years perfecting their legal research and writing skills, and usually have the benefit of well-stocked libraries, expensive computers, and paid paralegals to help them. Most prisoners don't have any of these things, so just do your best. This is especially true with writing. You should not worry about trying to use fancy legal terms. Just write clearly and simply.

There is a simple formula for writing clearly about legal issues that you can remember by thinking of the abbreviation: IRAC. IRAC stands for:

Idea  
Rule  
Application  
Conclusion

Some people find that creating an outline, making a diagram, or drawing a picture is helpful in writing IRAC formulas. These methods can help organize your thoughts, facts, and cases.

Say you have an Eighth Amendment claim based on exposure to secondhand smoke. Below is a sample of how to do a very simple outline. Your outline may be more complex or simple, depending on what works for you.

First you would go to the section in Chapter Three that applies to you, write the rule out for proving that claim, and put in citations to start keeping track of where you are getting the quotes from:

> To prove an Eighth Amendment violation by prison officials, you must show they acted with deliberate indifference to a prison condition that exposes a prisoner to an unreasonable risk of serious harm. *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

Now, break the above sentence into the different parts you will have to prove:

> To prove an Eighth Amendment violation by prison officials, you must show they:

- + acted with deliberate indifference to a prison condition that
- + exposes a prisoner to an unreasonable risk of serious harm.

Then, you look for cases in this Handbook or through your own research that defines more how you prove (a) and (b) above:

> To prove an Eighth Amendment violation by prison officials, you must show they:

- + acted with deliberate indifference to a prison condition
- + Deliberate indifference is when prison officials ignore an obvious and serious danger. *Farmer v. Brennan*, 511 U.S. 825, 835 (1994).
- + exposes a prisoner to an unreasonable risk of harm
- + Exposure to secondhand cigarette smoke is an unreasonable risk of serious harm. *Talal v. White*, 403 F.3d 423 (6th Cir. 2005)

Hopefully, you can see how each of the (i) sections explain each part of the rule. Now, you want to think about what has happened—the facts—that fit each of those sections. Those facts will become your application section.

Now, let's follow IRAC to actually draft your section. First, start with the Idea that you plan to support through your argument. For example:

Warden Wally violated the Eighth Amendment by putting me in a cell with a prisoner who smokes cigarettes.

Next, state the Rule of law that sets out the standard for your idea. If you can, you should also explain the rule in this section, by citing cases that are similar to yours. For example, first state the full rule:

Prison Officials violate the Eighth Amendment when they act with deliberate indifference to a prison condition that exposes a prisoner to an unreasonable risk of serious harm. *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

Then we explain, in two separate sentences, the two clauses from the above rule:

Prison officials act with deliberate indifference when they ignore an obvious and serious danger. *Farmer v. Brennan*, 511 U.S. 825, 835 (1994). Exposure to secondhand cigarette smoke presents an unreasonable risk of serious harm. *Talal v. White*, 403 F.3d 423 (6th Cir. 2005).

Third is the Application. For this step, you want to state the facts that show how your rights were violated. You should show the court how and why the rule applies to the facts of your specific case. Be detailed and specific, brief and to the point. For example:

As I wrote in my complaint, upon admission to Attica Correctional Facility, I was placed in a cell with Joe Shmoe. Joe Shmoe smokes two packs of cigarettes a day in our cell. The window in our cell doesn't open, so I am forced to breathe smoky air. I spend about twelve hours a day in this smoky environment. I sent a letter to Warden Wally on May 6, 2010 explaining this problem, and he did not respond. I sent him another letter two weeks later, and he still hasn't dealt with the problem. Then, in June, I used the

prison grievance system to request a transfer to another cell due to the smoke, and when that grievance was denied, I appealed it. Guards pass by my cell every day and hear me coughing, and they smell and see the smoke. I yell to the guards to tell the warden about this problem. I have been coughing a lot.

Finally, you should finish your section with a Conclusion. The conclusion should state how your rights were violated in one or two sentences. For example:

*Warden Wally's refusal to move me to a different cell or otherwise end my exposure to secondhand smoke amounts to deliberate indifference to an unreasonable risk of serious harm, in violation of the Eighth Amendment. For this reason, his motion to dismiss my case should be denied.*

If you use this formula for each and every point you need to address in your complaint, you have a much better chance of getting the judge to treat your case with the attention it deserves.

# APPENDICES

## A.

### Glossary of Terms

**Below is a list of legal terms, phrases, and other words that you may come across in this Handbook or in further research.**

**Absolute Immunity:** A way that certain government officials can avoid, or be “immune,” to any lawsuit for actions they took while doing their job.

**Administrative Remedies / Administrative Process:** This usually refers to a system for requesting something or making a complaint to the prison administration.

**Admissible:** Evidence that can be used at a trial is known as “admissible” evidence. “Inadmissible” evidence can’t be used at a trial.

**Affidavit:** A written or printed statement of facts that is made voluntarily by a person who swears to the truth of the statement before a public officer, such as a “notary public.”

**Affirm:** When the appellate court agrees with the decision of the trial court, the appellate court “affirms” the decision of the trial court. In this case, the party who lost in the trial court and appealed to the appellate court is still the loser in the case.

**Allege:** To claim that someone did something, or that something happened, which has not been proven. The thing that you claim happened is called an “allegation.”

**Amendment (as in the First Amendment):** Any change that is made to a law after it is first passed. In the United States Constitution, an “Amendment” is a law added to the original document that further defines the rights and duties of individuals and the government. Complaints can be amended too, so you may see references in this handbook to an “Amended Complaint.”

**Annotation:** A remark, note, or comment on a section of writing which is included to help you understand the passage.

**Answer:** A formal, written statement by the defendant in a lawsuit which responds to each allegation in the complaint

**Appeal:** When one party asks a higher court to reverse the judgement of a lower court because the decision was wrong or the lower court made an error. For example, if you lose in the trial court, you may “appeal” to the appellate court.

**Brief:** A document written by a party in a case that contains a summary of the facts of the case, relevant law and precedent, and an argument of how the law applies to the factual situation. Also called a “memorandum of law.”

**Burden of proof:** The duty of a party in a trial to convince the judge or jury of a fact or facts at issue. If the party does not fulfill this duty, they will lose their case or claim.

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**Business Days:** Some laws and courts use “business days” to tell you how long you have to file or respond. This means you only count the days Monday through Friday. Weekends and holidays that fall on a weekday are not business days.

**Calendar Days:** Some laws and courts use “calendar days” to tell you how long you have to file or respond. Each day on a calendar—weekends, holidays, weekdays—is counted as a “calendar day.” So if a court tells you that you must file a response in “thirty calendar days” that means thirty days, counting every day of the week.

**Caution:** The link between a defendant’s conduct and the plaintiff’s injury or harm. In a civil rights case, the plaintiff must always prove “causation.”

**Cause of Action:** Authority based on law that allows a plaintiff to file a lawsuit. In this handbook, we explain the “cause of action” called Section 1983.

**“Cert” or “Writ of Certiorari”:** An order by the Supreme Court stating that it will review a case already decided by the trial court and the appeals court. When the Supreme Court makes this order, it is called “granting cert.” If they decide not to review a case, it is called “denying cert.”

**Cf.:** An abbreviation used in legal writing to mean “compare.” The word directs the reader to another case or article in order to compare, contrast or explain views or statements.

**Circuit Court of Appeals:** The United States is divided into federal judicial circuits. Each “circuit” covers a geographical area, often called by its circuit number (like “5<sup>th</sup> Circuit”), and has a court of appeals. The appellate court is called the U.S. Court of Appeals for that particular circuit (for example, the U.S. Court of Appeals for the 5<sup>th</sup> Circuit).

**Citation:** A written reference to a book, a case, a section of the constitution, or any other source of authority.

**Civil (as in “civil case” or “civil action”):** In general, all cases or actions which are not criminal. “Civil actions” are brought by a private party to protect a private right.

**Claim:** A legal demand made about a violation of one’s rights.

**Class Action:** A lawsuit in which a few plaintiffs sue on behalf of a larger group of people whose rights are being violated in the same way.

**Clearly Established:** a right is “clearly established” if a reasonable officer would understand that right. Under the doctrine of “qualified immunity” you may only be able to recover money damages for violation of clearly established rights.

**Color of State Law:** When a state or local government official is carrying out their job or acting like they are carrying out their job. Acting “under color of state law” is one of the requirements of a Section 1983 action.

**Compensatory Damages:** When you receive “compensatory damages,” it means you are getting money to compensate you for injury or any type of loss, such as loss of property.

**Complaint:** The legal document filed in court by the plaintiff that begins a civil lawsuit. A “complaint” sets out the facts and the legal claims in the case and requests some action by the court.

**Consent:** Agreement; voluntary acceptance of the wish of another.

**Consent Order / Consent Decree:** An order for an injunction (to change something the defendant is doing) that is agreed on by the parties in a settlement and given to the court for approval and enforcement.

**Constitution:** The supreme law of the land. The U.S. Constitution applies to everyone in this country. Each state also has a State Constitution, which can provide *more* rights than the U.S. Constitution, but cannot take U.S. Constitutional rights away.

**Constitutional law:** Law set forth in the Constitution of the United States or a state constitution.

**Counsel:** A lawyer.

**Criminal (as in “criminal case” or “criminal trial”):** When the state or federal government charges a person with committing a crime. The **burden of proof** and the procedural rules in a criminal trial are different from those in a civil trial.

**Cross-examination:** At a trial or hearing, the questioning of a witness by the lawyer for the other side. Cross-examination takes place after the party that called the witness has questioned them. Each party has a right to “cross-examine” the other party’s witnesses.

**Damages:** Money awarded by a court to a person who has suffered some sort of loss, injury, or harm.

**Declaration:** A statement made by a witness under penalty of perjury.

**Declaratory Judgment:** A court order that sets out the rights of the parties or expresses the opinion of the court about a certain part of the law, without ordering any money damages or other form of relief for either side.

**Default judgment:** A judgment entered against a party who fails to appear in court or respond to the charges.

**Defendant:** The person against whom a lawsuit is brought.

**Defense:** A reason, stated by the defendant, why the plaintiff should lose a claim.

**Deliberate Indifference:** The level of intent required for a defendant in an Eighth Amendment claim. It requires a plaintiff to show that a defendant (1) actually knew of a substantial risk of serious harm, and (2) failed to respond reasonably.

**De Minimis:** Very small or not big enough. For example, in an Eighth Amendment excessive force claim, you need to prove an injury that is more than *de minimis*.

**Denial:** When the court rejects an application or petition. Or, when someone claims that a statement offered is untrue.

**De novo:** In the legal world, to review something “de novo” means to review an issue or case, taking a fresh look at it. When a court uses “de novo” review it does not defer to the determination of the lower court.

**Deposition:** One of the tools of discovery. It involves a witness giving sworn testimony in response to oral or written questions.

**Dictum:** An observation or remark made by a judge in their **opinion**, about a legal issue that is not necessary to the court’s actual decision. Future courts do not have to follow the legal analysis found in “dictum.” It is not “binding” because it is not the legal basis for the judge’s decision. Plural: “Dicta”

**Direct Examination:** At a trial or hearing, the questioning of a witness by the lawyer or party that called the witness. The lawyer conducts “direct examination” and then the lawyer for the other side gets the chance to “cross examine” that same witness.

**Discovery:** The process of getting information which is relevant to your case in preparation for a trial.

**Discretion:** The power or authority of a legal body, such as a court, to act or decide a situation one way or the other, where the law does not dictate the decision.

**Disposition:** The result of a case; how it was decided.

**District Court:** The trial courts within the federal court system. There are District Courts in each federal circuit and their decisions can be appealed to the Circuit Courts of Appeal.

**Document Request:** One of the tools of discovery, allows one party to a lawsuit to get papers or other evidence from the other party.

**Due process:** A constitutional right that guarantees everyone in the United States a certain amount of protection for their life, liberty, and property.

**Element:** A fact that one *must* prove to win a claim.

**Enjoining:** When a court orders a person to perform a certain act or to stop performing a specific act. The order itself is called an “injunction.”

**Evidence:** Anything that proves, or helps to prove, the claim of a party. “Evidence” can be testimony by witnesses and experts, documents, physical objects, and anything else admissible in court that will help prove a point.

**Exclude from evidence:** The use of legal means to keep certain evidence from being considered in deciding a case.

**Excessive Force:** more force than is justified in the situation.

**Exhaustion of Administrative Remedies:** the requirement that a prisoner use the prison grievance system to make (and appeal) a complaint before filing a lawsuit. One of the requirements of the *Prison Litigation Reform Act*.

**Exhibit:** Any paper or thing used as evidence in a lawsuit.

**Extrinsic Evidence:** Evidence which is not part of a document or is offered to explain or contradict the meaning of another piece of evidence. Extrinsic evidence is not always admissible in court.

**Federal law:** A system of courts and rules organized under the United States Constitution and statutes passed by Congress; different than state law.

**File:** When you officially send or give papers to the court in a certain way, it is called “filing” the papers.

**Finding:** Formal conclusion by a judge or jury on an issue of fact or law.

**Footnote:** More information about a subject indicated by a number in the body of a piece of legal writing which corresponds to the same number at the bottom of the page. The information at the bottom of the page is the “footnote.”

**Frivolous:** Something that is groundless, an obviously losing argument or unbelievable claim.

**Grant:** To allow or permit. For example, when the court “grants a motion,” it allows what the **motion** was asking for.

**Habeas Corpus (Habeas):** An order issued by a court to release a prisoner from prison or jail. For example, a prisoner can petition (or ask) for “*habeas*” because a conviction was obtained in violation of the law. The “*habeas writ*” can be sought in both state and federal courts.

**Hear:** To listen to both sides on a particular issue. For example, when a judge “hears a case,” they consider the validity of the case by listening to the evidence and the arguments of the lawyers from both sides in the litigation.

**Hearing:** A legal proceeding before a judge or judicial officer, in some ways similar to a trial, in which the judge or officer decides an issue of the case but does not decide the whole case.

**Hearsay:** Testimony that includes a written or verbal statement that was made out of court that is being offered in court to prove the truth of what was said. Hearsay is often “inadmissible.”

**Holding:** The decision of a court in a case and the accompanying explanation.

**Immunity:** When a person or governmental body cannot be sued, they are “immune” from suit.

**Impartial:** Even-handed or objective; favoring neither side.

**Impeach:** When one party presents evidence to show that a witness is lying or unreliable.

**Inadmissible evidence:** Evidence that cannot legally be introduced at a trial. Opposite of “admissible” evidence.

**Injunction:** An order by a court that a person or persons should stop doing something or should begin to do something.

**Injury:** A harm or wrong done by one person to another person.

**Interrogatories:** A set of questions in writing. One of the tools of **discovery**.

**Irreparable Harm:** a type of injury that would cause permanent harm or damage that cannot be fixed by money or some other form of relief.

**Judge:** A court officer who is elected or appointed to hear cases and make decisions about them.

**Judgment:** The final decision or holding of a court that resolves a case and determines the parties’ rights and obligations.

**Jurisdiction:** The authority of a court to hear a particular case.

**Jury:** A group of people called to hear a case and decide issues of fact.

**Law:** Rules and principles of conduct set out by the constitution, the legislature, and past judicial decisions.

**Lawsuit:** A legal action that involves at least one plaintiff, making one or more claims, against at least one defendant.

**Liable:** To be held responsible for something. In civil cases, plaintiffs must prove that the defendants are “liable” for unlawful conduct.

**Litigate:** To participate in a lawsuit. All the parts of a lawsuit are called “litigation” and sometimes lawyers are called “litigators.”

**Majority:** More than half. For example, an opinion signed by more than half the judges of a court is the “majority opinion” and it is the official decision of the court.

**Material evidence:** Evidence that is relevant and important to the legal issues being decided in a lawsuit.



**Memorandum of law:** A written document that includes a legal argument, also called a “brief.”

**Mistrial:** If a fundamental error occurs during trial that cannot be corrected, a judge may decide that the trial should not continue and declare a “mistrial.”

**Moot:** A legal claim that is no longer relevant is “moot” and must be dismissed.

**Motion:** A request made by a party to a judge for an order or some other action.

**Municipality:** A city or town.

**Negligent or Negligence:** To be “negligent” is to do something that a reasonable person would not do, or to not do something that a reasonable person would do. Sometimes a party needs to prove that the opposing party in the suit was “negligent.” For example, if you do not shovel your sidewalks all winter when it snows, you may be negligent.

**Nominal Damages:** Small amount of money awarded to people whose legal rights were violated but who cannot get compensatory damages because they have not suffered any “loss.” Usually one dollar.

**Notary or Notary Public:** A person who is authorized to stamp their seal on certain papers in order to verify that a particular person signed the papers. This is known as “notarizing the papers.”

**Notice or Notification:** “Notice” has several meanings in the law. First, the law often requires that “notice” be given to an individual about a certain fact. For example, if you sue someone, you must give them “notice” through “service of process.” Second, “notice” is used in cases to refer to whether an individual was aware of something.

**Objection:** During a trial, an attorney or a party who is representing themselves pro se may disagree with the introduction of a piece of evidence. They can voice this disagreement by saying “I object” or “objection.” The judge decides after each objection whether to “sustain” or “overrule” the objection. If the judge sustains an objection it means the judge, based on their interpretation of the law, agrees with the attorney raising the objection that the evidence cannot be presented. If an objection is “overruled,” it means the judge disagrees with the attorney raising the objection and the evidence can be presented.

**Opinion:** When a court decides a case, a judge writes an explanation of how the court reached its decision. This is an “opinion.”

**Order:** The decision by a court to prohibit or require a particular thing.

**Oral arguments:** Live, verbal arguments made by the parties of a case that a judge may hear before reaching a decision and issuing an **opinion**.

**Overrule:** To reverse or reject.

**Party:** A plaintiff or defendant or some other person who is directly involved in the lawsuit.

**Per se:** A Latin phrase meaning “by itself” or “in itself.”

**Permanent Injunction:** A court order that a person or entity take certain actions or stop certain actions for a certain amount of time.

**Perjury:** The criminal offense of making a false statement under oath.

**Penological:** Something having to do with prisons.

**Petition:** A written request to the court to take action on a particular matter. The person filing an action in a court or the person who appeals the judgment of a lower court is sometimes called a “petitioner.”

**Plaintiff:** The person who brings a lawsuit.

**Precedent:** A case decided by a court that serves as the rule to be followed in similar cases later on. For example, a case decided in the United States Supreme Court is “precedent” for all other courts.

**Preliminary Injunction:** A court order that temporarily stops a person or an entity (like a prison) from taking certain actions, or orders that person or entity to take certain actions. Preliminary injunctions usually take place before the end of a lawsuit.

**Preponderance of evidence:** This is the standard of proof in a civil suit. It means that more than half of the evidence in the case supports your explanation of the facts.

**Presumption:** Something that the court takes to be true without proof according to the rules of the court or the laws of the jurisdiction. Some presumptions are “rebuttable.” You can overcome a “rebuttable presumption” by offering evidence that it is not true.

**Privilege:** People may not have to testify about information they know from a specific source if they have a “privilege.” For example, “attorney-client privilege” means that the information exchanged between an attorney and their client is confidential, so an attorney may not reveal it without the client’s consent.

**Proceeding:** A hearing or other occurrence in court that takes place during the course of a dispute or lawsuit.

**Pro se:** A Latin phrase meaning “for oneself.” Someone who appears in court “pro se” is representing themselves without a lawyer.

**Punitive Damages:** Money awarded in a lawsuit in order to punish a defendant for the harm they caused.

**Question of fact:** A dispute as to what actually happened. It can be contrasted to a “question of law.”

**Qualified Immunity:** a doctrine that protects government officials from liability for acts they couldn’t have reasonably known were illegal.

**Reckless:** To act or fail to act despite the fact that one is aware of a substantial and unjustifiable risk.

**Record (as in the record of the trial):** A written account of all the proceedings of a trial, as transcribed by the court reporter.

**Regulation:** A rule or order that manages or governs a situation. One example is a “prison regulation.”

**Relevant / irrelevant:** A piece of evidence which tends to make some fact more or less likely or is helpful in the process of determining the truth of a matter is “relevant.” Something that is not at all helpful to determining the truth is “irrelevant.”

**Relief:** The remedy or award that a plaintiff or petitioner seeks from a court, or a remedy or award given by a court to a plaintiff or petitioner.

**Remand:** When a case is sent back from the appellate court to the trial court for further action or proceedings.

**Remedy:** Same as “relief.”

**Removal (or when a case is “removed”):** When a defendant transfers a case from state court to federal court.

**Respondent:** The person against whom a lawsuit or appeal is brought.

**Retain:** To hire, usually used when hiring a lawyer.

**Reverse:** When an appellate court changes the decision of a lower court. The party who lost in the trial court and then appealed to the appellate court is now the winner of the case. When this happens, the case is “reversed.”

**Right:** A legal entitlement that one possesses. For example, people in prison have the “right” to be free from cruel and unusual punishment.

**Sanction:** A penalty the court can impose when a party disobeys a rule or order.

**Service, “service of process” or “to serve”:** The physical act of handing something over, or delivering something to a person, as in “serving legal papers” on a person.

**Settled**, as in “the law is not settled”: If the law is “settled” then courts have generally agreed on its interpretation. If it is “not settled” then different courts have interpreted a law in different ways.

**Settlement:** When both parties agree to end the case without a trial.

**Shepardizing:** Method for determining if a case is still “good law” that can be relied upon.

**Standing:** A requirement that the plaintiff in a lawsuit has an actual injury that is caused by the defendant’s alleged action and that can be fixed by the court.

**Statute:** A law passed by the U.S. Congress or a state legislature.

**Statute of limitations:** A law that sets out time limitations within which different types of lawsuits must be brought. After the “statute of limitations” has run on a particular type of lawsuit, the plaintiff cannot bring that lawsuit.

**Stipulation:** An agreement between the plaintiff and the defendant as to a particular fact in a case.

**Subpoena:** An official court document that requires a person to appear in court at a specific time and place. A particular type of “subpoena” requires an individual to produce books, papers, and other things.

**Suit:** Short for lawsuit.

**Summary judgment:** A judgment given on the basis of pleadings, affidavits or declarations, and exhibits presented for the record without any need for a trial. It is used when there is no dispute as to the facts of the case and one party is entitled to a judgment as a matter of law.

**Suppress:** To prevent evidence from being introduced at trial.

**Testimony:** The written or oral evidence given by a witness under oath. It does not include evidence from documents or objects. When you give testimony, you “testify.”

**Third Party:** A person or an entity that is not directly involved in a lawsuit but has a small role in part of your litigation. For example, if you win money in a lawsuit, you may need assistance from a bank to access your money. The bank would be a third party. The term “third party” is also used in other situations not involving lawsuits as well.

**Tort:** A “wrong” or injury done to someone. Someone who destroys your property or injures you may have committed a “tort.”

**Trial:** A proceeding that takes place before a judge or a judge and a jury. In a trial, both sides present arguments and evidence.

**v. or vs. or versus:** Means “against,” and is used to indicate opponents in a case, as in “*Joe Prisoner v. Charles Corrections Officer.*”

**Vacate:** To set aside, as in “vacating the judgment of a court.” An appellate court, if it concludes that the decision of the trial court is wrong, may “vacate” the judgment of the trial court.

**Vague:** Indefinite, or not easy to understand.

**Venue:** The specific court where a case can be filed. For example, if you are in prison in upstate New York, your venue might be the Western District of New York.

**Verdict:** A conclusion, as to fact or law, that forms the basis for the court’s judgment.

**Verify:** To confirm the authenticity of a legal paper by affidavit or oath.

**Waive or waiver:** To give up a certain right. For example, when you “waive” the right to a jury trial or the right to be present at a hearing you give up that right.

**Witness:** A person who knows something which is relevant to your lawsuit and testifies at trial or in a deposition about it.

**Writ:** An order written by a judge that requires a specific act to be performed or gives someone the power to have the act performed. For example, when a court issues a writ of **habeas corpus**, it demands that the person who is detaining you release you from custody.

# APPENDIX B: SAMPLE COMPLAINT

## B.

UNITED STATES DISTRICT COURT NORTHERN  
DISTRICT OF ILLINOIS

-----X  
Walter Hey and Mohammed Abdul,

Plaintiff[s],

v.

John Smith, warden Illinois State Prison, and Dave  
Thomas, corrections officer at Illinois State Prison,  
individually and in their official capacities,

Defendant[s]  
-----X

Civil Action  
No. \_\_\_\_\_

### COMPLAINT

#### I. JURISDICTION & VENUE

1. This is a civil action authorized by 42 U.S.C. Section 1983 to redress the deprivation, under color of state law, of rights secured by the Constitution of the United States. The court has jurisdiction under 28 U.S.C. Section 1331 and 1343 (a)(3). Plaintiff Hey seeks declaratory relief pursuant to 28 U.S.C. Section 2201 and 2202. Plaintiff Hey's claims for injunctive relief are authorized by 28 U.S.C. Sections 2283 & 2284 and Rule 65 of the Federal Rules of Civil Procedure.
2. The Northern District of Illinois is an appropriate venue under 28 U.S.C. Section 1391 (b)(2) because it is where the events giving rise to this claim occurred.

#### II. PLAINTIFFS

3. Plaintiff Walter Hey is and was at all times mentioned herein a prisoner of the State of Illinois in the custody of the Illinois Department of Corrections. He is currently confined in Illinois State Prison in Colby, Illinois.
4. Plaintiff Mohammed Abdul is and was at all times mentioned herein a prisoner of the State of Illinois in the custody of the Illinois Department of Corrections. He is currently confined in Illinois State Prison in Colby, Illinois.

#### III. DEFENDANTS

5. Defendant John Smith is the warden of Illinois State Prison. He is legally responsible for the operation of Illinois State Prison and for the welfare of all the inmates of that prison.
6. Defendant Dave Thomas is a correctional officer of the Illinois Department of Corrections who, at all times mentioned in this complaint, held the rank of prison guard and was assigned to Illinois State Prison.
7. Each defendant is sued individually and in his official capacity. At all times mentioned in this complaint, each defendant acted under the color of state law.

#### IV. FACTS

8. At all times relevant to this case, Plaintiffs Walter Hey and Mohammed Abdul shared a cell on block D.

9. On June 29, 2009, Defendant Dave Thomas entered Hey and Abdul's cell to conduct a routine and scheduled cell search. Upon information and belief, Illinois State prison policy dictated that each cell be searched once a week for contraband.

10. Thomas searched Hey and Abdul's cell in their presence and did not uncover any contraband. Indeed, there was no contraband in their cell. After completing the search, Thomas told Hey to walk onto the range so that he could talk to Abdul alone. Hey asked why. Thomas told him to shut up and follow the order.

11. Hey exited the cell and stood to the right of the cell, on the range. He could see into the cell.

12. After Hey left, Thomas told Abdul that Hey was a problem prisoner, was in "deep trouble" with the prison administration, and that if Abdul knew what was good for him, he would tell Thomas what Hey was up to.

13. When Abdul refused to say anything to Thomas about Hey, Thomas punched Abdul in the face. The punch caused Abdul pain. Abdul's left eye was bruised and swollen for approximately four days.

14. Thomas then got Hey from outside the cell and told him that if he didn't abandon the prison grievance Hey had filed about racist comments Thomas made one week earlier at Hey's disciplinary hearing, he would "do the same" to Hey every single day. That grievance is attached as Exhibit A.

15. The following day, on June 30, 2009, Thomas returned to Hey and Abdul's cell, and asked Hey if he had withdrawn the grievance. Hey replied that he had not. Thomas punched him in the right eye, causing pain and swelling that lasted several days.

16. That same day, Hey and Abdul both requested sick call, and saw the prison medical tech regarding the pain they were both experiencing. The tech prescribed aspirin and noted bruising on their medical files. Relevant pages of Hey and Abdul's medical files are attached as Exhibit B.

17. Later that week, on July 2, 2009, Thomas again returned to Hey and Abdul's cell and again asked Hey if he had withdrawn the grievance. Hey said no. Thomas punched him again, this time in the stomach, again causing pain and bruising. Thomas again stated that he would punch Hey every day until he withdrew the grievance.

18. When Thomas opened the cell door to leave Hey and Abdul's cell, Hey and Abdul saw that Warden Thomas was outside the cell, looking in. Abdul asked the warden if he had seen what happened, and what he was going to do about it. Warden Smith responded that, "that is how we deal with snitches" in Illinois State Prison.

19. The following week, July 4 - 11, Defendant Thomas returned to Plaintiffs' cell each day, and each day punched Hey.

## **V. LEGAL CLAIMS**

20. Defendant Thomas used excessive force against Plaintiff Abdul by punching him in the face when Abdul was not violating any prison rule and was not acting disruptively. Defendant Thomas's action violated Plaintiff Abdul's rights under the Eighth Amendment to the United States Constitution and caused Plaintiff Abdul pain, suffering, physical injury, and emotional distress.

21. Defendant Thomas used and continues to use excessive force against Plaintiff Hey by punching him in the face repeatedly when Hey is not violating any prison rule nor acting disruptively in any way. Defendant Thomas's action violated and continues to violate Plaintiff Hey's rights under the Eighth Amendment to the United States Constitution and is causing Plaintiff Hey, pain, suffering, physical injury, and emotional distress.

22. By witnessing Defendant Thomas's illegal action, failing to correct that misconduct, and encouraging the continuation of the misconduct, Defendant Smith is also violating Plaintiff Hey's rights under the Eighth Amendment to the United States Constitution and causing Plaintiff Hey pain, suffering, physical injury, and emotional distress.

23. By threatening Plaintiff Hey with physical violence for exercise of his right to seek redress from the prison through use of the prison grievance system, Defendant Thomas is retaliating against Plaintiff Hey unlawfully, in violation of Plaintiff Hey's rights under the First Amendment to the United States Constitution. These illegal actions are causing Plaintiff Hey injury to his First Amendment rights.

24. Plaintiff Hey has no plain, adequate, or complete remedy at law to redress the wrongs described herein. Plaintiff Hey has been and will continue to be irreparably injured by the conduct of the defendants unless this court grants the declaratory and injunctive relief which Plaintiff seeks.

## VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this court enter judgment:

25. Granting Plaintiff Hey a declaration that the acts and omissions described herein violate his rights under the Constitution and laws of the United States, and
26. A preliminary and permanent injunction ordering defendants Thomas and Smith to cease their physical violence and threats toward Plaintiff Hey, and
27. Granting Plaintiff Hey compensatory damages in the amount of \$50,000 against each defendant, jointly and severally.
28. Plaintiff Abdul seeks compensatory damages of \$5,000 against defendant Thomas only.
29. Both plaintiffs seek nominal damages and punitive damages in the amount of \$50,000. Plaintiff Hey seeks these damages against each defendant, jointly and severally. Plaintiff Abdul seeks damages only against defendant Thomas.
30. Plaintiffs also seek a jury trial on all issues triable by jury.
31. Plaintiffs also seek recovery of their costs in this suit, and

Any additional relief this court deems just, proper, and equitable.

Dated: April 9, 2021

Respectfully submitted, Mohammed Abdul  
#56743  
Illinois State Prison,  
PO Box 50000  
Colby, IL

Walter Hey #58210  
Illinois State Prison,  
PO Box 50000  
Colby, IL

### VERIFICATION

I have read the foregoing complaint and hereby verify that the matters alleged therein are true, except as to matters alleged on information and belief, and, as to those, I believe them to be true. I certify under penalty of perjury that the foregoing is true and correct.

Executed at Colby, Illinois on April 9, 2021

*Mohammed Abdul.*  
Mohammed Abdul

*Walter Hey*  
Walter Hey

# APPENDIX C

## C.

Find a blank copy of the FTCA form on the following two pages.

<b>CLAIM FOR DAMAGE, INJURY, OR DEATH</b>		<b>INSTRUCTIONS:</b> Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.		FORM APPROVED OMB NO. 1105-0008	
1. Submit to Appropriate Federal Agency:			2. Name, address of claimant, and claimant's personal representative if any. (See instructions on reverse). Number, Street, City, State and Zip code.		
3. TYPE OF EMPLOYMENT <input type="checkbox"/> MILITARY <input type="checkbox"/> CIVILIAN		4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
8. BASIS OF CLAIM (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof. Use additional pages if necessary).					
<b>9. PROPERTY DAMAGE</b>					
NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, Street, City, State, and Zip Code).					
BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF THE DAMAGE AND THE LOCATION OF WHERE THE PROPERTY MAY BE INSPECTED. (See instructions on reverse side).					
<b>10. PERSONAL INJURY/WRONGFUL DEATH</b>					
STATE THE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE THE NAME OF THE INJURED PERSON OR DECEDENT.					
<b>11. WITNESSES</b>					
NAME			ADDRESS (Number, Street, City, State, and Zip Code)		
12. (See instructions on reverse). <b>AMOUNT OF CLAIM</b> (in dollars)					
12a. PROPERTY DAMAGE		12b. PERSONAL INJURY		12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights).
<b>I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.</b>					
13a. SIGNATURE OF CLAIMANT (See instructions on reverse side).				13b. PHONE NUMBER OF PERSON SIGNING FORM	14. DATE OF SIGNATURE
<b>CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM</b>			<b>CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS</b>		
The claimant is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages sustained by the Government. (See 31 U.S.C. 3729).			Fine, imprisonment, or both. (See 18 U.S.C. 287, 1001.)		

**INSURANCE COVERAGE**

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of the vehicle or property.

15. Do you carry accident insurance?  Yes If yes, give name and address of insurance company (Number, Street, City, State, and Zip Code) and policy number.  No

16. Have you filed a claim with your insurance carrier in this instance, and if so, is it full coverage or deductible?  Yes  No 17. If deductible, state amount.

18. If a claim has been filed with your carrier, what action has your insurer taken or proposed to take with reference to your claim? (It is necessary that you ascertain these facts).

19. Do you carry public liability and property damage insurance?  Yes If yes, give name and address of insurance carrier (Number, Street, City, State, and Zip Code).  No

**INSTRUCTIONS**

Claims presented under the Federal Tort Claims Act should be submitted directly to the "appropriate Federal agency" whose employee(s) was involved in the incident. If the incident involves more than one claimant, each claimant should submit a separate claim form.

Complete all items - Insert the word NONE where applicable.

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE, AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY

**Failure to completely execute this form or to supply the requested material within two years from the date the claim accrued may render your claim invalid. A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.**

If instruction is needed in completing this form, the agency listed in item #1 on the reverse side may be contacted. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplementing regulations. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with the claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file for both personal injury and property damage, the amount for each must be shown in item number 12 of this form.

DAMAGES IN A **SUM CERTAIN** FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN **TWO YEARS** AFTER THE CLAIM ACCRUES.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of the injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property, which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) **Failure to specify a sum certain will render your claim invalid and may result in forfeiture of your rights.**

**PRIVACY ACT NOTICE**

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. **Authority:** The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.

- B. **Principal Purpose:** The information requested is to be used in evaluating claims.
- C. **Routine Use:** See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.
- D. **Effect of Failure to Respond:** Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid."

**PAPERWORK REDUCTION ACT NOTICE**

This notice is solely for the purpose of the Paperwork Reduction Act, 44 U.S.C. 3501. Public reporting burden for this collection of information is estimated to average 6 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Director, Torts Branch, Attention: Paperwork Reduction Staff, Civil Division, U.S. Department of Justice, Washington, DC 20530 or to the Office of Management and Budget. Do not mail completed form(s) to these addresses.

# APPENDIX D

## D.

### More Legal Forms and Information

Most of the legal forms that we discuss in this handbook can be found within the chapters. However, we have also placed some additional forms in this appendix. Remember that these forms are examples and may not apply to your circumstances.

#### 1. Motion for Leave to File an Amended Complaint

Below is one example of a Motion for Leave to File an Amended Complaint. It is an example where the plaintiff wants to add a new defendant. You could also file this type of motion if you want to amend your complaint to include more or different facts, or add a new legal claim.

IN THE UNITED STATES DISTRICT COURT FOR THE

-----X	
Name of first plaintiff in the case, et al.,	
Plaintiff[s],	
v.	Civil Action
Name of first defendant in the case, et al.,	No. _____
Defendant[s]	
-----X	

#### MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

Plaintiff [your name], pursuant to Rules 15(a) and 19(a), Fed. R. Civ. P., requests leave to file an amended complaint adding a party.

1. The plaintiff in his original complaint named a John Doe Defendant.
2. Since the filing of the complaint the plaintiff has determined that the name of the John Doe defendant is [defendant's name]. Paragraphs [paragraphs in which you refer to John Doe] are amended to reflect the identity and the actions of Officer [defendant's name].
3. This Court should grant leave freely to amend a complaint. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

[Date]

Respectfully submitted,  
[Plaintiff's name]  
[Plaintiff's Address]



## 2. Declaration for Entry of Default

IN THE UNITED STATES DISTRICT COURT FOR THE

-----X	Civil Action
<i>Name of first plaintiff in the case, et al.,</i>	No.____
Plaintiff[s],	
v.	
<i>Name of first defendant in the case, et al.,</i>	
Defendant[s]	
-----X	

### DECLARATION FOR ENTRY OF DEFAULT

[*Your name*], hereby declares:

I am the plaintiff herein. The complaint herein was filled on the [*day you filed the complaint*] of [*month, year you filed the complaint*].

The court files and record herein show that the Defendants were served by the United States Marshal with a copy of summons, and a copy of the Plaintiffs' complaint on the [*day of service*] of [*month, year of service*].

More than 20 days have elapsed since the date on which the Defendants herein were served with summons and a copy of Plaintiffs' complaint, excluding the date thereof.

The Defendants have failed to answer or otherwise defend as to Plaintiffs' complaint, or serve a copy of any answer or any defense which it might have had, upon affiant or any other plaintiff herein.

Defendants are not in the military service and are not infants or incompetents.

I declare under penalty of perjury that the foregoing is true and correct. Executed at (*city and state*) on (*date*).

-----  
*Signature*

### 3. Motion for Judgment by Default

You only need to submit this Motion if the court clerk enters a default against the defendant.

IN THE UNITED STATES DISTRICT COURT FOR THE

-----X  
*Name of first plaintiff in the case*, et al.,  
 Plaintiff[s],  
 v.  
*Name of first defendant in the case*, et al.,  
 Defendant[s]  
 -----X

Civil Action  
No. \_\_\_\_\_

#### MOTION FOR DEFAULT JUDGMENT

Plaintiffs move this court for a judgment by default in this action, and show that the complaint in the above case was filed in this court on the *[date filed]* day of *[month, year filed]*; the summons and complaint were duly served on the Defendant, *[Defendants' names]* on the *[date served]* day of *[month, year served]*; no answer or other defense has been filed by the Defendant; default was entered in the civil docket in the office of this clerk on the *[day default entered]* day of *[month, year default entered]*; no proceedings have been taken by the Defendant since the default was entered; Defendant was not in military service and is not an infant or incompetent as appears in the declaration of *[your name]* submitted herewith.

Wherefore, plaintiff moves that this court make and enter a judgment that *[same as prayer for relief in complaint]*

Dated: \_\_\_\_\_

-----  
*[your signature]*

Plaintiffs' Names and Addresses

### 4. Notice of Appeal

IN THE UNITED STATES DISTRICT COURT FOR THE

-----X  
*Name of first plaintiff in the case*, et al.,  
 Plaintiff[s],  
 v.  
*Name of first defendant in the case*, et al.,  
 Defendant[s]  
 -----X

Notice of Appeal

Notice is hereby given that *[name all parties taking the appeal]*, plaintiffs in the above-named case, hereby appeal to the United States Court of Appeals for the \_\_\_\_\_ Circuit (from the final judgment) (from an order (describing it)) entered in this action on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_

Dated: \_\_\_\_\_

-----  
*[your signature]*

Plaintiffs' Names and Addresses

# APPENDIX E

## E.

### State Supplements: Grievance Procedures, PREA Rules, & LGBTQ+ Policies applicable in Certain States

With the 2021 Edition of the JLH, we included state specific information for the first time. As you will see, we only have information about nine states so far, but we hope to add more information in future updates. If you want to share information with us about how things work in your State, please write to the Center for Constitutional Rights, so future editions of the Handbook can be more complete.

Among other State-specific information shared below, one of the issues we have focused on is the prison grievance system. That's because completing your prison's grievance process is very important. If you don't complete all steps, your lawsuit could be dismissed.

#### General Reminders

- > Keep copies of your grievances if possible.
- > Some grievance forms have "receipts" that are for you to keep. Make sure you keep these if available.
- > Written documentation of what happened is always helpful!

#### ALABAMA

Last updated: January 2021

##### Overview of the Grievance Procedure

There is no clear grievance policy for people incarcerated by the Alabama Department of Corrections ("ADOC") as it currently stands. On October 7, 2014, ADOC responded to an open records request for their grievance procedure by stating that, "**Alabama does not have an inmate grievance system in place.**"

This is very confusing, because an Alabama regulation states that in order to file a lawsuit for any grievance, you are required to exhaust all available grievance procedures the prison provides. Ala. Code 1975 § 14-15-4(b). Therefore, we recommend you carefully review your "inmate handbook" AND ask ADOC staff for information on how the grievance process works at your facility, as well as a copy of any forms that you are required to use when filing a grievance. If you receive information, be sure to follow each step of the process (including appeals) and make a note of any deadlines. If you're told that no grievance process or forms exist, ask

another staff member the same questions to get confirmation. Write down all the details about your efforts to get a grievance form so you can argue that exhaustion was futile if need be.

##### Sexual Assault & PREA

You can report sexual abuse or sexual harassment several different ways:

- > by calling the PREA hotline (dial 91 on the prison phone)
- > depositing a complaint to speak with the PREA Compliance Manager in the PREA drop box (there should be a drop box located in every ADOC facility)
- > reporting the incident to a staff member verbally
- > making a request in writing to the ADOC Investigations and Intelligence Division
- > reporting through a third party (i.e., a friend or a legal organization).

If you are assaulted or witness an assault, consider reporting it immediately and preserving potential evidence like DNA samples and the clothes you wore during the assault.

##### DOC Policies Applicable to LGBTQ Prisoners

###### **Gender Dysphoria Healthcare Policy**

The ADOC has an official policy of providing medically necessary treatment to people with diagnoses of gender dysphoria, which is codified in ADOC Administrative Regulation ("AR") 637, entitled "Gender Dysphoria." Diagnoses for gender dysphoria will be made by medical professionals within your facility or by contracted medical professionals. This will occur whether you self-identify as having gender dysphoria or if it is identified by staff members upon admission to the ADOC, PREA intake procedures, or observation of symptoms while housed in an ADOC facility. There are several steps and avenues to the process of identification and diagnosis of gender dysphoria, all of which are explained in AR 637.

AR 637 provides opportunities to initiate hormone treatment or continue hormone treatment that began prior to incarceration upon review and verification of your prior treatment records. Anyone who is on a hormone treatment plan will be placed on both the medical chronic care treatment list and the mental health caseload. This allows the Gender Dysphoria Management and Treatment Committee ("GDMC") to review your treatment plan at least twice a year to determine if medications or treatment plans need to be adjusted.

## State Policy on Name Changes

Alabama's policy on name changes is very restrictive. You cannot legally change your name if you are currently facing criminal charges, or while you are involved with a court case. You also cannot legally change your name if you have been convicted of a felony or crime of moral turpitude. "Moral turpitude" means you were convicted of one of a long list of crimes such as murder, manslaughter, assault, rape, drug trafficking or others found under the *Definition of Moral Turpitude Act*, HB 282. If you have been convicted of a sex offense, the only time you can change your name is if "the change is incident to a change in the marital status of the sex offender or is necessary to effect the exercise of the religion of the sex offender." Ala. Code 1975 § 15-20A-36(a). People who do not fit into these categories can change their name by filing a petition with your local probate court. (A probate court is a court that primarily deals with wills and estates). You will have to pay a filing fee that varies in price depending on the probate court. To find your local probate court, we recommend you ask prison staff for information.

Unfortunately, even if you successfully change your name while incarcerated, prison staff can continue to use your old name. Your old name must also appear first in all your records and correspondence, followed by your new legal name. See AR 448.

## CALIFORNIA

Last updated March 2021

### DOC Policies Applicable to LGBTQ Prisoners

Thanks to the *Transgender Respect, Agency, and Dignity Act*, Senate Bill 132, which went into effect in January 2021, the California Department of Corrections and Rehabilitation ("CDCR") is now required to house transgender people in men's or women's facilities based on their own safety preferences. CDCR is also required to search and pat down transgender people based on their gender identity, and to respect their pronouns. Although CDCR can deny placement requests based on safety reasons, all denials must be placed in writing.

## FLORIDA

Last updated: January 2021

### Overview of the Grievance Procedure

Depending on the type of grievance you plan to file, you may be required to file an "informal grievance" **before** you file your "formal grievance." If your grievance is about sexual abuse, an emergency situation, the return of incoming mail, a violation of the *Americans with Disabilities Act*, placement in close management, gain time, medical care, reprisal, bank issues, or disciplinary action, you do not need to file an informal grievance, just file a formal grievance within fifteen days of the incident. (NOTE: there is no time limit for filing a grievance related to sexual abuse.) The full list of grievances that are exempt from this

informal grievance process is articulated in Fla. Admin. Code r. 33-103.006(3).

### Informal Grievance Process

For any other type of grievance, the Florida Department of Corrections ("FDOC") requires you to file an informal grievance within **twenty days** after the incident occurred. See Fla. Admin. Code r. 33-103.011(1)(a).

To file an informal grievance, use Form DC6-236, Inmate Request, and write "Informal Grievance" on the form. Fill it out and put it in the locked grievance box available in your open population or special housing unit. Be sure to sign the form. A grievance coordinator should respond to your request within fifteen days, and will either approve, deny, or return the grievance without action. After you get the grievance coordinators' response, or if fifteen days pass without a response, you have **fifteen days** to start the formal grievance process.

### Formal Grievance Process

Your formal grievance can only address one issue or complaint. To file a formal grievance, complete a Form DC1-303, Request for Administrative Remedy or Appeal, fill out your identifying information and state what happened. If you also filed an informal grievance, attach the informal grievance form and response to prove you completed that step. You must also date and sign the form. Put your grievance in the locked grievance box available in your open population or special housing unit. You should receive a decision within twenty days of its receipt. The response will state whether the grievance was approved, denied, or merely returned, and provide the reasons why.

If your grievance is denied or you do not receive a reply by the agency's deadline, **you should immediately file an appeal** by filling out a form DC1-303, Request for Administrative Remedy or Appeal, and attaching your grievance. Mail the completed form to:

Bureau of Policy Management and Inmate Appeals  
501 South Calhoun Street, Tallahassee, FL 32399-2500

The appeal form must be received within fifteen calendar days from the date you got the response to your formal grievance, so mail your appeal as soon as possible to allow time for processing and mailing.

### Sexual Assault & PREA

You can report sexual abuse or sexual harassment by filing a grievance yourself or through a third party. A third party can be another prisoner, a staff member, or an individual outside of the FDOC who can file on your behalf. See Fla. Admin. Code r. 33-103.006(3)(j). You can also report an incident to a staff member verbally. The FDOC suggests that reports should be made "immediately" for the sake of ensuring your safety and the integrity of potential evidence, but you are not required to submit either an informal or formal grievance within a specific timeframe. If a third party is filing the grievance on your behalf, they can only do so by filling out the DC1-303, Request for

Administrative Remedy or Appeal and note that it is for a sexual abuse grievance.

FDOC may claim an extension of time of up to seventy days to respond to a PREA grievance if it believes that the normal response requirements will be insufficient to properly investigate the grievance. If this is the case, then you will be notified of the extension and a date by which to expect the decision in writing. If, however, it is an emergency grievance and you express your belief that you are subject to a substantial risk of imminent sexual abuse, the FDOC must respond within forty-eight hours from the receipt of the grievance, and a final decision determining whether or not you are in substantial risk of imminent sexual abuse will be issued within five calendar days of the receipt of the grievance.

### DOC Policies Applicable to LGBTQ Prisoners

#### **Gender Dysphoria Healthcare**

According to FDOC Policy 403.012, *Identification and Management of Inmates Diagnosed with Gender Dysphoria*, transgender people will be evaluated to confirm their gender dysphoria diagnosis and will then be transferred to an FDOC facility specially designated to treat gender dysphoria. Once there, you will be eligible to receive treatment including hormone therapy, gender-affirming undergarments and canteen items, and allowances such as wearing make-up (in the housing unit only) and growing long hair. You can also use your preferred titles (Ms., Miss, Mr.) and pronouns in FDOC correspondence, and update your records to reflect a new legal name if you obtain a court-ordered name change that states “change all records.” FDOC encourages its staff to use gender-neutral titles (such as “Inmate Smith”) to prevent misgendering. FDOC also offers group and individualized therapy to transgender people at its gender dysphoria treatment facilities.

#### **State Policy on Name/Gender Marker Changes**

In Florida, if you have been convicted of a crime that could result in a prison sentence, you will not be able to change your name unless you receive a pardon or successfully apply for a full restoration of your civil rights. See Fl. Const. Art. 10 § 10; F.S.A. § 68.07; F.S.A. § 944.292(1). For information on the restoration process, visit <https://www.aclufi.org/en/restore-your-rights> or <https://www.fcor.state.fl.us/restoration.shtml>.

If your civil rights have been reinstated, you can file a petition to change your name with the Chancery Court in the county where you reside. See F.S.A. § 68.07(1). You must pay for fingerprints and a background check that will look at your criminal history on both the state and national levels. See F.S.A. § 68.07(2). If you are unable to afford the fees, you can apply for a waiver; you can request the form for this at the court, but you will need to pay a \$25-dollar administrative fee.

## **GEORGIA**

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Last updated: January 2021

### Overview of the Grievance Procedure

The Georgia Department of Corrections (GDC) has a mandatory two-step grievance process unless your complaint relates to a “non-grievable” issue. Non-grievable issues include: (a) disciplinary actions, (b) sexual assault or abuse, (c) housing placements and transfers, (d) involuntary assignments to Administrative Segregation (which has its own grievance procedure under GDC SOP 209.06), (e) healthcare co-pay charges, (f) work assignments or security classifications, and (h) religious accommodation requests.

If your problem is a non-grievable issue, you do not need to file a grievance to bring a lawsuit later on. But if you believe you experienced any of the above as a form of harassment or retaliation, you should still file a grievance.

#### **GDC’s Two Step Grievance Process**

Ordinarily, Georgia has a **two-step** process for exhausting grievances. However, in rare cases, a **third step** will apply.

- > In **Step 1**, you must submit an initial grievance within **ten days** of an incident unless you have good cause, i.e., illness, court dates, or another “unusual circumstance” that prevented you from filing a grievance on time. The Warden will have **forty days** to respond but can request a one-time **ten-day** extension.
- > For **Step 2**, you must file a Central Office Appeal of your grievance **within seven days of** receiving a response from the Warden **OR** once the time for the Warden to respond has expired. To file a Central Office Appeal, use the Grievance Appeal to Central Office Form. The Commissioner or their assigned reviewer has 120 days to respond with a decision.

Finally, in cases where the Commissioner determines that your grievance should have been accepted rather than rejected, they will return it to the Warden for investigation. The Warden must deliver a decision to you based on this new investigation within **fifteen days**. If you are not satisfied with the second grievance response you receive from the Warden, you must file a **second** Central Office Appeal within **seven days** of the Warden’s decision.

#### **How to File Grievances**

You can file your grievances and appeals by filling out a hard copy form and submitting to a grievance counselor, or by using a J-Pay Kiosk or Tablet. Other prisoners cannot file a grievance on your behalf. If you submit a hard copy grievance, you should receive a receipt from your counselor as proof that you filed the grievance. Each grievance must be limited to a **single** incident or issue (i.e., denial of healthcare), and you may not use extra pages, profanity, or slurs, or else it will be rejected.

You can only have **two active grievances** at a time, unless one of your grievances is an Emergency Grievance (i.e., grievance reporting significant injuries, *Americans with Disabilities Act* (ADA) violations, or important issues of prison

security or administration). Emergency Grievances will be handed over to the Duty Office and must be answered within forty-eight hours, instead of forty days. However, if an officer determines that your grievance is not an emergency, you will have ten days to file a new ordinary grievance that GDC must answer within forty days.

If you have more than the allowable number of grievances, you can decide which one you wish to drop and which one you want to keep open by speaking with a Grievance Coordinator.

### **Sexual Assault & PREA**

Georgia has detailed policies on the *Prison Rape Elimination Act* (PREA) and the protection of transgender, intersex, and gender nonconforming people in custody. See GDC SOP 208.06. In 2019, Georgia also released a new policy on the treatment of transgender and intersex prisoners, GDC SOP 220.09, *Classification and Management of Transgender and Intersex Offenders*. According to these policies, GDC is banned from assigning trans people to gender-specific facilities based solely on their anatomy. Instead, officials must decide whether to place transgender people in male or female facilities on a case-by-case basis, giving “serious consideration” to the individual’s own views on safety. Transgender people also have a right to shower privately away from others, and body cavity searches are restricted. Strip-searching transgender or intersex prisoners to determine their sex is prohibited, and making derogatory comments about transgender people’s gender identity is also banned. GDC staff are also required to attend training on how to communicate with LGBTQ+ people in a respectful and professional manner, and are instructed to address transgender people using their preferred pronouns or their last name. SOP 220.09.

GDC states that it has a zero-tolerance policy on sexual harassment and assault. You can report sexual abuse, harassment, and retaliation verbally, or in writing, through the prison PREA hotline by dialing \*7732, or by mail to the Department Ombudsman Office. If you want to remain anonymous when reporting, you can write to the State Board of Pardons and Paroles, Office of Victim Services, 2 Martin Luther King, Jr. Drive, S.E. Balcony Level, East Tower, Atlanta, Georgia 30334. You can also report on behalf of someone else, as a third party. Third party reports can be made to the Ombudsman’s Office by calling (478) 992-5358 or writing to the State Board of Pardons and Paroles address given above.

### **DOC Policies Applicable to LGBTQ+ Prisoners**

#### **Gender Dysphoria Healthcare**

After a ground-breaking case involving the serious mistreatment of and denial of medical care to a transwoman in a men’s prison (*Diamond v. Owens*, 131 F. Supp. 3d 1346 (M.D. Ga. 2015)), Georgia changed its official policy on gender dysphoria healthcare. Under GDC SOP 507.04.68, *Management and Treatment of Offenders Diagnosed with Gender Dysphoria*, GDC will provide individualized medical and mental health treatment to people with gender dysphoria, including hormone therapy,

though you are entitled to other necessary treatment as well. You can also request gender-affirming undergarments and hygiene products. The Statewide Medical Director and Statewide Mental Health Director must approve every treatment plan or denial of treatment, and treatment plans will be assessed on a regular basis and updated when needed.

### **State Policy on Name/Gender Marker Changes**

Name changes in Georgia are controlled by O.C.G.A. § 19-12-1–19-12-4, and O.C.G.A. § 31-10-23(d). Georgia does not restrict name changes for people with criminal convictions, and in a case called *In re Feldhaus*, 340 Ga. App. 83 (Ga. Ct. App. 2017), a Georgia appeals court affirmed that transgender name changes are legitimate and permissible.

The name change process is just complicated, which makes it hard to complete in prison. To change your name in Georgia, you must fill out four separate forms: a “Petition,” “Verification,” “Notice of Petition,” and “Case Filing Information” forms. These forms might be found in the Clerk’s Office of your county or can be found online. These forms must be notarized and then filed at the Superior Court Clerk’s Office. After filing, you must arrange for publication of your name change in your county’s official legal publisher. After waiting for the publication period to be complete, you schedule and attend a final court hearing where the judge will issue the final order on your name change. The last step is to file the final order and receive a certified copy, after which the name change is complete.

In order to change your gender marker on driver’s licenses or identification cards in Georgia, you must submit either a court order or a physician’s letter which certifies your gender change. These instructions can be found on the Department of Driver Services website. Birth certificate’s gender markers may be changed if you are able to acquire a court order which certifies that you have received gender confirmation surgery.

## **LOUISIANA**

Last updated: January 2021

### **Overview of the Grievance Procedure**

While the Louisiana Department of Public Safety and Corrections (“LA DPS&C”) asks you to speak with staff informally if you have a grievance, this is not required. You can start a formal grievance through the Administrative Remedy Procedure (ARP) by filing a Request for Administrative Remedy (Form B-05-005-ARP-1) or writing a letter to the Warden. You must file your grievance **within ninety days** after an incident occurs, but there is no time limit for filing a grievance about sexual assault. Time limits may also be waived depending upon the circumstances, so if the agency’s deadline has passed, you should file a grievance anyway. If you file your grievance as a letter, you should include the phrase “This is a request for administrative remedy” or “ARP.” Once the request is screened and accepted by an ARP Screening Officer, your grievance goes through a two-step process, detailed below:

- > **Step 1:** Prison staff are required to review your grievance and respond within forty days from the date the request is received. If your grievance is about sexual assault, they must **respond within five days** from the date the request is received. The Warden may request permission for an extension of **up to five days**; if the extension is granted, you must be notified in writing. The Warden will provide a response on a First Step Response Form.
- > **Step 2:** If your grievance is denied or you do not receive a reply by the agency's deadline, you must **file an appeal within five days**. In the space provided on the First Step Response Form, explain why you are dissatisfied and requesting the appeal. Completed appeals should be submitted to your ARP Screening Officer. You should receive a final decision from the Secretary of the DPS&C or its designee within forty-five days of the ARP Screening Officer's receipt of your request.

### DOC Policies Applicable to LGBTQ Prisoners

At the time of publication, Louisiana did not have an express policy on gender dysphoria treatment and care. However, as Section I Part V explains, transgender people incarcerated in LDOC have a Constitutional right to receive hormone therapy and other necessary treatments, regardless of whether a formal policy exists.

### Sexual Assault & PREA

You can report sexual assault, sexual misconduct, or sexual harassment to any staff member verbally or in writing. Upon the reporting of such allegations, the staff member must immediately notify their supervisor who must complete an Unusual Occurrence Report. You can also use the ARP as a way to report any sexual assault, and no time limit or requirement of exhaustion of more informal grievance remedies will be imposed. Third parties such as friends, family members, and outside advocates can also report an incident by notifying the warden's office where you are incarcerated. If you make a PREA report within seventy-two hours of your assault happening, you should be escorted to the infirmary for the obtainment of evidence, as well as assessment and testing for sexually transmitted diseases. If the alleged abuser is a staff member, contact between you and the staff member is prohibited without approval from the Unit Head.

### State Policy on Name/Gender Marker Changes

In Louisiana, you must complete all prison time, probation, or parole you were sentenced to before you can change your name. See LSA-R.S. 13:4751(D)(1). However, if you have ever been convicted for a "crime of violence," your name change petition will be denied, no matter how long ago you completed your sentence. See LSA-R.S. 13:4751(D)(2). A "crime of violence" can be any of over fifty different offenses, such as murder, rape, carjacking, burglary, and many others, which are enumerated in LSA-R.S. 14:2(B).

If you are not serving a sentence for a felony conviction and there are no "crimes of violence" on your record, then you can change your name by filing a petition with the district court of the parish in which you were sentenced. See LSA-R.S. 13:4751(B). You will have to pay a filing fee for your petition that varies from parish to parish, with some fees being under \$200 and some being over \$350. See LSA-R.S. 13:4755.

If you cannot afford the filing fee, you can ask the court to waive it by filing an affidavit asking to proceed "in forma pauperis," meaning "file as a poor person." If your application is approved, you will be allowed to proceed with your case without paying the filing fees in advance. At the end of the case, the judge will determine whether you can afford to pay anything towards the court fees, and, if so, how much you have to pay. However, if you are in prison when you file your application to proceed "in forma pauperis" you may have to pay some advance costs for the name change case if you have some assets. The court will tell you how much.

## MISSISSIPPI

Last updated: January 2021

### Overview of the Grievance Procedure

Mississippi has a **two-step** process for exhausting administrative remedies.

- > **Step 1: Initial Grievance.** First, file a grievance within **thirty days** of the incident you want to complain about using the printed forms provided by the Administrative Remedy Program ("ARP"). However, if you are found guilty in a disciplinary hearing, you have **fifteen days** to appeal the decision in writing to the ARP Director.

Your initial complaint should explain what happened, including who was there, when it was, where it was, and include the words "This is a request for an administrative remedy." Carefully follow all instructions, and be sure to address only **one incident** in each grievance. Submit your completed grievance to the ARP along with an Inmate Legal Assistance Program request form, which you can request from the tower officer in your housing unit. The ARP has ninety days to respond to your initial complaint. If the ARP rejects your grievance for a technical reason, or because your complaint is not clear or you have attached too much information, you have **five days** to revise your grievance and submit it again.

- > **Step 2: Appeal.** Second, file an appeal within **five days** if your Step-One grievance is denied or you do not receive a reply by the agency's deadline, using Form ARP-2. Explain why you are appealing, but you do not have to describe the incident you are complaining about again. You should use the envelope you were given with the response to mail this form. If you need an extension at any time, you can request one by writing to the ARP Director.

### Emergency Grievances:

If you need to make an emergency complaint because going through the regular timeline would put you at a substantial risk of personal injury or cause you serious and irreparable harm, you can send an emergency request to the ARP Director, who will review it immediately. You can also file your complaint directly with the ARP Director if you believe you would be harmed if your complaint became known about at your facility. If the ARP Director believes your complaint is not an emergency, you will have **five days** to resubmit your request through the regular channels.

### Sexual Assault & PREA

You can report sexual assault, sexual harassment, or sexual misconduct by calling a dedicated PREA tip line from the prison phone: lift the handset, select your language preference, dial the tip-line number for your facility (either 9999#, 9909#, or #99), and leave a voice message. Third parties (like your friends or family members) can access the tip line by calling 1-601-359-5600. You can also report an incident to a staff member, either verbally or in writing. Additionally, you can report sexual abuse and get confidential support services such as counseling by writing to the Mississippi Coalition Against Sexual Assault at P.O. Box 4172, Jackson, MS 39296 or calling 1-888-987-9011.

### DOC Policies Applicable to LGBTQ Prisoners

#### Gender Dysphoria Healthcare

At the time of publication, Mississippi did not have an express policy on gender dysphoria treatment and care. However, transgender people incarcerated in MDOC have a Constitutional right to receive hormone therapy and other necessary treatments, regardless of whether a formal policy exists.

#### State Policy on Name/Gender Marker Changes

There is no statute or case law in Mississippi that limits the rights of people in prison to change their names. However, the name-change petition forms ask people to certify that they do “not have any outstanding judgments,” have “never been convicted of a crime, and are “not involved in any pending legal actions.” This may mean that currently and formerly incarcerated people will face challenges when trying to change their name. However, you can still try to initiate a name change by petitioning the chancery court in the county where your facility is located. See Miss. Code Ann. § 93-17-1.

## NEW YORK

Last updated: January 2021

### Overview of the Grievance Procedure

New York State’s grievance process has three main steps. See Part 701 of Title 7 of the N.Y. Codes, Rules and Regulations (NYCCR); and DOCCS Directive No. 4040 released in 2016.

- > **Step 1 – Initial Grievance & IGRC Decision:** You must file and submit an Inmate Grievance Complaint (Form

#2131 or plain paper) to the Inmate Grievance Resolution Committee (IGRC) **within twenty-one days** of an incident. However, if your complaint is about sexual assault, no deadline applies. Your complaint should include the following information:

- + Your name
- + Department Identification Number
- + Housing unit, program assignment, and any other identifying information
- + A short, specific description of the problem and the remedies you are requesting; and
- + Details of the actions you have already taken to try to resolve the complaint, including people you have contacted and responses you have received.

The IGRC will schedule you for a hearing within **sixteen days** after you filed your complaint unless they’re able to resolve it informally. At the hearing, you will have an opportunity to appear at the hearing and present relevant information, comments, or evidence in support of your grievance. You can also ask any witnesses who have relevant information to come to the hearing and speak. The IGRC acts as the judge. The hearings are governed by NYCCR Section 701.5(b)(2). If you object to any of the prisoner representatives on the IGRC, you can say so and these representatives will not participate in the process. NYCCR Section 701.6(c). The IGRC will discuss your grievance in private and make a decision. NYCCR Section 701.5(b)(3). Their decision must be communicated to you in writing with reasons stated within **two working days**. If their decision requires the Superintendent or Central Office to take action, then their decision will be referred to as a “recommendation” and will be referred to the Superintendent.

- > **Step 2 – Appeal to the Superintendent:** If your Step One grievance is denied, you have **seven days** to appeal. You must file an appeal to the Superintendent by submitting a Form 2131 with the Grievance clerk. The Superintendent will determine whether your grievance is a Departmental or Institutional issue. Departmental issues are complaints that ask DOCCS to change one of its policies or directives. These grievances will be forwarded to the Central Office Review Committee (CORC) and you will receive notice that your complaint has been forwarded. If the grievance is an Institutional issue, the Superintendent will provide a written response within twenty calendar days. If you have not received a decision within forty-five days, you may appeal to the CORC.
- > **Step 3 - Appeal to the Central Office Review Committee (CORC):** If your **Step 2** grievance is denied or you do not receive a reply within forty-five days, file an appeal to the CORC using Form 2133, regardless of whether your complaint was an Institutional or Departmental issue. Appeals must be



filed with the Grievance Clerk within **seven days** of receiving the Superintendent's response, or the expiration of the agency's deadline. CORC will review the decision and send you its decision within thirty days after they received the appeal. If you have not received a decision within forty-five days of filing your appeal, **you should send a letter to the IGP supervisor** to make sure your appeal was filed and received by the CORC.

### **Sexual Assault & PREA**

You can report sexual abuse, sexual harassment, and retaliation in connection with one of these matters by talking to staff at your facility, writing to the Superintendent, a member of the facility Executive Team, the Central Office, the DOCCS Office of Special Investigations (OSI) or to the DOCCS PREA Coordinator. The address and hotline for OSI is listed below.

Office of Special Investigations  
Department of Corrections and Community Supervision  
State Office Campus, Building 2  
1220 Washington Avenue, Albany, New York 12226-2050  
(518) 457-2653 | Hotline: 1-844-OSI-4NYS

You can also have a third party file a report on your behalf. This can be done by contacting your facility's Superintendent or, if after hours, the Watch Commander. The twenty-one-day time limit for filing grievances does not apply to sexual harassment or abuse complaints.

Victims of sexual abuse will have access to forensic medical examinations at an outside facility and these examinations will be performed by Sexual Assault Forensic Examiners (SAFEs) or Sexual Assault Nurse Examiners (SANEs) whenever possible.

### **DOC Policies Applicable to LGBTQ Prisoners**

#### ***Gender Dysphoria Healthcare***

People who receive a gender dysphoria diagnosis in custody or prior to their incarceration will be eligible to receive hormone therapy according to DOCCS Division of Health Services Policy No. 1.31, which was updated in 2018. You can request a screening and treatment at any point during your incarceration, and your FHS1 Problem List will be updated. DOCCS cannot discontinue your hormone therapy unless it is medically urgent or the DC/CMO gives approval for it to end.

If you have a gender dysphoria diagnosis, you can also request gender-affirming underwear through your facility's Health Unit. Once approved, the Deputy Superintendent for Administration at your facility will order your undergarments and issue you a medical permit to possess and wear these garments. Note: you **cannot** receive gender-appropriate undergarments through the Package Room or personal purchase.

There is no formal policy that describes your rights to receive gender affirming surgeries. However, once you have a gender dysphoria diagnosis, you can ask your primary health care provider about your surgery options.

Your primary provider will need to get permission from the DC/CMO, and you will likely be given an opportunity to have a consultation with an outside specialist. If you experience any significant delays during this process, you should ask for the reasoning for the delay. There is no set timeline that DOCCS must follow for surgery consultations, but you can report unreasonable delays through the grievance process.

### **State Policy on Name/Gender Marker Changes**

New York allows incarcerated people and people on parole to seek name changes by submitting a notarized Petition, explaining why you want to change your name, an Order, and Exhibits like your birth certificate (if you're a New York State Resident) and your criminal record to the NYS Supreme Court in the county where you are located. However, people who have been convicted of a violent offense also have to serve copies of their Petition to the District Attorney of every county where you have been convicted of a violent felony, and each court where you were sentenced. For a list of violent felonies, see New York Penal Law § 70.02.

For a complete guide to the process and template letters and forms, you can write to:

Sylvia Rivera Law Project,  
Attn: Prisoner Justice Project,  
147 W. 24th Street, 5th Floor, New York, NY 10011

The name change process for incarcerated individuals can take anywhere between three and twelve months, depending on how quickly you can obtain the supporting documentation described below. You will also be asked to pay a filing fee of \$210 in most upstate counties or \$65 in New York City. You can try to have these fees waived by filing an "Affidavit in Support of Application Pursuant to C.P.L.R. 1101(f) for Reduced Filing Fees" in which you state your income and reasons for needing a waiver. However, most counties do not waive their filing fees.

#### **Hearings:**

New York courts generally rule on name changes without having an in-person hearing. However, if you receive a letter from the court asking you to appear for a hearing, you should be prepared with short answers about why you want your name change. You might hear the counterargument that your name change should not be granted because it will create record-keeping confusion, but you can argue that justification is not valid.

#### **Publication:**

After your name change has been granted, you will need to publish your new name in a newspaper. Newspapers are accustomed to these requests. You can write to a newspaper, explain what you need, and they will send you an affidavit of publication after the notice appears. You will have sixty days from the date of the order to complete publication and ninety days to file proof of this publication. This requirement generally cannot be waived for incarcerated people and especially not for those who have been incarcerated for a violent felony. You will likely need

to publish this Notice in your county of incarceration and perhaps also in the county of your conviction.

Once you have completed the above steps, you should request at least one certified copy of the name change order from the clerk of the court so you can save it for your records.

## **NORTH CAROLINA**

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Last updated: January 2021

### **Overview of the Grievance Procedure**

North Carolina has a **three-step** process for exhausting grievances. See Chapter G, Section .0300 of the North Carolina Department of Public Safety policies and procedures.

- > **Step 1: Initial Grievance.** First, submit a written grievance using Form DC-410 to a designated screening officer or any other staff member within **ninety days** of the incident you want to complain about. This deadline does not apply to sexual abuse or sexual harassment complaints. After you submit your grievance, a Screening Officer will review it and decide whether to accept it for processing or reject it within **three days**. Your grievance may be automatically rejected if it challenges a matter already decided by a court, challenges a disciplinary action, is outside of the ninety-day time limit, or if the language in your grievance is profane or vulgar. If the screening officer rejects your grievance, they have to tell you in writing and give you the opportunity to resubmit the grievance on a new form.

If the screening officer determines that your Step 1 grievance can be considered, then it moves forward to an investigation. You should receive a written response to your grievance within **fifteen days** of its acceptance. If you do not receive a response to your grievance within fifteen days, **you should file a new grievance** stating you are treating the non-response as a denial and will therefore appeal that denial and submit an appeal through the Step 2 process.

- > **Step 2: First Appeal.** If your grievance is denied OR you do not receive a reply by the agency deadline, **you must appeal within twenty-four hours** by submitting a Form DC 410 to the Facility Head. The Facility Head will then start an investigation which must be completed within fifteen days. You should receive a written response within **twenty days** from the day you were informed your grievance was accepted. The Facility Head may then investigate your grievance or assign a staff member to investigate. If your grievance is about the Facility Head themselves, then they will send your grievance to the Region Director to complete this step of review.
- > **Step 3: Final Appeal.** If you are not satisfied with the Step 2 decision or do not receive a response by the deadline, you must submit your appeal to the Inmate Grievance Examiner (IGE) **within twenty-four hours**. If

you do not submit your appeal within twenty-four hours, you will lose your right to appeal the earlier decisions. You should be informed of the final decision on your grievance within fifty days of the acceptance of your grievance, although the prison may extend its response time by a maximum of seventy days if they notify you in writing. Once you have received your final grievance response at Step 3, you have completed this grievance process and you may move forward with a legal claim.

### **Sexual Assault & PREA**

You may report incidents of sexual assault or abuse in a variety of ways and there is no time limit for when you can file these complaints. You can use the grievance procedure listed above at any point and the PREA office at your facility will be immediately notified. Complaints about sexual abuse or harassment submitted through the grievance procedure are not allowed to be instantly rejected for any reason. Alternatively, you can make a report to any staff member, call the Department of Public Safety Communications office at 1-800-368-1985 or the PREA Administration Office at 919-825-2754.

### **DOC Policies Applicable to LGBTQ Prisoners**

#### **Gender Dysphoria Healthcare**

In August 2019, North Carolina released a new policy called *Evaluation and Management of Transgender Offenders* and created Facility Transgender Accommodation Review Committees (TARC), with representatives from psychiatry, behavior health, primary health care provider, nursing, and other medical fields, to determine whether gender dysphoria treatment and accommodations are needed.

You can ask to be referred to the Facility TARC for a treatment consultation at any point during your incarceration, including when you are processed or transferred to another facility. In addition to hormone therapy, you may ask for undergarments that match your gender identity, private showering, special housing considerations, and hygiene/hair products. During the individualized consultation, you will be asked to sign an authorization for release of information so that the facility may obtain all medical and mental health records and you will be interviewed by the TARC as well as a licensed behavioral health clinician. The licensed behavioral health clinician will ask for input from a staff psychiatrist and then complete an evaluation.

#### **Hormonal therapy:**

If you were receiving hormone therapy immediately before your incarceration, your hormone therapy will be continued. The policy states that "Interruption in hormone therapy should be avoided unless otherwise clinically indicated." If you are asking to begin hormone therapy for the first time, your request will be reviewed by the TARC and the TARC will submit a recommendation to the Director of Prisons and Deputy Secretary of Health Services for a final decision. Their decision must be summarized in writing using the Form DC-411D. The policy does not state how quickly you will receive a decision.

## Surgeries:

Any requests for gender affirming surgeries will be reviewed by the TARC who will then make a recommendation to the Director of Prisons and Deputy Secretary of Health Services for a final decision.

## State Policy on Name/Gender Marker Changes

To change your name in North Carolina, you must submit the six documents listed below to the clerk of the superior court of your county. However, if you are currently registered as a sex offender, name changes are banned.

- 1. Petition for Name Change:** Your petition must include: your true name, your county of birth, date of birth, the full name of your parents as shown on your birth certificate, the name you want to use, the results of the criminal background checks, and a sworn statement as to whether you are a resident in the county which you are filing your petition and whether or not you have outstanding tax or child support obligations.
- 2. North Carolina State Background Check:** To request a copy, complete a Criminal History Request Form (or write and request one) and send along with \$14 to:  
  
North Carolina State Bureau of Investigation  
Criminal Information and Identification Section  
Attention: Application Unit – Right to Review  
3320 Garner Road, P.O. Box 29500  
Raleigh, NC 27626-0500
- 3. FBI background check:** To request copy, fill out an Applicant Information Form (or write and request one) and send the form along with \$18 to:  
  
FBI CJIS Division – Summary Request  
1000 Custer Hollow Road, Clarksburg, WV 26306
- 4. Affidavit of Character:** You will probably need signed and notarized Affidavits of Character from two adults who are also residents in your county and are not members of your family. While most counties require these affidavits, some do not.
- 5. Notice of Intent to Change Name form:** Before filing your petition, you will need to fill out a Notice of Intent to Change Name form and submit it to your county courthouse to be posted on a bulletin board for ten consecutive business days. If you have a legitimate concern for your safety in regard to making your name change public, you may be exempted from this requirement.
- 6. Filing Fee:** The filing fees for each county are different, but \$120 is typical. You can request a fee waiver in most counties but might need to first write the clerk and ask for a fee waiver form. Once the materials above have been received, the clerk will then determine whether there are good and sufficient reasons to either accept or deny your petition.

## SOUTH CAROLINA

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Last updated: January 2021

### Overview of the Grievance Procedure

South Carolina has a **four-step** process for exhausting grievances that is summarized in SCDC Policy/Procedure GA-01.12, *Inmate Grievance System*.

- > **Step 1 Informal Grievance.** First, you must make an effort to informally resolve your grievance by submitting a Request to Staff Member Form to an appropriate staff member within **eight working days** of the incident you are complaining about. However, sexual assault grievances may be filed at any time. If your grievance concerns criminal activity or a disciplinary conviction, complete a Form 10-5, Step 1 **within five working days** of the incident instead.
- > **Step 2: Formal Grievance.** Next, submit a formal grievance using Form 10-5, Step 1, within **eight working days** of receiving the response to your Request to Staff Member Form. Be sure to describe the issue you are complaining about, including the date and time of the incident, and why you believe you are entitled to relief. Also detail your attempts to resolve the problem informally and include a copy of the Request to Staff Member Form. You can file the grievance by placing the form in one of the dedicated grievance drop boxes.  
  
The Warden will respond in writing on Form 10-5, Step 1, within forty-five days of the date the grievance was formally entered into the system. The Warden will explain in detail the reasoning behind the decision and what remedies are recommended. You will be informed of your right to appeal to the next level. **If you do not receive a response within forty-five days, you should move to the next step.**
- > **Step 3: Agency Appeal.** Next, appeal to the Deputy Director of Operations by completing Form 10-5a, Step 2 within **five calendar days** of your receipt of the Warden's response, or expiration of their deadline to respond. Explain why your appeal should be granted, and place your completed form in the grievance drop box. You will receive a response within ninety days. This will be the department's final decision in the matter.
- > **Step 4: Court Appeal.** Finally, submit an appeal to the South Carolina Administrative Law Court within **thirty days** of receiving the department's final response, using the Notice of Appeal attached to the department's final response, to fully exhaust your administrative remedies under the PLRA.

### **Additional Restrictions:**

You are only allowed to file five grievances per month, including any grievances that are returned unprocessed because the Inmate Grievance Coordinator has decided the issue you are complaining about is not grievable. You can file an emergency grievance if your health, safety, or welfare is in serious danger and you believe there is a substantial risk of personal injury or other serious or irreparable harm. This will be forwarded directly to the Warden, who will respond within seven working days. If the Warden decides that the grievance is not an emergency, it will be processed as a normal grievance instead.

### **Sexual Assault & PREA**

You can file a grievance about sexual abuse **at any time** even if the deadline for filing a Step 1 grievance has passed. You do not need to attempt informal resolution by filling out a Request to Staff Member form before filing a grievance about sexual assault. A third party such as another prisoner, a family member, a friend, or an attorney can assist you in filing a grievance and can also file on your behalf; however, you must give written consent to the grievance being filed on your behalf. You will receive a final response within ninety days of filing a grievance regarding sexual abuse, though this can be extended by another seventy days. If you file an emergency grievance showing substantial risk of imminent sexual abuse, this grievance will be immediately forwarded to the Warden and you will receive a response within five days.

You can also report sexual abuse by calling \*22 from any prison phone, making a complaint to any staff member, or writing to South Carolina Law Enforcement Division at P.O. Box 21398, Columbia, SC 29221. You can also call a sexual assault center outside of the prison by calling \*63 from any prison phone. A friend or family member can report sexual harassment or assault through an Anonymous PREA Tips form on the South Carolina Department of Corrections' website.

### **DOC Policies Applicable to LGBTQ Prisoners**

#### ***Gender Dysphoria Healthcare***

South Carolina Department of Corrections issued a policy in September 2017 to ensure people with gender dysphoria receive medically necessary treatment and safe housing. The policy, which is codified in SCDC Policy/Procedure GA-06.09, *Care and Custody of Transgender Inmates and Inmates Diagnosed with Gender Dysphoria*, states that gender dysphoria diagnoses will be made by medical professionals within your facility or by referral to outside medical professionals. Once diagnosed, you will be eligible to receive treatment including hormone therapy and other accommodations.

SCDC GA-06.09 also requires that one's gender identity and expression and one's views about their own health and safety to be considered when SCDC makes housing decisions regarding transgender people and people with gender dysphoria, so that placement in male and female facilities are each available on a case-by-case basis. You can also indicate in writing which gender you feel most

comfortable being searched by, and this preference will be accommodated when possible.

### **State Policy on Name/Gender Marker Changes**

You can change your name by petitioning the family court in the county where your facility is located. See S.C. Code Ann. § 15-49-10. You will have to pay a filing fee of \$100. S.C. Code Ann. § 15-49-30; S.C. Code Ann. 8-21-310(C)(1). Include in your petition your age, your place of residence and birth, the reason for the change, and the new name you wish to be known by. S.C. Code Ann. § 15-49-10. You must attach the following records to the petition or arrange for them to be provided directly to the court: the results of a fingerprint and criminal background check conducted by the State Law Enforcement Division; a screening statement from the Department of Social Services indicating whether you are on the Central Registry of Child Abuse and Neglect; an signed affidavit stating whether you are under a court order to pay child support or alimony; and a screening statement from the State Law Enforcement Division stating whether you are listed on the sex offender registry. S.C. Code Ann. § 15-49-20(A). When you request the background check from the State Law Enforcement Division, you must include a signed affidavit stating that you have never been convicted of a crime under a name other than the one you are using to make the request. S.C. Code Ann. § 15-49-20(F).

If the judge grants your petition for a name change, the clerk of court will notify the Department of Corrections of your new name and the Department of Corrections will update your record. S.C. Code Ann. § 15-49-20(C). Additionally, the clerk of court will notify the State Law Enforcement Agency, which will update your name on your criminal record. S.C. Code Ann. § 15-49-20(D). If you are on the Central Registry of Child Abuse and Neglect or the sex offender registry, the court will notify the appropriate agencies to update those registries with your new name. S.C. Code Ann. § 15-49-20(A)(2); S.C. Code Ann. § 15-49-20(A)(4).

## **TENNESSEE**

Last updated: January 2021

### **Overview of the Grievance Procedure**

The Tennessee Department of Correction has a **three-step** grievance process, which is codified in Policy 501.01.

- > **Step 1: Initial Grievance.** You have **seven calendar days** from the incident to file a grievance. This deadline does not apply to grievances about sexual assault. You can file a grievance about sexual assault at any time. Fill out the grievance form (form CR-1394) and file it with the Grievance Chairperson at your facility. The chairperson will respond to you **within seven working days**.
- > **Step 2: First Appeal.** If you do not receive a reply from the chairperson or are unhappy with their response, file an appeal within **five calendar days** of their response or the expiration of their reply deadline.

Appeals can be submitted to the grievance committee and the Warden or Superintendent of your facility by filling out the bottom of form CR-1394 and giving it back to the chairperson. A hearing will be held within five working days of when you file your appeal, and you will receive a response within fifteen working days of the hearing. If you do not get a response within these time periods, you may automatically move to the next level of the process, unless you agree in writing to give the department an extension.

- **Step 3: Final Appeal.** If the Warden does not agree to your proposed solution, you have **five calendar** days to file a final appeal with the Assistant Commissioner of Prisons. They will have twenty-five working days to respond to you. When you complete this step, your grievance will be fully exhausted.

**NOTE:** You cannot file more than one grievance about the same incident, and you cannot have more than one grievance pending at Step One. If resolving your grievance within the normal time limits could cause you substantial risk of personal injury or irreparable harm, you can file an emergency grievance. If the Grievance Chairperson agrees that it is an emergency, the chairperson is required to immediately bring your grievance to the attention of the person who can take action to fix the problem. Otherwise, the ordinarily rules and restrictions will apply.

### Sexual Assault & PREA

You can file a grievance alleging sexual assault at any time, even if the deadline for filing a step-one grievance has passed. PREA grievances will be reviewed by the Associate Warden of Treatment or the Deputy Superintendent, who will make a final decision within ninety days of when you file the grievance. Your friend, family member, attorney, or other third party can file a grievance related to sexual abuse for you, but you must agree to have the grievance filed on your behalf (you can use form CR-1394 to do this) and independently pursue any subsequent steps in the grievance process. TDOC also has adopted a PREA policy (Policy 502.06.1) that calls for case by case decisions on transgender housing, prohibits searching transgender and intersex people to determine their genital status, and requires staff to receive training on respectful engagement with members of the LGBTQ+ community.

### DOC Policies Applicable to LGBTQ Prisoners

#### **Gender Dysphoria Healthcare**

At the time of publication, Tennessee did not have an express policy on gender dysphoria treatment and care. However, as Section I Part V explains, transgender people incarcerated in TDOC have a Constitutional right to receive hormone therapy and other necessary treatments, regardless of whether a formal policy exists.

#### **State Policy on Name/Gender Marker Changes**

To change your name in Tennessee, you must petition the petition the circuit, probate, or county court in the county that your facility is in. Tenn. Code Ann. § 29-8-101(a). You cannot change your name if you have been convicted of first- or second-degree murder or have been required to register as a sex offender. Tenn. Code Ann. § 29-8-101(b)(1). If you have been convicted of a different felony, you will have to show the court that you are making the petition in good faith and do not intend to defraud or mislead anyone, and that changing your name will not cause injury to anyone else or a threat to the public safety. Tenn. Code Ann. § 29-8-101(b)(3). Tennessee law does not allow anyone to change their gender marker on their birth certificate. Tenn. Code Ann. § 68-3-203.

## Summary of Name Change Policies Nationwide

Below is a summary of the policies that apply to transgender and non-transgender name changes nationwide, current through July 2019.

State	Can people who are currently incarcerated change their names?	Can people with previous convictions change their names?	Can people who have been convicted as sex offenders change their names?
AL	Yes, but not if convicted of a felony, a sex offense, or a crime of moral turpitude.	If you have ever been convicted of a felony, a sex offense, or a crime of moral turpitude, you cannot change your name. You also cannot change your name while facing criminal charges or while involved in a court case.	No sex offender shall change their name unless the change is incident to a change in the marital status of the sex offender or is necessary to affect the exercise of the religion of the sex offender.
AK	Yes	Yes	No specific restriction
AZ	Yes	Yes, but certain convictions might lead a judge to deny your petition.	No specific restriction
AR	No, unless the name change is for religious reasons	No specific restriction	No specific restriction
CA	Yes	Yes, under limited circumstances.	If you are a registered sex offender, the judge will only approve your name change if they believe it will not harm public safety.
CO	Yes, but not if convicted adult felons or delinquents with the equivalent of an adult felony unless there is good cause.	A name change will not be granted for convicted adult felons or delinquents with the equivalent of an adult felony unless there is good cause.	
CT	Yes	Yes	Yes
DE	Yes	Yes	Yes
DC	No specific restriction	Yes	Yes
FL	No, if your civil rights have been suspended, which means you have been convicted of a felony and have not received a pardon or a reinstatement of civil rights.	Unlikely	Will be a factor to consider.
GA	No specific restriction	No specific restriction	No specific restriction
HI	No specific restriction	No specific restriction	No, unless the court finds the name change to be in the best interest of justice and that the name change won't adversely affect public safety.
ID	Yes	Yes	No specific restriction

State	Can people who are currently incarcerated change their names?	Can people with previous convictions change their names?	Can people who have been convicted as sex offenders change their names?
IL	Yes, but you can only change your name if incarcerated for a misdemeanor.	No, if you have a conviction for identity theft or have a felony conviction within the last ten years	No
IN	No	Yes	No specific restriction
IA	No, IDOC prohibits name change requests during incarceration. <sup>1</sup>	No specific restriction	No specific restriction
KS	Yes	Yes	Yes
KY	Yes	Yes	Yes
LA	Yes, if serving for non-felony.	Yes, after the sentence is satisfied, except for violent crime.	Yes
ME	No specific restriction	No specific restriction	No specific restriction
MD	No specific restriction	Yes	Yes
MA	No specific restriction	No specific restriction	No specific restriction
MI	Yes, but with higher burden of proof.	Yes, but with higher burden of proof.	Yes, but with higher burden of proof.
MN	Yes, but only once.	Yes	No specific restriction
MS	Probably not	Probably not.	Probably not.
MO	No specific restriction	No specific restriction	No specific restriction
MT	No specific restriction	No specific restriction	No specific restriction
NE	Yes	No specific restriction	No specific restriction
NV	Yes, but as a factor.	Yes, but as a factor.	Yes, but as a factor.
NH	Need a compelling case.	Yes.	Need a compelling case.
NJ	Yes	Yes	Yes
NM	No specific restriction	No specific restriction	No specific restriction
NY	Yes	Yes	Yes
NC	No specific restriction	No specific restriction	No
ND	Yes, but felony record will make it much less likely that your request will be granted.	Yes, but felony record will make it much less likely that your request will be granted.	Yes

State	Can people who are currently incarcerated change their names?	Can people with previous convictions change their names?	Can people who have been convicted as sex offenders change their names?
OH	Yes, except for "sexually oriented offense" and "child-victim oriented offense".	Yes, except for "sexually oriented offense" and "child-victim oriented offense".	Yes
OR	Yes	No specific restriction	Yes
PA	Yes, unless incarcerated for felony.	Yes, if not convicted of a violent crime and not convicted of a felony in less than two years.	Yes
RI	No specific restriction	No specific restriction	No specific restriction
SC	Yes	Yes	Yes
SD	No specific restriction	No specific restriction	No specific restriction
TN	Yes, except for individuals who have been convicted of first-degree murder, second-degree murder, or a sex offense. Note that individuals who have been convicted of a felony have a higher burden of proof.	Yes, except for individuals who have been convicted of first-degree murder, second-degree murder, or a sex offense. Note that individuals who have been convicted of a felony have a higher burden of proof.	No
TX	No, if felony. Uncertain if misdemeanor.	Yes, if your record includes a felony, it must either be pardoned, or have been 2 years since your release.	Yes
UT	Yes	Yes	No
VT	Yes	Yes	No, unless compelling reason.
VA	No, unless good cause.	Yes	No, unless good cause.
WA	Yes, if for legitimate cultural reasons (which might include religion).	Yes	Yes, if for legitimate cultural reasons.
WV	No	Yes, if not finished the sentence of first-degree murder or felony kidnapping in the recent ten years.	No.
WI	Yes	Yes, however being currently on parole may affect your chance to change name.	No
WY	Yes	Yes	Yes



# APPENDIX F

## F.

### Excerpts from the PLRA

See also Chapter Two, Section F for some descriptions of these provisions. These are excerpts from the PLRA that the authors believe are the most important, not the entire federal law."

#### Definitions

##### 18 U.S.C. § 3626(h). Definitions. [...]

(2) the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison;

(3) the term "prisoner" means any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program; [...]

(5) the term "prison" means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law;

#### Prospective Relief

##### 18 U.S.C. § 3626. Appropriate remedies with respect to prison conditions

##### (a) Requirements for relief

(1) **Prospective relief.** (A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

(B) The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless—

(i) Federal law requires such relief to be ordered in violation of State or local law;

(ii) the relief is necessary to correct the violation of a Federal right; and

(iii) no other relief will correct the violation of the Federal right.

(C) Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts.

(2) **Preliminary injunctive relief.** In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief and shall respect the principles of comity set out in paragraph (1)(B) in tailoring any preliminary relief. Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period.

(3) **Prisoner release order.** (A) In any civil action with respect to prison conditions, no court shall enter a prisoner release order unless—

(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and

(ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

(B) In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court in accordance with section 2284 of title 28, if the requirements of subparagraph (E) have been met.

(C) A party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met.

(D) If the requirements under subparagraph (A) have been met, a Federal judge before whom a civil action with respect to prison conditions is pending who believes that a prison release order should be considered

may sua sponte request the convening of a three-judge court to determine whether a prisoner release order should be entered.

**(E)** The three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that—

- (i)** crowding is the primary cause of the violation of a Federal right; and
- (ii)** no other relief will remedy the violation of the Federal right.

**(F)** Any State or local official including a legislator or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and shall have the right to intervene in any proceeding relating to such relief.

### **(b) Termination of relief**

**(1) Termination of prospective relief. (A)** In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener—

- (i)** 2 years after the date the court granted or approved the prospective relief;
- (ii)** 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or
- (iii)** in the case of an order issued on or before the date of enactment of the *Prison Litigation Reform Act*, 2 years after such date of enactment.

**(B)** Nothing in this section shall prevent the parties from agreeing to terminate or modify relief before the relief is terminated under subparagraph (A)

**(2) Immediate termination of prospective relief.** In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

**(3) Limitation.** Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

**(4) Termination or modification of relief.** Nothing in this section shall prevent any party or intervener from seeking modification or termination before the relief is terminable under paragraph **(1)** or **(2)**, to the extent that modification or termination would otherwise be legally permissible.

### **(c) Settlements**

**(1) Consent decrees.** In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).

**(2) Private settlement agreements. (A)** Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.

**(B)** Nothing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law.

### **(d) State law remedies**

The limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law.

### **(e) Procedure for motions affecting prospective relief**

**(1) Generally.** The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions. Mandamus shall lie to remedy any failure to issue a prompt ruling on such a motion.

**(2) Automatic stay.** Any motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay during the period

**(A)**

- (i)** beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or
- (ii)** beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and

**(B)** ending on the date the court enters a final order ruling on the motion.

**(3) Postponement of automatic stay.** The court may postpone the effective date of an automatic stay specified in subsection (e)(2)(A) for not more than 60 days for good cause. No postponement shall be permissible because of general congestion of the court's calendar.

**(4) Order blocking the automatic stay.** Any order staying, suspending, delaying, or barring the operation of the automatic stay described in paragraph (2) (other than an order to postpone the effective date of the automatic stay

under paragraph (3)) shall be treated as an order refusing to dissolve or modify an injunction and shall be appealable pursuant to section 1292(a)(1) of title 28, United States Code, regardless of how the order is styled or whether the order is termed a preliminary or a final ruling.

**(f) Special masters**

**(1) In general. (A)** In any civil action in a Federal court with respect to prison conditions, the court may appoint a special master who shall be disinterested and objective and who will give due regard to the public safety, to conduct hearings on the record and prepare proposed findings of fact.

**(B)** The court shall appoint a special master under this subsection during the remedial phase of the action only upon a finding that the remedial phase will be sufficiently complex to warrant the appointment.

**(2) Appointment. (A)** If the court determines that the appointment of a special master is necessary, the court shall request that the defendant institution and the plaintiff each submit a list of not more than 5 persons to serve as a special master.

**(B)** Each party shall have the opportunity to remove up to 3 persons from the opposing party's list.

**(C)** The court shall select the master from the persons remaining on the list after the operation of subparagraph (B).

**(3) Interlocutory appeal.** Any party shall have the right to an interlocutory appeal of the judge's selection of the special master under this subsection, on the ground of partiality.

**(4) Compensation.** The compensation to be allowed to a special master under this section shall be based on an hourly rate not greater than the hourly rate established under section 3006A for payment of court-appointed counsel, plus costs reasonably incurred by the special master. Such compensation and costs shall be paid with funds appropriated to the Judiciary.

**(5) Regular review of appointment.** In any civil action with respect to prison conditions in which a special master is appointed under this subsection, the court shall review the appointment of the special master every 6 months to determine whether the services of the special master continue to be required under paragraph (1). In no event shall the appointment of a special master extend beyond the termination of the relief.

**(6) Limitations on powers and duties.** A special master appointed under this subsection—

**(A)** may be authorized by a court to conduct hearings and prepare proposed findings of fact, which shall be made on the record;

**(B)** shall not make any findings or communications ex parte;

**(C)** may be authorized by a court to assist in the development of remedial plans; and

**(D)** may be removed at any time, but shall be relieved of the appointment upon the termination of relief.

**(g) Definitions**

As used in this section

**(1)** the term "consent decree" means any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlements;

**(2)** the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison;

**(3)** the term "prisoner" means any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program;

**(4)** the term "prisoner release order" includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison;

**(5)** the term "prison" means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law;

**(6)** the term "private settlement agreement" means an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled;

**(7)** the term "prospective relief" means all relief other than compensatory monetary damages;

**(8)** the term "special master" means any person appointed by a Federal court pursuant to Rule 53 of the Federal Rules of Civil Procedure or pursuant to any inherent power of the court to exercise the powers of a master, regardless of the title or description given by the court; and

**(9)** the term "relief" means all relief in any form that may be granted or approved by the court, and includes consent decrees but does not include private settlement agreements.

## **Exhaustion of Administrative Remedies, Waiver of Reply, Mental & Emotional Injury, Attorneys Fees**

### **42 U.S.C. § 1997e**

#### **(a) Applicability of administrative remedies**

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

#### **(b) Failure of State to adopt or adhere to administrative grievance procedure**

The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 1997a or 1997c of this title.

#### **(c) Dismissal**

**(1)** The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

**(2)** In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

#### **(d) Attorney's fees**

**(1)** In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that—

**(A)** the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 [722] of the Revised Statutes; and

**(B) (i)** the amount of the fee is proportionately related to the court ordered relief for the violation; or

**(ii)** the fee was directly and reasonably incurred in enforcing the relief ordered for the violation. **(2)** Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant. **(3)** No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel. **(4)** Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 2 [722] of the Revised Statutes of the United States (42 U.S.C. 1988).

#### **(e) Limitation on recovery**

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act.

# APPENDIX G

## G.

### Model Questionnaire for United Nations Special Rapporteur on Torture

For more information on submissions to the United Nations Special Rapporteur on Torture, please see Chapter 2, Section E (2).

This model questionnaire is to be completed by persons alleging torture or their representatives. Please answer all of the questions to the best of your ability. Information on the torture of a person should be transmitted to the Special Rapporteur in written form and sent to:

Special Rapporteur on Torture  
c/o Office of the High Commissioner for Human Rights  
United Nations Office at Geneva  
CH-1211 Geneva 10, Switzerland  
E-mail: [urgent-action@ohchr.org](mailto:urgent-action@ohchr.org)

Although it is important to provide as much detail as possible, the lack of a comprehensive accounting should not necessarily preclude the submission of reports. However, the Special Rapporteur can only deal with clearly identified individual cases containing the following minimum elements of information:

- a. Full name of the victim;
- b. Date on which the incident(s) of torture occurred (at least as to the month and year);
- c. Place where the person was seized (city, province, etc.) And location at which the torture was carried out (if known);
- d. Indication of the forces carrying out the torture;
- e. Description of the form of torture used and any injury suffered as a result;
- f. Identify of the person or organization submitting the report (name and address, which will be kept confidential).

Additional sheets should be attached where space does not allow for a full rendering of the information requested. Also, copies of any relevant corroborating documents, such as medical or police records should be supplied where it is believed that such information may contribute to a fuller accounting of the incident. Only copies and not originals of such documents should be sent.

#### I. Identity of the person(s) subjected to torture

- A. Family Name
- B. First and other names
- C. Sex: Male Female
- D. Birth date or age
- E. Nationality
- F. Occupation
- G. Identity card number (if applicable)
- H. Activities (trade union, political, religious, humanitarian/ solidarity, press, etc.)
- I. Residential and/or work address

#### II. Circumstances surrounding torture

- A. Date and place of arrest and subsequent torture
- B. Identity of force(s) carrying out the initial detention and/or torture (police, intelligence services, armed forces, paramilitary, prison officials, other)
- C. Were any person, such as a lawyer, relatives or friends, permitted to see the victim during detention? If so, how long after the arrest?
- D. Describe the methods of torture used
- E. What injuries were sustained as a result of the torture?
- F. What was believed to be the purpose of the torture?
- G. Was the victim examined by a doctor at any point during or after his/her ordeal? If so, when? Was the examination performed by a prison or government doctor?
- H. Was appropriate treatment received for injuries sustained as a result of the torture?
- I. Was the medical examination performed in a manner which would enable the doctor to detect evidence of injuries sustained as a result of the torture? Were any medical reports or certificates issued? If so, what did the reports reveal?
- J. If the victim died in custody, was an autopsy or forensic examination performed and which were the results?

#### III. Remedial action

Were any domestic remedies pursued by the victim or his/her family or representatives (complaints with the forces responsible, the judiciary, political organs, etc.)? If so, what was the result?

#### IV. Information concerning the author of the present report:

- A. Family Name
- B. First Name
- C. Relationship to victim
- D. Organization represented, if any
- E. Present full address

## H.

### Universal Declaration of Human Rights

#### Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

#### Article 1.

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

#### Article 2.

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

#### Article 3.

Everyone has the right to life, liberty and security of person.

#### Article 4.

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

#### Article 5.

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

#### Article 6.

Everyone has the right to recognition everywhere as a person before the law.

#### Article 7.

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

#### Article 8.

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

#### Article 9.

No one shall be subjected to arbitrary arrest, detention or exile.

#### Article 10.

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

#### Article 11.

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

**Article 12.**

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

**Article 13.**

(1) Everyone has the right to freedom of movement and residence within the borders of each state.

(2) Everyone has the right to leave any country, including his own, and to return to his country.

**Article 14.**

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

**Article 15.**(1) Everyone has the right to a nationality.

(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

**Article 16.**

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

**Article 17.**

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

**Article 18.**

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

**Article 19.**

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart

information and ideas through any media and regardless of frontiers.

**Article 20.**

(1) Everyone has the right to freedom of peaceful assembly and association.

(2) No one may be compelled to belong to an association.

**Article 21.**

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

**Article 22.**

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

**Article 23.**

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his interests.

**Article 24.**

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

**Article 25.**

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

**Article 26.**

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

**Article 27.**

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

**Article 28.**

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

**Article 29.**

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

**Article 30.**

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.



# APPENDIX I

## I.

### Sources of Legal Support

Below is a short list of other organizations working on prison issues, mainly with a legal focus. When writing to these groups, please remember a few things:

- Write simply and specifically, but don't try and write like you think a lawyer would. Be direct in explaining yourself and what you are looking for.
- Do not send any legal documents unless they are requested. If or when you do send legal documents, only send copies. Hold on to your original paperwork.
- Because of laws like the PLRA and limited funding, many organizations are small, have limited resources and volunteer staff. It may take some time for them to answer your letters. But always keep writing.

**NOTE:** The contact information for these resources is current as of the printing of this Handbook in 2021.

Do not send money for publications unless you have verified the address of the organization first.

**American Civil Liberties Union National Office**  
125 Broad Street, 18<sup>th</sup> Floor, New York, NY 10004

The biggest civil liberties organization in the country. They have a National Prison Project and a Reproductive Freedom Project, which might be helpful to women prisoners. Write them for information about individual chapters.

**American Friends Service Committee Criminal Justice Program - National**  
15 Rutherford Place, New York, NY 10003  
Human and civil rights issues, research/analysis, women prisoners, prisoner support.

**Black and Pink**  
is a national prison abolitionist organization founded to 2005 that is dedicated to abolishing the criminal punishment system and liberating LGBTQIA2S+ people and people living with HIV/AIDS who are affected by that system through advocacy, support, and organizing. Black and Pink has 13 volunteer-led chapters and more than 20,000 current and formerly incarcerated LGBTQIAS2+ and people living with HIV/AIDS members nationwide. Write to Black & Pink, 2406 Fowler Ave Suite 316, Omaha, NE 68111, or have a friend or family member email [admin@blackandpink.org](mailto:admin@blackandpink.org).

**California Prison Focus**  
4408 Market Street, Suite A, Oakland, CA 94608

Publishes a quarterly magazine, *Prison Focus*, and other publications. Focuses organizing efforts on CA and on SHU conditions.

**Center for Constitutional Rights**  
666 Broadway, 7<sup>th</sup> floor, New York, NY 10012

Legal organization that brings impact cases around prison conditions, co-publisher of this handbook.

**Criminal Justice Policy Coalition**  
549 Columbus Ave, Boston, MA 02118

Involved in policy work around numerous prison issues.

**Critical Resistance, National Office**  
1904 Franklin St., Suite 504, Oakland, CA 94612

Uniting people in prison, former prisoners, and family members to lead a movement to abolish prisons, policing, surveillance, and other forms of control.

**Freedom Overground**  
*LGBTQI people in Georgia only.* Freedom Overground's mission is to improve the quality of life and life expectancy of the trans community during and after incarceration. We are currently serving the Georgia prison population but are hoping to create a benchmark for national change. Our initiatives and programs ensure that the medical and therapeutic needs of trans incarcerated people are met by state facilities. For more info, have someone on the outside email: [freedomoverground@gmail.com](mailto:freedomoverground@gmail.com).

**Immigration Equality, Inc.** *LGBTQI immigrants only.*

Provides several resource pamphlets. Write to:  
40 Exchange Place, 17th Floor, New York, NY 10005

**Innocence Project.**  
Takes only post-conviction, DNA cases. Does not take cases in CA, AZ, IL, MI, or OH. If you write them, briefly answer these questions in your letter: The basic facts of the crime. What happened? When? Where? What were you accused of doing? Where were you at the time of the crime(s)? What were you doing? Do you know the victim(s)? If so, how do you know the victim(s)? What did the victim(s) say happened? Are you claiming innocence of all the charges/convictions? Write to: Innocence Project, Intake Department, 40 Worth St., Suite 701, New York, NY 10013.

**Lambda Legal Defense and Education Fund, Inc.**  
*LGBTQI only.* A national civil rights organization that advocates for LGBTQ+ people and people living with HIV, including incarcerated LGBTQ+ people, through impact litigation, education, and public policy work. Write to: Lambda Legal, 120 Wall Street, 19th Floor, New York, NY 10005-3919.

**Legal Services for Prisoners with Children**  
1540 Market St., Suite 490, San Francisco, CA 94102

Legal resources and issues around women in prison, including guides and manuals for people in prison with children.

**The National Center for Lesbian Rights**  
*LGBTQI only.* A national legal organization committed to protecting and advancing the rights of lesbian, gay, bisexual, and transgender people, including LGBT individuals in prison, through impact litigation, public policy advocacy, public education, direct legal services, and collaboration with other civil rights organizations. Write to: The National Center for Lesbian Rights, 870 Market Street Suite 370, San Francisco CA 94102.

**National Clearinghouse for the Defense of Battered Women**

990 Spring Garden Street, Suite 703 Philadelphia PA 19123.  
Legal and other assistance for battered women.

**National Lawyers Guild, National Office**

PO Box 1266, New York, NY 10009

Membership organization of progressive lawyers.  
Co-publisher of this Handbook. Will only respond to membership and JLH requests. Cannot provide individual legal assistance - do not send any legal documents.

**National Resource Center on Children and Families of the Incarcerated at Rutgers-Camden**

405-7 Cooper St., Room 103, Camden, NJ 08102

For over three decades, the NRCCFI has served as a resource for those working with families impacted by incarcerated.

**North Carolina Prisoner Legal Services**

Offers legal services, legal forms that you can fill out yourself, and other free legal resources. Write to: North Carolina Prisoner Legal Services, Inc., P.O. Box 25397, Raleigh, NC 27611.

**Peter Cicchino Youth Project of the Urban Justice Center**

123 William Street 16th Floor, New York, NY, 10038

Legal services project focusing on the legal needs of the thousands of homeless and street-involved young people in New York City, with a focus on the particular needs of lesbian, gay, bisexual, transgender, queer, and questioning (LGBTQQ) youth. (only for lesbian, gay, bisexual and transgender youth age 24 or under)

**Prison Activist Resource Center**

PO Box 70447, Oakland, CA 94612

Clearinghouse for information and resources on organizing for prisoners' rights, prison issues, anti-racism. Produce a free directory / resource packet for people in prison.

**Prison Law Office - San Quentin**

General Delivery, San Quentin CA 94964

Legal services and resources in California for individual prisoners and class actions. Publishers of *The California State Prisoners Handbook: A Comprehensive Guide to Prison and Parole Law*.

**Prisoner Self Help Legal Clinic**

Very good self-help legal kits on a variety of issues, available only electronically at [www.pshlc.org](http://www.pshlc.org).

**Southern Center for Human Rights**

60 Walton St NW, Atlanta, GA 30303

Provides legal representation to people facing the death penalty, challenges human rights violations in prisons and jails. Legal resources are available.

**Southern Poverty Law Center**

400 Washington Ave., Montgomery AL 36104

Legal resources and publications, including *Prisoner Diabetes Handbook* and *Protecting Your Health and Safety: Prisoners' Rights*. Also files class-action suits around prison conditions.

**Sylvia Rivera Law Project**

*LGBTQI only.* The project provides basic templates for name changes, identity documents, and other legal matters. You can also request to join their Prisoner Pen Pal Postcard Project, participate in their Prisoner Advisory Committee, or receive their newsletter written by and for LGBTQ people who are incarcerated. Their address is 147 West 24<sup>th</sup> Street, 5<sup>th</sup> Fl., New York, NY 10011

**TGI Justice Project**

Re-entry and support work. (only for transgender, gender variant, and intersex people) 370 Turk St #370, San Francisco, CA 94102

**Transformative Justice Law Project of Illinois**

*LGBTQI only.* Distributes resources and connects people to their peers, friends, family, allies, advocates, and the larger prison abolition movement.

203 N. LaSalle, Suite 2100 | Chicago, IL 60601

**The Transgender Law Center ("TLC")**

*Trans people only.* is the largest national trans-led organization advocating self-determination for all people. Grounded in legal expertise and committed to racial justice, TLC employs a variety of community-driven strategies to keep transgender and gender nonconforming people alive, thriving, and fighting for liberation. Write to: Transgender Law Center PO Box 70976, Oakland, CA 94612-0976, or call 510.380.8229 (toll-free).

**TRANScending Barriers Atlanta**

*LGBTQI only.* TRANScending Barriers is a trans-led grassroots 501c3 non-profit organization that serves the transgender and gender non-conforming community in Georgia and provides support for trans\* prisoners transitioning back from life in prison after their release. You can write to Transcending Barriers at 1755 The Exchange Suite 160, Atlanta, Georgia 30339, or via email at [info@transcendingbarriersatl.org](mailto:info@transcendingbarriersatl.org)

# APPENDIX J

## J.

### Tips for Reaching out to Journalists and the Media

The authors of this Handbook asked several experienced journalists for tips on how to approach the media if you are writing to a news publication from prison. Here are a few things they recommended:

- > Keep it short, a couple paragraphs at most. A journalist often won't even start reading if a letter looks like it's very long. Make very clear what the focus of your story is, why it's important, and why you're the person to tell it. You don't need to send your full story in your first letter.
  - > If you are providing information about something you want a reporter to look into, make clear what access you have to any evidence or to people who are willing to speak about that particular situation.
  - > If you or someone on the outside can, find out who is the editor at the news outlet who works on prison issues and address your letter to that person rather than just to the news organization.
- > If you know that a certain publication or journalist has done some good reporting on prison issues before, you can write a sentence or two referencing that. For example, "Your paper does very powerful first-person stories. I think mine could be a good fit."
  - > If you have a lawsuit, do not send your court documents unless a journalist requests them. However, you should send the name and citation for the case.
  - > Stories about mundane aspects of life inside prison can sometimes be very interesting to journalists. People who have never been incarcerated or don't have incarcerated loved ones have no idea what life inside is like. The things that to someone who is incarcerated might seem most mundane, like the daily bureaucracy, prison rules, day-to-day exchanges with prison staff, can be what people outside would most benefit from learning about, including anything detailing abusive conditions inside prisons.
  - > Keep following up! Journalists are often very busy and get huge amounts of mail, emails, and phone calls every day. But someone who is persistent can often get a response, it just might take several weeks or months. All the journalists we spoke with said to keep writing if you don't get a response at first. Remember to keep your follow-up letters short.

# APPENDIX K

## K.

### Prisoners' Rights Books and Newsletters

A list of printed publications and books that you can order for further assistance. Please note that prices may change on many of the publications. **Before you send money, please verify the address and price with the organization. Because of the COVID pandemic, responses may be very slow or delayed.**

#### A. Federal Legal Resources

**Federal Rules of Civil Procedure, 2019** - \$20.00

**Federal Rules of Appellate Procedure with forms, 2018** - \$12.00

If convicted of a federal crime, you can request the **Federal Rules of Criminal Procedure** for \$13.00 and the **Federal Rules of Evidence** for \$7.00. **The Federal Rules of Criminal Procedure and of Evidence will not assist state prisoners.**

All prices include postage. To order any of the Federal Rules, write to:

U.S. Government Printing Office  
P.O. Box 979050, St. Louis, MO 63197-9000  
(Check or money order payable to "Superintendent of Documents")

#### B. National Resources

> **The Bluebook: A Uniform System of Citation**

Write to: Attn Business Office, Bluebook Orders, Harvard Law Review Association, Gannett House, 1511 Massachusetts Ave., Cambridge, MA 02138. Cost is \$38.50 plus shipping.

> **Brief Writing and Oral Argument, 9<sup>th</sup> edition**

Guidance on preparing effective oral and written arguments, especially relating to the Courts of Appeals. Send \$53.00 and order to: Oxford University Press, 2001 Evans Road, Cary, NC 27513

> **Columbia University Jailhouse Lawyers Manual**

is an excellent resource, especially if you are incarcerated in New York. Send your request with a check or money order (no stamps) for \$30.00, payable to *Columbia Human Rights Law Review* to: Columbia Human Rights Law Review, Attn: JLM Order, 435 W. 116th St., New York, NY 10027.

> **Cohen and Olson's Legal Research in a Nutshell, 14<sup>th</sup> Edition.**

West Publishing, 444 Cedar St, Suite 700, St. Paul, MN 55101. Cost is \$50.00.

**Fortune News.** Newsletter from the Fortune Society, specifically for prisoners. The majority of the writers are prisoners / ex-prisoners. Free. Write to: The Fortune Societies, Attn: Fortune News Subscriptions, 29-76 Northern Blvd, Long Island City, NY 11101.

> **Introduction to the Legal System of the United States, 4<sup>th</sup> Edition.**

This publication will help you understand the principles of the U.S. legal system. No longer published by publisher but cheap copies can be ordered by family members online.

> **Law Offices of Alan Ellis, PC.** Attorney Alan Ellis has a number

of publications available., including the **Federal Prison Guidebook: 2021 Edition** - the print edition is \$189. To order the Guidebook, write to: James Publishing, Inc., 3505 Cadillac Avenue, Suite P-101, Costa Mesa, CA 92626. Many free resources available online at [www.alanellis.com](http://www.alanellis.com), if you have a friend on the outside to help.

> **Osborne Association** - publishes Parenting from Inside/Out:

The Voices of Mothers in Prison and other New York state-specific resources. Many resources on website. Write to: 809 Westchester Ave., Bronx, NY 10455

> **The Prisoners' Guide to Survival.** A comprehensive legal

assistance manual for post-conviction relief and prisoners' civil rights. Last updated in 2001. For prisoners, send \$54.95 to: PSI Publishing, Inc., 413-B 19<sup>th</sup> Street, #168, Lynden, WA 98264

> **Prison Legal News.** A monthly newsletter. **Highly**

**recommended.** The best source of the latest prison-related legal news. A 12-month subscription is \$30. Send check and order to: P.O. Box 1151, Lake Worth, FL 33460.

> **The Prisoners' Assistance Directory** is published by the

American Civil Liberties Union Prison Project. As of 2021, it has not been updated since 2012, and many addresses may be out of date. It includes contact information and services descriptions for over 300 national, state, local, and international organizations that provide assistance to prisoners, ex-offenders, and families of prisoners. It can be downloaded for free at [www.aclu.org](http://www.aclu.org) Mailing address: 915 15th St., NW, 7<sup>th</sup> Floor, Washington, DC 20005.

> **Prisoners Self-Help Litigation Manual, 4<sup>th</sup> Edition. Highly**

**recommended.** The Fourth Edition of this well-respected resource was published in 2010. It is a very detailed book on prisoners' constitutional and federal rights, as well as information on how to file and proceed with a lawsuit. It includes lots of citations to relevant cases. Send \$44.95 and order to: Oxford University Press, 2001 Evans Road, Cary, NC 27513

> **Protecting Your Health & Safety** is a publication of the Southern

Poverty Law Center and explains the legal rights inmates have regarding health and safety—including the right to medical care and to be free from inhumane treatment. Send \$16 and your request to: Protecting Your Health and Safety, Prison Legal News, P. O. Box 1151, Lake Worth, FL 33460.

> **Sinister Wisdom.** Mails free subscriptions to women in prison.

Only mails to women's prisons. Subscription is \$36 for one year, \$58 for two years. Sliding Scale is available. Mail money and request to: Sinister Wisdom, 2333 McIntosh Road, Dover, FL 33527.

# APPENDIX L

## L.

### Free Book Programs

#### Books Through Bars & Free Book Programs

There are many unaffiliated chapters that send books to prisoners for free or low cost. Most places request that you let them know which category of books you are interested in, so if they don't have a specific book you are asking for, they can send you something similar. Be aware that it may take several months to receive books due to the volume of requests. Unless otherwise noted, the programs ship books to prisoners anywhere in the U.S. The addresses and information were current as of this printing.

#### **Appalachian Prison Book Project**

P.O. Box 601, Morgantown, WV 26507  
Ships books to WV, VA, MD, OH, KY, and TN.

#### **Asheville Prison Books Program, c/o Downtown Books and News**

67 N. Lexington Ave., Asheville, NC 28801  
Ships books only in NC, SC, GA, and TN.

#### **Books Through Bars - Philadelphia**

4722 Baltimore Ave., Philadelphia, PA, 19143  
Will only send books to prisoners in:  
PA, NJ, NY, DE, MD, VA, and WV.

#### **Books Through Bars - New York City**

To request specific books, you can write to: NYC Books Through Bars, c/o Bluestockings Bookstore, 116 Suffolk St., New York, NY 10002. They fill requests from all states *except* AL, FL, LA, MA, MI, MS, NC, PA, OH, and WI, **with a priority for NY**. Send only requests.

#### **Books to Prisoners c/o Left Bank Books**

Sending books to people in prison since the 1970s.  
Write to: 92 Pike St., Box A, Seattle, WA 98101

#### **Chicago Books to Women in Prison c/o BeyondMedia**

4001 N. Ravenswood Ave., #204C, Chicago, IL 60613  
Ship books to women in prison only.

#### **Cleveland Books 2 Prisoners**

PO Box 602440, Cleveland, OH 44102  
Ships books only in OH.

#### **Inside Books Project c/o 12th Street Books**

827 W. 12<sup>th</sup> St., Austin, TX 78701 Ships books only in TX.

**Lesbian and Gay Insurrection:** provides a free bimonthly newsletter to prisoners, "ULTRAVIOLET." To get ULTRAVIOLET in the mail, send your snail mail address to us at 3543 18th St. #26, San Francisco, CA 94110.

**LGBT Books to Prisoners:** Sends packages of books, educational materials, and other LGBTQ resources to incarcerated LGBTQ people across the U.S. Write a letter requesting the genres of books you would like and giving your full name, prison identification number, and address to: LGBT Books to Prisoners, c/o Social Justice Center Incubator, 1202 Williamson St., Suite 1, Madison, WI 53703.

#### **Louisiana Books 2 Prisoners**

3157 Gentilly Blvd. #141, New Orleans, LA 70122  
Ships books only in Louisiana.

#### **Midwest Books to Prisoners c/o Quimby's Bookstore**

1854 W. North Avenue, Chicago, IL 60622  
Ships books to IL, WI, MN, MO, IA, KS, IN, and NE.

#### **Midwest Pages to Prisoners**

PO Box 1324, Bloomington, IN 47402  
Ships books to AR, IA, IN, KS, MN, MO, ND, NE, OK, SD.

#### **Prison Books Collective c/o Internationalist Books**

405 W. Franklin St., Chapel Hill, NC 27514  
Ships books mostly to prisoners in MS, AL, and NC, maintains an extensive radical 'zine catalog, and publishes prisoners' art and writing.

#### **Prison Book Program c/o Lucy Parsons Bookstore**

1306 Hancock St., Suite 100, Hancock, MA 02169

#### **Prisoners Literature Project c/o Bound Together Bookstore**

1369 Haight St., San Francisco, CA 94117

#### **Prison Library Project c/o The Claremont Forum**

915-C W. Foothill Blvd., P.M.B. 128, Claremont, CA 91711

#### **Tranzmission Prison Books**

Offers free books and resources to LGBTQI+ identified folks. Write to: Tranzmission Prison Books, P.O. Box 1874, Asheville, NC 28802

#### **UC Books to Prisoners**

Box 515, Urbana, IL 61803, Ships books only in IL.

#### **Women's Prison Book Project c/o Boneshaker Books**

2002 23rd Ave S., Minneapolis, MN 55404  
Ships to women and transgender people in prison only.

# APPENDIX M

## M.

### District Court Addresses

You have already learned that the Federal court system is broken into districts. Some states have more than one district, and some districts also have more than one division, or more than one courthouse. We have compiled the following list of United States District Courts to help you figure out where to send your complaint.

**We have listed the courts in alphabetical order by state.** Find your state in the following list and then look for the county your prison is in. Under the name of your county, you will find the address of the U.S. District Court where you should send your complaint. All special instructions are in *italics*.

#### ALABAMA (11<sup>TH</sup> CIRCUIT)

**Northern District of Alabama:** Bibb, Blount, Calhoun, Cherokee, Clay, Cleburne, Colbert, Cullman, DeKalb, Etowah, Fayette, Franklin, Greene, Jackson, Lamar, Lauderdale, Lawrence, Limestone, Madison, Marion, Marshall, Morgan, Pickens, Randolph, Saint Clair, Shelby, Sumter, Talladega, Tuscaloosa, Walker, Winston

United States District Court  
Hugo L. Black U. S. Courthouse  
1729 Fifth Avenue North, Birmingham, AL 35203

#### Middle District of Alabama

*The Middle District of Alabama has three divisions:*

The Northern Division: Autauga, Barbour, Bullock, Butler, Chilton, Coosa, Covington, Crenshaw, Elmore, Lowndes, Montgomery, and Pike.

The Southern Division: Coffee, Dale, Geneva, Henry, and Houston.

The Eastern Division: Chambers, Lee, Macon, Randolph, Russell, and Tallapoosa.

*All official papers for all the divisions should be sent to:*

Ms. Debra Hackett  
Clerk of the Court, U.S.D.C.  
P.O. Box 711, Montgomery, AL 36101-0711

#### Southern District of Alabama

Baldwin, Choctaw, Clarke, Conceuh, Dallas, Escambia, Hale, Marengo, Mobile, Monroe, Perry, Washington, Wilcox.

U.S.D.C. Southern District of Alabama  
113 St. Joseph Street, Mobile, AL 36602

#### ALASKA (9<sup>TH</sup> CIRCUIT)

##### District of Alaska

*Documents for cases in any county in Alaska may be filed in Anchorage, or in the divisional office where the case is located (addresses below).*

U.S. District Court Clerk's Office 222 W. 7th Avenue, #4 Anchorage, AK 99513	U.S. District Court 101 12th Ave Rm 332 Fairbanks, AK 99701
U.S. District Court PO Box 020349 Juneau, AK 99802	U.S. District Court PO Box 130 Nome, AK 99762
U.S. District Court 648 Mission Street Room 507 Ketchikan, AK 99901	

#### ARIZONA (9<sup>TH</sup> CIRCUIT)

**District of Arizona** – *The District of Arizona covers the entire state, but it is divided into three divisions with the following counties:*

Phoenix Division: Maricopa, Pinal, Yuma, La Paz, Gila

Prescott Division: Apache, Navajo, Coconino, Mohave, Yavapai

*You should send all documents for cases in the Phoenix OR the Prescott division to the Phoenix Courthouse, at:*

Sandra Day O'Connor U.S. Courthouse  
401 West Washington Street, Suite 130, SPC 1  
Phoenix, AZ 85003-2118

Tucson Division: Pima, Cochise, Santa Cruz, Graham, Greenlee

*Send all documents for cases in the Tucson Division to:*

Evo A. DeConcini U.S. Courthouse  
405 West Congress Street, Suite 1500  
Tucson AZ 85701-5010

#### ARKANSAS (8<sup>TH</sup> CIRCUIT)

**Eastern District of Arkansas** – *has five divisions.*

Northern Division 1: Cleburne, Fulton, Independence, Izard, Jackson, Sharp, Stone

Eastern Division 2: Cross, Lee, Monroe, Phillips, St. Francis, and Woodruff

Western Division 4: Conway, Faulkner, Lonoke, Perry, Pope, Prairie, Pulaski, Saline, Van Buren, White, Yell.

*Send documents for cases that arise in any of these three divisions to:*

U.S. District Court Clerk's Office  
U.S. Post Office & Courthouse  
600 West Capitol, #A149, Little Rock, AR 72201-3325

Jonesboro Division 3: Clay, Craighead, Crittenden, Greene, Lawrence, Mississippi, Poinsett, Randolph

*Send documents for cases in this division to:*

U.S. District Court Clerk's Office  
615 S. Main Street, Rm. 312, Jonesboro, AR 72401

Pine Bluff Division 5: Arkansas, Chicot, Cleveland, Dallas Desha, Drew, Grant, Jefferson, and Lincoln

*Send documents for cases in this division to:*

U.S. District Court Clerk's Office  
100 E. 8<sup>th</sup> Ave., Rm. 3103, Pine Bluff, AR 71601

**Western District of Arkansas** – Has six divisions. You should send documents to the division where the case arose.

El Dorado Division 1: Ashley, Bradley, Calhoun, Columbia, Ouachita, and Union.

United States Courthouse & Post Office  
101 S. Jackson Ave., Room 205, El Dorado, AR 71730-6133

Fort Smith Division 2: Crawford, Franklin, Johnson, Logan, Polk, Scott, and Sebastian.

U.S. District Court Clerk's Office  
Judge Isaac C. Parker Federal Building  
P.O. Box 1547, Fort Smith, AR 72902-1547

Harrison Division 3: Baxter, Boone, Carroll, Marion, Newton, and Searcy

Fayetteville Division 5: Benton, Madison, and Washington.

*Send documents for cases in these two divisions to:*

U.S. District Court Clerk's Office  
John Paul Hammerschmidt Federal Building  
35 E. Mountain Street, Room 510,  
Fayetteville, AR 72701-5354

Texarkana Division 4: Hempstead, Howard, Lafayette, Little River, Miller, Nevada, and Sevier.

U.S. District Court Clerk's Office  
U.S. Post Office and Courthouse  
500 N. State Line Ave., Room 302,  
Texarkana, AR 71854-5961

Hot Springs Division 6: Clark, Garland, Hot Spring, Montgomery, and Pike.

U.S. District Court Clerk's Office, U.S. Courthouse  
100 Reserve St., Room 347, Hot Springs, AR 71901-4143

## CALIFORNIA (9<sup>TH</sup> CIRCUIT)

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**Northern District of California**: San Jose Branch: Monterey, San Benito, Santa Clara, Santa Cruz

*Send documents for cases in this branch to:*  
U.S. District Courthouse  
280 South 1<sup>st</sup> Street, Room 2112, San Jose, CA 95113

Oakland Branch: Alameda, Contra Costa

*Send documents for cases in this branch to:*

Ronald V. Dellums Federal Building  
& United States Courthouse  
1301 Clay Street, Suite 400S, Oakland, CA 94612

San Francisco Office: Del Norte, Humboldt, Lake, Marin, Mendocino, Napa, San Francisco, San Mateo, Sonoma

*Send documents for cases in this branch to:*

U.S. District Courthouse, Clerk's Office  
450 Golden Gate Ave., Box 36060, San Francisco, CA 94102

**Eastern District of California** – Has two divisions. Send your documents to the division where your case arose.

Fresno Division: Calaveras, Fresno, Inyo, Kern, Kings, Madera, Mariposa, Merced, Stanislaus, Tulare, and Tuolumne.

U.S. District Court  
2500 Tulare Street, Room 1501, Fresno, CA 93721

Sacramento Division: Alpine, Amador, Butte, Colusa, El Dorado, Glenn, Lassen, Modoc, Mono, Nevada, Placer, Plumas, Sacramento, San Joaquin, Shasta, Sierra, Siskiyou, Solano, Sutter, Tehama, Trinity, Yolo, and Yuba.

U.S. District Court  
501 I Street, Suite. 4-200, Sacramento, CA 95814

**Central District of California**–The Central District is divided into three divisions, covering Los Angeles, Orange County, Riverside, San Bernardino, San Luis Obispo, Santa Barbara, Ventura. Choose the division that applies to the county.

Western Division: Los Angeles, San Luis Obispo, Santa Barbara, Ventura

U.S. Courthouse  
312 N. Spring Street, Los Angeles, CA 90012

Eastern Division: Riverside, San Bernardino.

George E. Brown, Jr. Federal Building  
and United States Courthouse, 3470 Twelfth Street,  
Riverside, CA 92501-3801

Southern Division:

Orange County

Ronald Reagan Federal Building and United States Courthouse

411 West 4th Street, Room 1053, Santa Ana, CA 92701-4516

**Southern District of California:** Imperial, San Diego

U.S. District Court, Office of the Clerk  
Southern District of California  
333 West Broadway, Suite 420, San Diego, CA 92101

**COLORADO (10<sup>TH</sup> CIRCUIT)**

**District of Colorado** – Send all documents to:

Clerk's Office  
Alfred A. Arraj United States Courthouse Room A-105  
901 19th Street. Denver, Colorado 80294-3589

**CONNECTICUT (2D CIRCUIT)**

**District of Connecticut** – there are three U.S. District Courthouses in the District of Connecticut. You can file your complaint in any of the following locations

U.S. Courthouse 141 Church Street New Haven, CT 06510	U.S. Courthouse 450 Main Street Hartford, CT 06103
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U.S. Courthouse  
915 Lafayette Boulevard  
Bridgeport, CT 06604

**DELAWARE (3D CIRCUIT)**

**District of Delaware**  
U.S. District Court  
844 N. King Street, Suite 18, Wilmington, DE 19801

**DISTRICT OF COLUMBIA (D.C. CIRCUIT)**

**District for the District of Columbia**  
United States District Court for the District of Columbia  
333 Constitution Avenue, N.W.  
Washington, D.C. 20001

**FLORIDA**

**Northern District of Florida**– There are four divisions in the Northern District of Florida, and you must file your complaint in the division in which your case arose:

Pensacola Division: Escambia, Santa Rosa, Okaloosa, and Walton.

U.S. Federal Courthouse  
100 North Palafox St., Pensacola, FL 32502-4839

Panama City Division: Jackson, Holmes, Washington, Bay, Calhoun, and Gulf.

U.S. Federal Courthouse  
30 W. Government St., Second Floor, Panama City, FL 32401

Tallahassee Division: Leon, Gadsden, Liberty, Franklin, Wakulla, Jefferson, Taylor, and Madison.

U.S. Federal Courthouse  
111 N. Adams Street, Tallahassee, FL 32301

Gainesville Division: Alachua, Lafayette, Dixie, Gilchrist, and Levy

U.S. Federal Courthouse  
401 S.E. First Ave. Suite. 243, Gainesville, FL 32601

**Middle District of Florida** - There are five divisions in the Middle District of Florida; you should file your case in the division in which your case arose.

Tampa Division: Hardee, Hemando, Hillsborough, Manatee, Pasco, Pinellas, Polk, and Sarasota.

Clerk's Office, United States District Court  
Sam M. Gibbons US Courthouse  
801 N. Florida Avenue  
Tampa, Florida 33602-3800

Ft. Myers Division: Charlotte, Collier, DeSoto, Glades, Hendry, and Lee.

Clerk's Office, United States District Court  
US Courthouse & Federal Building  
2110 First Street Fort Myers, FL 33901-3083

Orlando Division: Brevard, Orange, Osceola, Seminole, and Volusia.

U.S. Courthouse  
401 West Central Boulevard, Room 1200  
Orlando, Florida 32801-0120

Jacksonville Division: Baker, Bradford, Clay, Columbia, Duval, Flagler, Hamilton, Nassau, Putnam, St. Johns, Suwanne, and Union.

United States Courthouse  
300 North Hogan Street, Jacksonville, FL 32202

Ocala Division: Citrus, Lake, Marion, Sumter

Clerk's Office  
United States District Court  
Golden-Collum Memorial Federal Building  
207 N.W. Second Street, Ocala, FL 34475-6666

**Southern District of Florida** - the Southern District of Florida covers the following counties: Broward, Collier, Dade, Glades, Hendry, Highlands, Indian River, Martin, Monroe, Okeechobee, Palm Beach, St. Lucie. There are five divisions in the Southern District of Florida. You can file your case in any one of them.

United States District Court Clerk's Office  
299 East Broward Boulevard, Room 108  
Fort Lauderdale, FL 33301



United States District Court Clerk's Office  
300 South Sixth Street, Fort Pierce, FL 34950

United States District Court Clerk's Office  
301 Simonton Street, Key West, FL 33040

United States District Court Clerk's Office  
400 North Miami Avenue, 8<sup>th</sup> Floor, Miami, FL 33128

United States District Court Clerk's Office  
701 Clematis St., Room 202, West Palm Beach, FL 33401

## **GEORGIA (11<sup>TH</sup> CIRCUIT)**

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**Northern District of Georgia** - covers the following counties: Banks, Barrow, Bartow, Carroll, Catoosa, Chattooga, Cherokee, Clayton, Cobb, Coweta, Dade, Dawson, DeKalb, Douglas, Fannin, Fayette, Floyd, Forsyth, Fulton, Gilmer, Gordon, Gwinnett, Habersham, Hall, Haralson, Heard, Henry, Jackson, Lumpkin, Meriwether, Murray, Newton, Paulding, Pickens, Pike, Polk, Rabun, Rockdale, Spalding, Stephens, Towns, Troup, Union, Walker, White, and Whitfield.

*There are four Divisions in the Northern District of Georgia, but all prisoners should file their 1983 cases at the following main location:*

U.S. District Court  
Northern District of Georgia  
2211 U.S. Courthouse, 75 Ted Turner Dr S.W.  
Atlanta, GA 30303

**Middle District of Georgia** - *The Middle District of Georgia is divided into six divisions. You can file your case in any division where you are, where the defendant is, or where the claim arose.*

Albany Division: Baker, Ben Hill, Calhoun, Crisp, Dougherty, Early, Lee, Miller, Mitchell, Schley, Sumter, Terrell, Turner, Worth, and Webster.

C. B. King U.S. Courthouse  
201 West Broad Avenue  
Albany, Georgia 31701

Athens Division: Clarke, Elbert, Franklin, Greene, Hart, Madison, Morgan, Oconee, Oglethorpe, and Walton.

U.S. Post Office and Courthouse  
P.O. Box 1106, Athens, GA 30601

Columbus Division: Chattahoochee, Clay, Harris, Marion, Muscogee, Quitman, Randolph, Stewart, Talbot, and Taylor.

U.S. Post Office and Court House  
P.O. Box 124, Columbus, GA 31902

Macon Division: Baldwin, Bibb, Bleckley, Butts, Crawford, Dooly, Hancock, Houston, Jasper, Jones, Lamar, Macon, Monroe, Peach, Putnam, Twiggs, Upson, Washington, Wilcox, and Wilkinson.

William A. Bootle Federal Building and U.S. Courthouse  
P.O. Box 128 Macon, GA 31202

Thomasville Division: Brooks, Colquitt, Decatur, Grady, Seminole, Thomas.

*Thomasville is not staffed, so file all complaints for the Thomasville Division in the Valdosta Courthouse, address below.*

Valdosta Division: Berrien, Clinch, Cook, Echols, Irwin, Lanier, Lowndes, and Tift.

U.S. Courthouse and Post Office  
401 N. Patterson Street, Suite 212, Valdosta, GA 31601

**Southern District of Georgia** - *The Southern District of Georgia consists of six divisions. You can bring your case in the division where the defendant lives or the actions occurred.*

Augusta Division: Burke, Columbia, Glascock, Jefferson, Lincoln, McDuffie, Richmond, Tauferro, Warren, and Wilkes.

Dublin Division: Dodge, Johnson, Laurens, Montgomery, Telfair, Treutlen, and Wheeler.

*All cases in the Augusta and Dublin divisions should be filed at:*

Clerk's Office, U.S. Courthouse  
600 James Brown Blvd., Augusta, GA 30901

Savannah Division: Bryan, Chatham, Effingham, Liberty

Waycross Division: Atkinson, Bacon, Brantley, Charlton, Coffee, Pierce, and Ware.

Statesboro Division: Bulloch, Candler, Emanuel, Evans, Jenkins, Screven, Toombs, and Tatnall.

*All cases in Savannah, Waycross and Statesboro divisions should be filed in:*

Clerk's Office, U.S. Courthouse  
125 Bull Street, Room 304, Savannah, GA 31401

Brunswick Division: Appling, Glynn, Jeff Davis, Long, McIntosh, Wayne

*All cases in the Brunswick Division should be filed in:*

Clerk's Office, U.S. Courthouse  
801 Gloucester Street, Suite 220, Brunswick, GA 31520

## **GUAM (9<sup>TH</sup> CIRCUIT)**

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**District of Guam**  
U.S. Courthouse, 4<sup>th</sup> floor  
520 West Soledad Avenue, Hagåtña, Guam 96910

## **HAWAII (9<sup>TH</sup> CIRCUIT)**

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**District of Hawaii**  
U.S. Courthouse  
300 Ala Moana Blvd., Room C338, Honolulu, HI 96850

## IDAHO (9<sup>TH</sup> CIRCUIT)

**District of Idaho** - *There are three divisions in the District of Idaho:*

Southern Division: Ada, Adams, Boise, Canyon, Elmore, Gem, Owyhee, Payette, Valley, and Washington.

James A. McClure Federal Building & U.S. Courthouse  
550 W. Fort St., Suite 400, Boise, ID 83724

Northern Division: Benewah, Bonner, Boundary, Clearwater, Idaho, Kootenai, Latah, Lewis, Nez Perce, and Shoshone.

U.S. Courthouse  
6450 N. Mineral Dr. Coeur d'Alene, ID 83815

Eastern Division: Bannock, Bear Lake, Bingham, Blaine, Bonneville, Butte, Camas, Caribou, Cassia, Clark, Custer, Franklin, Fremont, Gooding, Jefferson, Jerome, Lincoln, Lemhi, Madison, Minidoka, Oneida, Power, Teton, and Twin Falls.

U.S. Courthouse  
801 E Sherman St., Suite 119, Pocatello, ID 83201

## ILLINOIS (7<sup>TH</sup> CIRCUIT)

**Northern District of Illinois** - *There are two divisions in the Northern District of Illinois.*

Western Division: Boone, Carroll, DeKalb, Jo Davies, Lee, McHenry, Ogle, Stephenson, Whiteside, and Winnebago.

Stanley J. Roszkowski United States Courthouse  
327 South Church Street, Rockford, IL 61101

Eastern Division: Cook, Dupage, Grundy, Kane, Kendall, Lake, LaSalle, and Will.

Everett McKinley Dirksen Building  
219 South Dearborn Street, Chicago, IL 60604

**Central District of Illinois** - *There are four divisions in the Central District of Illinois. You must file your case in the division in which the claim arose.*

Peoria Division: Bureau, Fulton, Hancock, Knox, Livingston, Marshall, McDonough, McLean, Pedria, Putnam, Stark, Tazewell, and Woodford.

305 U.S. Courthouse  
100 N.E. Monroe Street, Peoria, IL 61602

Rock Island Division: Henderson, Henry, Mercer, Rock Island, and Warren.

40 U.S. Courthouse  
211 19th Street, Rock Island IL 61201

Springfield Division: Adams, Brown, Cass, Christian, DeWitt, Greene, Logan, Macoupin, Mason, Menard, Montgomery, Pike Calhoun, Sangamon, Schuyler, Scott, and Shelby.

151 U.S. Courthouse  
600 E. Monroe Street, Springfield IL 62701

Urbana Division: Champaign, Coles, Douglas, Edgar, Ford, Iroquois, Kankakee, Macon, Moultrie, and Piatt.

218 U.S. Courthouse  
201 S. Vine Street, Urbana IL 61802

**Southern District of Illinois:** Alexander, Bond, Calhoun, Clark, Clay, Clinton, Crawford, Cumberland, Edwards, Effingham, Fayette, Franklin, Gallatin, Hamilton, Hardin, Jackson, Jasper, Jefferson, Jersey, Johnson, Lawrence, Madison, Marion, Marshall, Massac, Monroe, Perry, Pope, Pulaski, Randolph, Richland, St. Clair, Saline, Union, Wabash, Washington, Wayne, White, and Williamson.

*There are two courthouse locations in the Southern District of Illinois, but prisoners can file cases in either one.*

U.S. Courthouse  
301 West Main Street  
Benton, IL 62812

U.S. Courthouse  
750 Missouri Avenue  
East St. Louis, IL 62201

## INDIANA (7<sup>TH</sup> CIRCUIT)

**Northern District of Indiana** - *There are four divisions in the Northern District of Indiana. You should file in the division where your claim arose.*

Fort Wayne Division: Adams, Allen, Blackford, DeKalb, Grant, Huntington, Jay, LaGrange, Noble, Steuben, Wells and Whitley counties.

U.S. Courthouse  
1300 S. Harrison St., Fort Wayne, IN 46802

Hammond Division: Lake and Porter counties.

U.S. Courthouse  
5400 Federal Plaza, Suite 2300, Hammond, IN 46320

Lafayette Division: Benton, Carroll, Jasper, Newton, Tippecanoe, Warren, and White counties.

U.S. Courthouse  
230 N. Fourth St., Room 105, Lafayette, IN 47901

South Bend Division: Cass, Elkhart, Fulton, Kosciusko, LaPorte, Marshall, Miami, Pulaski, St. Joseph, Starke, and Wabash Counties.

U.S. Courthouse  
204 S Main St., South Bend, IN 46601

**Southern District of Indiana** - *There are four divisions in the Southern District of Indiana. File where your claim arose.*

Indianapolis Division: Bartholomew, Boone, Brown, Clinton, Decatur, Delaware, Fayette, Fountain, Franklin, Hamilton, Hancock, Hendricks, Henry, Howard, Johnson, Madison, Marion, Monroe, Montgomery, Morgan, Randolph, Rush, Shelby, Tipton, Union, and Wayne.

U.S. District Court  
46 East Ohio Street, Room 105, Indianapolis, IN 46204

Terre Haute Division: Clay, Greene, Knox, Owen, Parke, Putnam, Sullivan, Vermillion, and Vigo.

U.S. District Court  
921 Ohio Street, Room 104, Terre Haute, IN 47807

Evansville Division: Daviess, Dubois, Gibson, Martin, Perry, Pike, Posey, Spencer, Vanderburgh, and Warrick.

U.S. District Court  
101 Northwest MLK Boulevard, Room 304, Evansville, IN 47708

New Albany Division: Clark, Crawford, Dearborn, Floyd, Harrison, Jackson, Jefferson, Jennings, Lawrence, Ohio, Orange, Ripley, Scott, Switzerland, and Washington.

U.S. District Court  
121 West Spring Street, Room 210, New Albany, IN 47150

## **IOWA (8<sup>TH</sup> CIRCUIT)**

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**Northern District of Iowa** – *There are four divisions in the Northern District of Iowa, and two different locations to file papers.*

Cedar Rapids Division: Benton, Cedar, Grundy, Hardin, Iowa, Jones, Linn, and Tama.

Eastern Division: Allamakee, Blackhawk, Bremer, Buchanan, Chickasaw, Clayton, Delaware, Dubuque, Fayette, Floyd, Howard, Jackson, Mitchell, Winneshiek

Cases arising in either the Cedar Rapids or the Eastern Division should be filed with the clerk of the court at the Cedar Rapids location:

U.S. District Court for the Northern District of Iowa,  
Clerk's Office, 111 Seventh Ave SE, Box 12, Cedar Rapids, IA 52401-2101

Western Division: Buena Vista, Cherokee, Clay, Crawford, Dickinson, Ida, Lyon, Monona, O'Brien, Osceola, Plymouth, Sac, Sioux, and Woodbury.

Central Division: Butler, Calhoun, Carroll, Cerro Gordo, Emmet, Franklin, Hamilton, Hancock, Humboldt, Kossuth, Palo Alto, Pocahontas, Webster, Winnebago, Worth, Wright,

*Cases arising in the Western or Central Division should be filed in Sioux City:*

US District Court for the Northern District of Iowa  
320 Sixth Street, Sioux City, IA 51101

**Southern District of Iowa** – *There are three divisions in the Southern District of Iowa, and you should file your case at the division in which your claims arose.*

Central Division: Adaire, Adams, Appanoose, Boone, Clarke, Dallas, Davis, Decatur, Greene, Guthrie, Jasper, Jefferson, Keokuk, Lucas, Madison, Mahaska, Marion, Marshall, Monroe, Polk, Poweshiek, Ringgold, Story, Taylor, Union, Wapello, Warren, and Wayne.

U.S. District Court, Southern District of Iowa  
123 East Walnut Street, Des Moines, Suite 300, IA 50309

Western Division: Audubon, Cass, Fremont, Harrison, Mills, Montgomery, Page, Pottawattamie, and Shelby.

U. S. District Court, Southern District of Iowa  
8 South 6<sup>th</sup> Street, Room 313  
Council Bluffs, IA 51501

Eastern Division: Clinton, Des Moines, Henry, Johnson, Lee, Louisa, Muscatine, Scott, Van Buren, and Washington.

U. S. District Court, Southern District of Iowa  
131 East 4th Street, Suite 150  
Davenport, IA 52801

## **KANSAS (10<sup>TH</sup> CIRCUIT)**

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**District of Kansas** – *You can file your case at any of the following courthouses.*

Robert J. Dole Courthouse  
500 State Ave, Room 259, Kansas City, Kansas 66101

U.S. Courthouse  
444 S.E. Quincy,  
Room 490  
Topeka, Kansas 66683

U.S. Courthouse  
401 N. Market,  
Room 204  
Wichita, Kansas 67202

## **KENTUCKY (6<sup>TH</sup> CIRCUIT)**

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**Eastern District of Kentucky** – *The Eastern District of Kentucky has several divisions, but you can file all pleadings in the main office. The District includes the following counties: Anderson, Bath, Bell, Boone, Bourbon, Boyd, Boyle, Bracken, Breathitt, Campbell, Carroll, Carter, Clark, Clay, Elliott, Estill, Fayette, Fleming, Floyd, Franklin, Gallatin, Garrard, Grant, Greenup, Harlan, Harrison, Henry, Jackson, Jessamine, Johnson, Kenton, Knott, Knox, Laurel, Lawrence, Lee, Leslie, Letcher, Lewis, Lincoln, McCreary, Madison, Magoffin, Martin, Mason, Menifee, Mercer, Montgomery, Morgan, Nicholas, Owen, Owsley, Pendleton, Perry, Pike, Powell, Pulaski, Robertson, Rockcastle, Rowan, Scott, Shelby, Trimble, Wayne, Whitley, Wolfe, and Woodford.*

U.S. District Court Robert R. Carr, Clerk  
101 Barr St., Lexington, KY 40507

**Western District of Kentucky** – *The Western District of Kentucky has several divisions, but you can file at any of the following locations.*

Bowling Green Division: Adair, Allen, Barren, Butler, Casey, Clinton, Cumberland, Edmonson, Green, Hart, Logan, Metcalf, Monroe, Russell, Simpson, Taylor, Todd, and Warren.

Clerk's Office  
241 East Main Street, Suite 120  
Bowling Green, KY 42101-2175

Louisville Division: Breckinridge, Bullitt, Hardin, Jefferson, Larue, Marion, Meade, Nelson, Oldham, Spencer, and Washington.

Gene Snyder U.S. Courthouse, Clerks Office  
601 W. Broadway, Rm. 106, Louisville, KY 40202

Owensboro Division: Daviess, Grayson, Hancock, Henderson, Hopkins, McLean, Muhlenberg, Ohio, Union, and Webster.

U.S. District Court, Clerk's Office  
423 Frederica St., Suite 126, Owensboro, KY 42301-3013

Paducah Division: Ballard, Caldwell, Calloway, Carlisle, Christian, Crittenden, Fulton, Graves, Hickman, Livingston, Lyon, McCracken, Marshall, and Trigg.

U.S. District Court, Clerk's Office  
501 Broadway, Suite 127, Paducah, KY 42001-6801

## LOUISIANA (5<sup>TH</sup> CIRCUIT)

**Eastern District of Louisiana** – *This district has several divisions, but all documents may be filed in New Orleans. The Eastern District of Louisiana includes the following counties: Assumption, Jefferson, Lafourche, Orleans, Plaquemines, Saint Bernard, Saint Charles, Saint James, Saint John the Baptist, Saint Tammany, Tangipahoa, Terrebonne, and Washington.*

U.S. District Court  
500 Poydras Street New Orleans, LA 70130

**Middle District of Louisiana** – *There is only one courthouse in the Middle District of Louisiana, and it covers the following counties: Ascension, East Baton Rouge, East Feliciana, Iberville, Livingston, Pointe Coupee, Saint Helena, West Baton Rouge, and West Feliciana.*

U.S. District Court  
777 Florida Street, Suite 139 Baton Rouge, LA 70801

**Western District of Louisiana** – *There are several divisions in the Western District, but all pleadings should be filed at the below address. The district includes the following counties: Acadia, Allen, Avoyelles, Beauregard, Bienville, Bossier, Caddo, Calcasieu, Caldwell, Cameron, Catahoula, Claiborne, Concordia, Jefferson Davis, De Soto, East Carroll, Evangeline, Franklin, Grant, Iberia, Jackson, Lafayette, La Salle, Lincoln, Madison, Morehouse, Natchitoches, Ouachita, Rapides, Red River, Richland, Sabine, Saint Landry, Saint Martin, Saint Mary, Tensas, Union, Vermilion, Vernon, Webster, West Carroll, and Winn.*

United States Courthouse, Tony R. Moore, Clerk  
300 Fannin Street, Suite 1167, Shreveport, LA 71101-3083

## MAINE (1<sup>ST</sup> CIRCUIT)

**District of Maine** – *There are two divisions in Maine, you should file in the appropriate division, as explained below.*

Bangor Division: Arronstrook, Franklin, Hancock, Kennebec, Penobscot, Piscataquis, Somerset, Waldo, Washington. *Cases from one of these counties, file at:*

Clerk, U.S. District Court  
202 Harlow Street  
Bangor, Maine 04401

Portland Division: Androscoggin, Cumberland, Knox, Lincoln, Oxford, Sagadahoc, York. *Cases that arise in these counties should be filed at the Portland Courthouse, except if you are in prison at Thomaston or Warren, in which case you should file at the above Bangor location.*

Clerk, U.S. District Court  
156 Federal Street, Portland, Maine 04401

## MARYLAND (4<sup>TH</sup> CIRCUIT)

**District of Maryland** – *There are two divisions in the District of Maryland, and you can file in either location.*

U.S. Courthouse 101 W. Lombard Street Baltimore, MD 21201	U.S. Courthouse 6500 Cherrywood Lane Greenbelt, MD 20770
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## MASSACHUSETTS (1<sup>ST</sup> CIRCUIT)

**District of Massachusetts** – *There are three divisions in the District of Massachusetts.*

Eastern Division: Barnstable, Bristol, Dukes, Essex, Middlesex, Nantucket, Norfolk, Plymouth, and Suffolk.

John Joseph Moakley, U.S. Courthouse  
1 Courthouse Way – Suite 2300, Boston, MA 02210

Central Division: Worcester County

Harold D. Donohue Federal Building & Courthouse  
595 Main Street, Worcester, MA 01608

Western Division: Berkshire, Franklin, Hampden, and Hampshire.

Federal Building & Courthouse  
300 State Street, Suite 120, Springfield, MA 01105

## MICHIGAN (6<sup>TH</sup> CIRCUIT)

**Eastern District of Michigan** – *There are several divisions in this district, but you can file in whichever courthouse you want. The Eastern District of Michigan includes the following counties: Alcona, Alpena, Arenac, Bay, Cheboygan, Clare, Crawford, Genesee, Gladwin, Gratiot, Huron, Iosco, Isabella, Jackson, Lapeer, Lenawee, Livingston, Macomb, Midland, Monroe, Montmorency, Oakland, Ogemaw, Oscoda, Otsego, Presque Isle, Roscommon, Saginaw, Saint*

Clair, Sanilac, Shiawassee, Tuscola, Washtenaw, and Wayne.

U.S. District Courthouse  
P.O. Box 8199  
Ann Arbor, MI 48107

U.S. District Courthouse  
P.O. Box 913  
Bay City, Michigan 48707

Theodore Levin  
U.S. Courthouse  
231 W. Lafayette Blvd  
Detroit, Michigan 48226.

U.S. District Courthouse  
600 Church Street,  
Room 140  
Flint, Michigan 48502

**Western District of Michigan** – *there is a Northern and a Southern Division in the Western District of Michigan, but you can file your complaint at the headquarters in Grand Rapids. The Western District includes the following counties:* Alger, Allegan, Antrim, Baraga, Barry, Benzie, Berrien, Branch, Calhoun, Cass, Charlevoix, Chippewa, Clinton, Delta, Dickinson, Eaton, Emmet, Gogebic, Grand Traverse, Hillsdale, Houghton, Ingham, Ionia, Iron, Kalamazoo, Kalkaska, Kent, Keweenaw, Lake, Leelanau, Luce, Mackinac, Manistee, Marquette, Mason, Mecosta, Menominee, Missaukee, Montcalm, Muskegon, Newaygo, Oceana, Ontonagon, Osceola, Ottawa, Saint Joseph, Schoolcraft, Van Buren, and Wexford.

United States District Court,  
Western District of Michigan  
399 Federal Building, 110 Michigan St NW,  
Grand Rapids, MI 49503

## **MINNESOTA (8<sup>TH</sup> CIRCUIT)**

**District of Minnesota** – *There are several courthouses in the District of Minnesota, and you can file in whichever one you want.*

202 U.S. Courthouse 300 S. 4th Street Minneapolis, MN 55415	Warren E. Burger Federal Building and U.S. Courthouse 316 North Robert St. St. Paul, MN 55101
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417 Federal Building 515 W. 1st Street Duluth, MN 55802-1397	212 USPO Building 118 S. Mill Street Fergus Falls, MN 56537
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## **MISSISSIPPI (5<sup>TH</sup> CIRCUIT)**

**Northern District of Mississippi** – *There are four divisions in the Northern District of Mississippi, and three courthouses where you can file papers.*

Aberdeen Division: Alcorn, Attala, Chickasaw, Choctaw, Clay, Itawamba, Lee, Lowndes, Monroe, Oktibbeha, Prentiss, Tishomingo, and Winston.

Greenville Division: Carroll, Humphreys, Leflore, Sunflower, and Washington.

U.S. District Court  
305 Main Street, Room 329, Greenville, Mississippi  
38701-4006

Delta Division: Bolivar, Coahoma, DeSoto, Panola, Quitman, Tallahatchie, Tate, and Tunica.

Western Division: Benton, Calhoun, Grenada, Lafayette, Marshall, Montgomery, Pontotoc, Tippah, Union, Webster, Yalobusha. Prisoners in the Delta OR Western Division, file at: Room 369 Federal Building, 911 Jackson Avenue, Oxford, MS 38655

**Southern District of Mississippi** – *There are four court divisions in the Southern District of Mississippi, and you should file based on the county where your prison is located.*

Southern Division: George, Greene, Hancock, Harrison, Jackson, Pearl River, Stone.

United States District Court  
2012 15th Street, Suite 403, Gulfport, MS 39501

Eastern Division: Clarke, Covington, Forrest, Jasper, Jefferson Davis, Jones, Lamar, Lawrence, Marion, Perry, Walthall, and Wayne.

United States District Court  
701 North Main Street, Suite 200, Hattiesburg, MS  
39401

Northern Division: Copiah, Hinds, Holmes, Issaquena, Kemper, Lauderdale, Leake, Madison, Neshoba, Newton, Noxubee, Rankin, Scott, Sharkey, Simpson, Smith, Warren, and Yazoo.

Western Division: Adams, Amite, Claiborne, Franklin, Jefferson, Lincoln, Pike, and Wilkinson.

*Filings for the Northern and Western Divisions should be sent to the Clerk's Office in Jackson:*

United States Courthouse  
501 E. Court Street, Suite 2.500, Jackson, MS 39201

## **MISSOURI (8<sup>TH</sup> CIRCUIT)**

**Eastern District of Missouri** – *There are three divisions in the Eastern District of Missouri, and you should file based on what county your prison is in.*

Eastern Division: Crawford, Dent, Franklin, Gasconade, Iron, Jefferson, Lincoln, Maries, Phelps, Saint Charles, Saint Francois, Saint Genevieve, Saint Louis, Warren, Washington, and City of St. Louis.

Northern Division: Adair, Audrain, Chariton, Clark, Knox, Lewis, Linn, Marion, Monroe, Montgomery, Pike, Ralls, Randolph, Schuyler, Scotland, and Shelby.

*Eastern or Northern Division, file at:*

Thomas F. Eagleton Courthouse  
111 South 10<sup>th</sup> Street, Suite 3.300, St. Louis, MO 63102

Southeastern Division: Bollinger, Butler, Cape Girardeau, Carter, Dunklin, Madison, Mississippi, New Madrid, Pemiscot, Perry, Reynolds, Ripley, Scott, Shannon, Stoddard, and Wayne.

Rush Hudson Limbaugh Sr. U.S. Courthouse  
555 Independence Street, Cape Girardeau, MO 63703

**Western District of Missouri** – *There are several divisions in the Western District of Missouri, but prisoners from all counties in the district can file their complaint in Kansas City. The District covers the following counties: Andrew, Atchison, Barry, Barton, Bates, Benton, Boone, Buchanan, Caldwell, Callaway, Camden, Carroll, Cass, Cedar, Christian, Clay, Clinton, Cole, Cooper, Dade, Dallas, Daviess, DeKalb, Douglas, Gentry, Greene, Grundy, Harrison, Henry, Hickory, Holt, Howard, Howell, Jackson, Jasper, Johnson, Laclede, Lafayette, Lawrence, Livingston, McDonald, Mercer, Miller, Moniteau, Morgan, Newton, Nodaway, Oregon, Osage, Ozark, Pettis, Platte, Polk, Pulaski, Putnam, Ray, Saint Clair, Saline, Stone, Sullivan, Taney, Texas, Vernon, Webster, Worth, and Wright.*

Charles Evans Whittaker Courthouse  
400 E. 9th Street, Kansas City, MO 64106

### **MONTANA (9<sup>TH</sup> CIRCUIT)**

**District of Montana** – *There are several divisions in the District of Montana, but all prisoners can send their complaint to the Billings Courthouse.*

James F. Battin Federal Courthouse  
2601 2<sup>nd</sup> Avenue North, Billings, MT 59101

### **NEBRASKA (8<sup>TH</sup> CIRCUIT)**

**District of Nebraska** – Adams, Antelope, Arthur, Banner, Blaine, Boone, Box Butte, Boyd, Brown, Buffalo Burt, Butler, Cass, Cedar, Chase, Cherry, Cheyenne, Clay, Colfax, Cuming, Custer, Dakota, Dawes, Dawson, Deuel, Dixon, Dodge, Douglas, Dundy, Fillmore, Franklin, Frontier, Furnas, Gage, Garden, Garfield, Gosper, Greeley, Hall, Hamilton, Harlan, Hayes, Hitchcock, Holt, Hooker, Howard, Jefferson, Johnson, Kearney, Keith, Keya Paha, Kimball, Knox, Lancaster, Lincoln, Logan, Loup, Madison, McPherson, Merrick, Morrill, Nance, Nemaha, Nuckolls, Otoe, Pawnee, Phelps, Pierce, Platte, Polk, Red Willow, Richardson, Rock, Saline, Sarpy, Saunders, Scotts Bluff, Seward, Sheridan, Sherman, Sioux, Stanton, Thayer, Thomas, Thurston, Valley, Washington, Wayne, Webster, Wheeler, and York counties.

All mail should be addressed to the courthouse in Omaha:

Clerk of the Court, Roman L. Hruska Federal Courthouse  
111 South 18th Plaza, Suite 1152, Omaha, NE 68102

### **NEVADA (9<sup>TH</sup> CIRCUIT)**

**District of Nevada:** Carson City, Churchill, Douglas, Elko, Eureka, Humboldt, Lander, Lyon, Mineral, Pershing, Storey, Washoe, and White Pine counties:

Clerk of the Court  
U.S. District Court of Nevada, Northern Division  
400 S. Virginia St., Reno, NV 89501

Clark, Esmeralda, Lincoln, and Nye Counties:

Clerk of the Court  
U.S. District Court of Nevada, Southern Division  
333 S. Las Vegas Blvd., Las Vegas, NV 89101

### **NEW HAMPSHIRE (1<sup>ST</sup> CIRCUIT)**

**District of New Hampshire**  
Clerk of the Court, U.S. District Court  
Warren B. Rudman U.S. Courthouse  
55 Pleasant Street, Room 110, Concord, NH 03301-3941

### **NEW JERSEY (3<sup>D</sup> CIRCUIT)**

**District of New Jersey**  
Martin Luther King & U.S. Courthouse  
50 Walnut Street, Rm. 4015, Newark, NJ 07101

### **NEW MEXICO (10<sup>TH</sup> CIRCUIT)**

**District of New Mexico**  
U.S. District Court  
333 Lomas Blvd. N.W., Ste 270 Albuquerque, NM 87102

### **NEW YORK (2<sup>D</sup> CIRCUIT)**

**Northern District of New York:** Albany, Broome, Cayuga, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Oswego, Otesgo, Rensselaer, Saratoga, Schenectady, Schoharie, St. Lawrence, Tioga, Tompkins, Ulster, Warren, and Washington counties:

U.S. District Court, Northern District of New York  
U.S. Courthouse & Federal Building  
P.O. Box 7367, Syracuse, NY 13261

**Southern District of New York:** Bronx, Dutchess, New York, Orange, Putnam, Rockland, Sullivan, and Westchester counties:

U.S. District Court, Southern District of New York  
Daniel Patrick Moynihan United States Courthouse  
500 Pearl Street, New York, NY 10007-1312

**Eastern District of New York:** Kings, Nassau, Queens, Richmond, and Suffolk counties:

U. S. District Court, Eastern District of New York  
225 Cadman Plaza East, Brooklyn, New York 11201

**Western District of New York:**

Buffalo Division: Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans, and Wyoming counties:

U.S. District Court, Western Division of New York  
Office of the Clerk2 Niagara Square  
Buffalo, NY 14202-3498

Rochester Division: Chemung, Livingston, Monroe, Ontario, Schuyler, Seneca, Steuben, Wayne, and Yates counties:

U.S. District Court, Western Division of New York  
Office of the Clerk, 2120 United States Courthouse  
100 State Street, Rochester, New York 14614-1387

## **NORTH CAROLINA (4<sup>TH</sup> CIRCUIT)**

**Eastern District of North Carolina:** Beaufort, Betrie, Bladen, Brunswick, Camden, Carteret, Chowan, Columbus, Craven, Cumberland, Currituck, Dare, Duplin, Edgecombe, Franklin, Gates, Granville, Greene, Halifax, Harnett, Hertford, Hyde, Johnston, Jones, Lenoir, Martin, Nash, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Pitt, Robeson, Sampson, Tyrell, Vance, Wake, Warren, Washington, Wayne, and Wilson counties:

Peter A. Moore, Jr., Clerk of Court  
PO Box 25670, Raleigh, NC 27611

**Middle District of North Carolina:** Alamance, Alleghany, Ashe, Cabarrus, Caswell, Chatham, Davidson, Davie, Durham, Forsyth, Guilford, Hoke, Lee, Montgomery, Moore, Orange, Person, Randolph, Richmond, Rockingham, Rowan, Scotland, Stanly, Stokes, Surry, Watauga, and Yadkin counties:

Clerk, U.S. District Court for the  
Middle District of North Carolina,  
324 W. Market Street Greensboro, NC 27401-2544.

### **Western District of North Carolina**

Asheville Division: Haywood Madison, Yancey, Watuaga, Avery, Buncombe, McDowell, Burke, Transylvania, Henderson, Polk, Rutherford, Cleveland, Cherokee, Clay, Graham, Jackson, Macon, and Swain counties:

U.S. Courthouse  
100 Otis St., Room 309, Asheville, NC 28801

Charlotte Division: Gaston, Mecklenburg, Union, and Anson counties:

U.S. Courthouse  
401 W. Trade St., Room 210, Charlotte, NC 28202

Statesville Division: Watauga, Ashe, Alleghany, Caldwell, Wilkes, Alexander, Iredell, Catawba, and Lincoln counties:

U.S. Courthouse  
200 W. Broad St., Room 304, Statesville, NC 28677

## **NORTH DAKOTA (8<sup>TH</sup> CIRCUIT)**

### **District of North Dakota**

U.S. District Court  
PO Box 1193 Bismarck, ND 58502-1193

## **NORTHERN MARIANA ISLANDS (9<sup>TH</sup> CIRCUIT)**

### **District for the Northern Marina Islands**

U.S. District Court for the Northern Mariana Islands  
P.O. Box 500687, Saipan, MP 96950 USA

## **OHIO (6<sup>TH</sup> CIRCUIT)**

### **Northern District of Ohio**

Eastern Division: Ashland, Ashtabula, Carroll, Clumbiana, Crawford, Cuyahoga, Geauga, Holmes, Lake, Lorain, Mahoning, Medina, Portage, Richland, Stark, Summit, Trumbull, Tuscarawas, and Wayne counties:

U.S. District Court Northern District of Ohio 2 South Main Street Akron, OH 44308	U.S. District Court Northern District of Ohio 801 West Superior Ave. Cleveland, OH 44113
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U.S. District Court  
Northern District of Ohio  
125 Market Street  
Youngstown, OH 44503

Western Division: Allen, Auglaize, Defiance, Erie, Fulton, Hancock, Hardin, Henry, Huron, Lucas, Marion, Mercer, Ottawa, Paulding, Putnam, Sandusky, Seneca, Van Wert, Williams, Wood, and Wyandot:

U.S. District Court, Northern District of Ohio  
1716 Spielbusch Avenue, Toledo, OH 43604

### **Southern District of Ohio**

Athens, Belmont, Coschocton, Delaware, Fairfield, Fayette, Franklin, Gallia, Guernsey, Harrison, Hocking, Jackson, Jefferson, Knox, Licking, Logan, Madison, Meigs, Monroe, Morgan, Morrow, Muskingum, Noble, Perry, Pickaway, Pike, Ross, Union, Vinton, and Washington counties:

U.S. District Court, Southern District of Ohio  
Office of the Clerk, Room 121  
85 Marconi Boulevard, Columbus, OH 43215

Adams, Brown, Butler, Clermont, Clinton, Hamilton, Highland, Lawrence, Scioto, and Warren counties:

U.S. Courthouse Southern District of Ohio  
Office of the Clerk, Room 103  
100 East Fifth Street, Cincinnati, OH 45202

Champaign, Clark, Darke, Greene, Miami, Montgomery, Preble, and Shelby counties:

U.S. District Court, Southern District of Ohio  
Federal Building, Room 712  
200 West Second Street, Dayton, OH 45402

## **OKLAHOMA (10<sup>TH</sup> CIRCUIT)**

**Northern District of Oklahoma:** Craig, Creek, Delaware, Mayes, Nowata, Osage, Ottawa, Pawnee, Rogers, Tulsa, and Washington counties:

U.S. District Court, Northern District of Oklahoma  
Clerk of Court  
333 W. 4th St., Room 411, Tulsa, OK 74103

**Eastern District of Oklahoma:** Adair, Atoka, Bryan, Carter, Cherokee, Choctaw, Coal, Haskell, Hughes, Johnston, Latimer, Le Flore, Love, Marshall, McCurtain, McIntosh, Murray, Muskogee, Okfuskee, Okmulgee, Pittsburg, Ponotoc, Pushmataha, Seminole, Sequoyah, Wagoner counties:

U.S. District Court, Eastern District of Ohio  
P.O. Box 607, Muskogee, OK 74401

**Western District of Oklahoma:** Alfalfa, Beaver, Beckham, Blaine, Caddo, Canadian, Cimarron, Cleveland, Comanche, Cotton, Custer, Dewey, Ellis, Garfield, Garvin, Grady, Grant, Greer, Harmon, Harper, Jackson, Jefferson, Kay, Kingfisher, Kiowa, Lincoln, Logan, Major, McClain, Noble, Oklahoma, Payne, Pottawatomie, Roger Mills, Stephens, Texas, Tillman, Washita, Woods, Woodward counties:

U.S. District Court, Western District of Oklahoma  
200 NW 4<sup>th</sup> St., Room 1210, Oklahoma City, OK 73102

## **OREGON (9<sup>TH</sup> CIRCUIT)**

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### **District of Oregon**

Portland Division: Baker, Clackamas, Clatsop, Columbia, Crook, Gilliam, Grant, Harney, Hood River, Jefferson, Malheur, Morrow, Multnomah, Polk, Sherman, Tillamook, Umatilla, Union, Wallowa, Wasco, Washington, Wheeler, and Yamhill counties:

U.S. District Court for the District of Oregon  
Mark O. Hatfield U.S. Courthouse, Room 1507  
1001 S.W. Third Avenue, Portland, OR 97204

Eugene Division: Benton, Coos, Deschutes, Douglas, Lane, Lincoln, Linn, and Marion counties:

U.S. District Court for the District of Oregon,  
Wayne L. Morse U.S. Courthouse, Room 2100  
405 East Eighth Avenue, Eugene, Oregon 97401

Medford Division: Curry, Jackson, Josephine, Klamath, Lake counties:

U.S. District Court for the District of Oregon,  
James A. Redden U.S. Courthouse, Room 213  
310 W. Sixth Street, Medford, OR 97501

## **PENNSYLVANIA (3D CIRCUIT)**

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**Eastern District of Pennsylvania:** Berks, Bucks, Chester, Delaware, Lancaster, Lehigh, Montgomery, Northampton, and Philadelphia counties:

U.S. District Court, Eastern District of Pennsylvania  
601 Market St., Room 2609, Philadelphia, PA 19106-1797

**Middle District of Pennsylvania:** Adams, Bradford, Cameron, Carbon, Centre, Clinton, Columbia, Cumberland, Dauphin, Franklin, Fulton, Huntingdon, Juniata,

Lackawanna, Lebanon, Luzerne, Lycoming, Mifflin, Monroe, Montour, Northumberland, Perry, Pike, Potter, Schuylkill, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, Wyoming, York counties:

U.S. District Court, Middle District of Pennsylvania  
235 N. Washington Ave., P.O. Box 1148  
Scranton, PA 18501

### **Western District of Pennsylvania**

Allegheny, Armstrong, Beaver, Butler, Clarion, Fayette, Greene, Indiana, Jefferson Lawrence, Mercer, Washington, and Westmoreland counties:

U.S. District Court, Western District of Pennsylvania  
700 Grant Street, Pittsburgh, PA 15219

Crawford, Elk, Erie, Forest, McKean, Venango, and Warren counties:

U.S. District Court, Western District of Pennsylvania  
17 South Park Row, Erie, PA 16501

Bedford, Blair, Cambria, Clearfield, and Somerset counties:

U.S. District Court, Western District of Pennsylvania  
208 Penn Traffic Building  
319 Washington Street, Johnstown, PA 15901

## **PUERTO RICO (1<sup>ST</sup> CIRCUIT)**

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### **District of Puerto Rico**

United States District Court, Clerk's Office  
150 Carlos Chardón Street, Suite 150, San Juan, PR 00918

## **RHODE ISLAND (1<sup>ST</sup> CIRCUIT)**

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### **District of Rhode Island**

U.S. District Court, District of Rhode Island  
Federal Building and Courthouse  
One Exchange Terrace, Providence, RI 02903

## **SOUTH CAROLINA (4<sup>TH</sup> CIRCUIT)**

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### **District of South Carolina**

Aiken, Barnwell, Allendale, Kershaw, Lee, Sumter, Richland, Lexington, Aiken, Barnwell, Allendale, York, Chester, Lancaster, and Fairfield counties:

U.S. District Court, District of South Carolina  
Matthew J. Perry, Jr. Courthouse  
901 Richland Street, Columbia, South Carolina 29201

Oconee, Pickens, Anderson, Greenville, Laurens, Abbeville, Greenwood, Newberry, McCormick, Edgefield, Saluda, Spartanburg, Union, and Cherokee counties:

U.S. District Court, District of South Carolina  
Clement F. Haynsworth Federal Building  
300 E. Washington St., Greenville, South Carolina 29601

Chesterfield, Marlboro, Darlington, Dillon, Florence, Marion, Horry, and Williamsburg counties:



U.S. District Court, District of South Carolina  
McMillan Federal Building  
401 West Evans Street, Florence, South Carolina 29501

Jasper, Hampton, Beaufort Clarendon, Georgetown,  
Charleston, Berkeley, Dorchester, and Colleton counties:

Charleston Federal Courthouse  
85 Broad Street, Charleston, South Carolina 29401

## **SOUTH DAKOTA (8<sup>TH</sup> CIRCUIT)**

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### **District of South Dakota**

#### Southern Division:

U.S. District Court, District of South Dakota  
U.S. Courthouse, Room 128  
400 S. Phillips Avenue, Sioux Falls, SD 57104

#### Western Division:

Andrew W. Bogue Federal Building and U.S. Courthouse  
Clerk's Office  
515 Ninth Street, Room 302, Rapid City, SD 57701

#### Pierre (Central) and Aberdeen (Northern) Divisions: Clerk's Office

U.S. District Court U.S. Post Office and Courthouse  
225 South Pierre Street Pierre, SD 57501

## **TENNESSEE (6<sup>TH</sup> CIRCUIT)**

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### **Eastern District of Tennessee**

Greenville Division: Carter, Cocke, Greene, Hamblen,  
Hancock, Hawkins, Johnson, Sullivan, Unicoi, and  
Washington counties:

U.S. District Court, Eastern District of Tennessee  
220 West Depot Street, Suite 200, Greenville, TN 37743

Knoxville Division: Anderson, Blount, Campbell,  
Claiborne, Grainger, Jefferson, Knox, Loudon, Monroe,  
Morgan, Roane, Scott, Sevier, and Union counties:

U.S. District Court, Eastern District of Tennessee  
800 Market Street, Suite 130, Knoxville, TN 37902

Chattanooga Division: Bledsoe, Bradley, Hamilton,  
McMinn, Marion, Meigs, Polk, Rhea and Sequatchie  
counties:

U.S. District Court, Eastern District of Tennessee  
900 Georgia Avenue, Chattanooga, TN 37402

Winchester Division: Bedford, Coffee, Franklin, Grundy,  
Lincoln, Moore, Warren, and Van Buren counties:

U.S. District Court, Eastern District of Tennessee  
200 South Jefferson Street, Winchester, TN 37398

**Middle District of Tennessee:** Cannon, Cheatham, Clay,  
Cumberland, Davidson, De Kalb, Dickson, Fentress, Giles,  
Hickman, Houston, Humphreys, Jackson, Lawrence, Lewis,  
Macon, Marshall, Maury, Montgomery, Overton, Pickett,  
Putnam, Robertson, Rutherford, Smith, Stewart, Sumner,  
Trousdale, Wayne, White, Williamson, Wilson counties:

U.S. District Court, Middle District of Tennessee  
Nashville Clerk's Office  
801 Broadway, Room 800, Nashville, TN 37203

### **Western District of Tennessee**

Dyer, Fayette, Lauderdale, Shelby, and Tipton counties:

U.S. District Court, Western District of Tennessee  
Federal Building, Room 242  
167 North Main Street, Memphis, TN 38103

Benton, Carroll, Chester, Crockett, Decatur, Gibson,  
Hardeman, Hardin, Haywood, Henderson, Henry, Lake,  
McNairy, Madison, Obion, Perry, and Weakley counties:

U.S. District Court, Western District of Tennessee  
U. S. Courthouse, Room 262  
111 South Highland Avenue, Jackson, TN 38301

## **TEXAS (5<sup>TH</sup> CIRCUIT)**

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### **Northern District of Texas**

Abilene Division: Jones, Nolan, Stephens, Throckmorton,  
Fisher, Haskell, Howard, Shackelford, Stonewall, Taylor,  
Callahan, Eastland, and Mitchell counties:

U.S. District Court, Northern District of Texas  
341 Pine Street, Rm. 2008, Abilene, TX 79601

Amarillo Division: Carson, Deaf Smith, Gray, Hutchinson,  
Swisher, Armstrong, Brisco, Castro, Dallam, Hartley,  
Moore, Ochiltree, Parmer, Roberts, Childress, Donley,  
Hall, Lipscomb, Oldham, Potter, Wheeler, Collingsworth,  
Hansford, Hemphill, Randall, and Sherman counties:

U.S. District Court, Northern District of Texas  
205 SE Fifth Street, Rm. 133, Amarillo, TX 79101-1559

Dallas Division: Ellis, Kaufman, Dallas, Rockwall, Hunt,  
Johnson, and Navarro counties:

U.S. District Court, Northern District of Texas  
1100 Commerce St., Rm. 1452, Dallas, TX 75242

Fort Worth Division: Commanche, Perker, Erath, Hood,  
Tarrant, Wise, Jack, and Palo Pinto counties:

U.S. District Court, Northern District of Texas  
501 West 10th Street, 310, Fort Worth, TX 76102-3673

Lubbock Division: Borden, Cochran, Crosby, Hockley,  
Lynn, Dickens, Gaines, Hale, Lamb, Scurry, Bailey, Garza,  
Kent, Motley, Yoakum, Dawson, Floyd, Lubbock, and  
Terry counties:

U.S. District Court, Northern District of Texas  
1205 Texas Avenue, Room 209, Lubbock, TX 79401-  
4091

San Angelo Division: Reagan, Schleicher, Coke, Concho, Irion, Menard, Sterling, Tom Green, Brown, Coleman, Mills, Crockett, Glasscock, Runnels, and Sutton counties:

U.S. District Court, Northern District of Texas  
33 E. Twohig Avenue, 202, San Angelo, TX 76903-6451

Wichita Falls Division: Archer, Hardeman, Knox, Montague, Wilbarger, Cottle, Baylor, Clay, King, Wichita, and Young counties:

U.S. District Court, Northern District of Texas  
1000 Lamar Street, Room 203, Wichita Falls, TX 76301

### **Eastern District of Texas**

Beaumont Division: Hardin, Jasper, Jefferson, Liberty, Newton, and Orange counties:

U.S. District Court, Eastern District of Texas  
300 Willow Street, Suite 104, Beaumont, TX 77701

Marshall Division: Camp, Cass, Harrison, Marion, Morris, and Upshur counties:

Sam B. Hall Jr. Federal Building and U.S. Courthouse  
100 E. Houston, Room 125, Marshall, TX 75670

Sherman Division: Collin, Cooke, Denton, Grayson, Delta, Fannin, Hopkins, and Lamar counties:

Paul Brown U.S. Courthouse  
101 E. Pecan St. Room 216, Sherman, TX 75090

Texarkana Division: Bowie, Franklin, Titus, and Red River counties:

U.S. District Court, Eastern District of Texas  
500 North State Line Avenue, Texarkana, TX 75501

Tyler Division: Anderson, Cherokee, Gregg, Henderson, Panola, Rains, Rusk, Smith, Van Zandt, and Wood counties:

U.S. District Court, Eastern District of Texas  
211 W. Ferguson, Room 106, Tyler, TX 75702

Lufkin Division: Angelina, Houston, Nacogdoches, Polk, Sabine, San Augustine, Shelby, Trinity, and Tyler counties:

U.S. District Court, Eastern District of Texas  
104 N. Third Street, Lufkin, TX 75901

### **Southern District of Texas**

Brownsville Division: Cameron and Willacy counties:

U.S. District Court, Southern District of Texas  
600 East Harrison St., Room 101, Brownsville, TX 78520

Corpus Christi Division: Aransas, Bee, Brooks, Duval, Jim Wells, Kenedy, Kleberg, Live Oak, Nueces, and San Patricio counties:

U.S. District Court, Southern District of Texas  
1133 North Shoreline Blvd., Corpus Christi, TX 78401

Galveston Division: Brazoria, Chambers, Galveston, and Matagorda counties:

U.S. District Court, Southern District of Texas  
Clerk of Court  
601 Rosenberg Street, Room 411, Galveston, Texas 77550

Houston Division: Austin, Brazos, Colorado, Fayette, Fort Bend, Grimes, Harris Madison, Montgomery, San Jacinto, Walker, Waller, and Wharton counties:

U.S. District Court, Southern District of Texas  
P.O. Box 61010, Houston, TX 77208

Laredo Division: Jim Hogg, LaSalle, McMullen, Webb, and Zapata counties:

U.S. District Court, Southern District of Texas  
1300 Victoria Street, Ste. 1131, Laredo, TX 78040

McAllen Division: Hidalgo and Starr counties:

U.S. District Court, Southern District of Texas  
P.O. Box 5059 McAllen, TX 78501

Victoria Division: Calhoun, De Witt, Goliad, Jackson, Lavaca, Refugio, and Victoria counties:

U.S. District Court, Southern District of Texas  
312 S. Main St., Room 406, Victoria, TX 77901

### **Western District of Texas**

Bastrop, Blanco, Burleson, Burnet, Caldwell, Gillespie, Hays, Kimble, Lampasas, Lee, Llano, Mason, McCulloch, San Saba, Travis, Washington, and Williamson counties:

U.S. District Court, Western District of Texas  
U.S. District Clerk's Office  
501 West Fifth Street, Suite 1100, Austin, Texas 78701

Edwards, Kinney, Maverick, Terrell, Uvalde, Val Verde, and Zavala counties:

U.S. District Court, Western District of Texas  
U.S. District Clerk's Office  
111 East Broadway, Room L100, Del Rio, Texas 78840

El Paso County:

U.S. District Court, Western District of Texas  
U.S. District Clerk's Office  
525 Magoffin Avenue, Suite 105, El Paso, Texas 79901

Andrews, Crane, Ector, Martin, Midland and Upton counties:

U.S. District Court, Western District of Texas  
U.S. District Clerk's Office  
200 East Wall, Room 222, Midland, Texas 79701

Brewster, Culberson, Jeff Davis, Hudspeth, Loving, Pecos, Presidio, Reeves, Ward and Winkler counties:

U.S. District Court, Western District of Texas

U.S. District Clerk's Office  
410 South Cedar, Pecos, Texas 79772

Atascosa, Bandera, Bexar, Comal, Dimmit, Frio, Gonzales, Guadalupe, Karnes, Kendall, Kerr, Medina, Real and Wilson counties:

U.S. District Court, Western District of Texas

U.S. District Clerk's Office  
655 E. Cesar E. Chavez Blvd., Room G65  
San Antonio, Texas 78206

Bell, Bosque, Coryell, Falls, Freestone, Hamilton, Hill, Leon, Limestone, McLennan, Milam, Robertson, and Somervell counties:

U.S. District Court, Western District of Texas  
U.S. District Clerk's Office  
800 Franklin Ave., Room 380, Waco, Texas 76701

## **UTAH (10<sup>TH</sup> CIRCUIT)**

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### **District of Utah**

U.S. District Court, District of Utah  
351 So. West Temple, Room 1.100  
Salt Lake City, UT 84101

## **VERMONT (2D CIRCUIT)**

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### **District of Vermont**

U.S. District Court, District of Vermont  
P.O. Box 945, Burlington, VT 05402-0945

## **VIRGIN ISLANDS (3D CIRCUIT)**

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### **District of the Virgin Islands**

U.S. District Court, District of the Virgin Islands  
5500 Veterans Drive, Rm 310, St. Thomas, VI 00802

## **VIRGINIA (4<sup>TH</sup> CIRCUIT)**

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### **Eastern District of Virginia**

Persons in the city of Alexandria and the counties of Loudoun, Fairfax, Fauquier, Arlington, Prince William, and Stafford:

U.S. District Court, Eastern District of Virginia  
Albert V. Bryan U.S. Courthouse  
401 Courthouse Square, Alexandria, VA 22314

Persons in the Cities of Newport News, Hampton and Williamsburg, and the Counties of York, James City, Gloucester, Mathews:

U.S. District Court, Eastern District of Virginia  
U.S. Postal Office & Courthouse Building  
2400 West Avenue, Newport News, VA 2360

Persons in the Cities of Norfolk, Portsmouth, Suffolk, Franklin, Virginia Beach, Chesapeake, and Cape Charles, and the counties of Accomack, Northampton, Isle of Wight, and Southampton:

U.S. District Court, Eastern District of Virginia  
Walter E. Hoffman, U.S. Courthouse  
600 Granby Street, Norfolk, VA 23510

Persons in the Cities of Richmond, Petersburg, Hopewell, Colonial Heights and Fredericksburg, and the Counties of

Amelia, Brunswick, Caroline, Charles City, Chesterfield, Dinwiddie, Essex, Goochland, Greensville, Hanover, Henrico, King and Queen, King George, King William, Lancaster, Lunenburg, Mecklenburg, Middlesex, New Kent, Northumberland, Nottoway, Powhatan, Prince Edward, Prince George, Richmond, Spotsylvania, Surry, Sussex, Westmoreland:

U.S. District Court, Eastern District of Virginia  
701 East Broad Street, Richmond, VA 23219

### **Western District of Virginia**

Persons in the city of Bristol or the counties of Buchanan, Russel, Smyth, Tazewell, and Washington:

U.S. District Court, Western District of Virginia  
180 W. Main Street, Room 104, Abingdon, VA 24210

Persons in the city of Norton or the counties of Dickenson, Lee, Scott, and Wise:

U.S. District Court, Western District of Virginia  
180 W. Main Street, Room 104, Abingdon, VA 24210

Persons in the city of Charlottesville or the counties of Albemarle, Culpeper, Fluvanna, Greene, Louisa, Madison, Nelson, Orange, Rappahannock:

U.S. District Court, Western District of Virginia  
255 W. Main Street, Room 304, Charlottesville, VA 22902

Persons in the cities of Danville, Martinsville, South Boston or the counties of Charlotte, Halifax, Henry, Patrick, and Pittsylvania:

U.S. District Court, Western District of Virginia  
P.O. Box 1400, Danville, VA 24543

Persons in the cities of Harrisonburg, Staunton, Waynesboro, and Winchester or the counties of Augusta, Bath, Clarke, Frederick, Highland, Page, Rockingham, Shenandoah, and Warren:

U.S. District Court, Western District of Virginia  
116 N. Main Street, Room 314, Harrisonburg, VA 22802

Persons in the cities of Bedford, Buena Vista, Lexington, and Lynchburg or the counties of Amherst, Appomattox, Bedford, Buckingham, Campbell, Cumberland, and Rockbridge:

U.S. District Court, Western District of Virginia  
1101 Court Street, Suite A66, Lynchburg, VA 24504

Persons in the cities of Clifton Forge, Covington, Galax, Radford, Roanoke, and Salem or the counties of Alleghany, Bland, Botetourt, Carroll, Craig, Floyd, Franklin, Giles, Grayson, Montgomery, Pulaski, Roanoke, and Wythe:

U.S. District Court, Western District of Virginia  
210 Franklin Road S.W., Suite 540  
Roanoke, VA 24011-2208

## **WASHINGTON (9<sup>TH</sup> CIRCUIT)**

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### **Eastern District of Washington**

For Adams, Asotin, Chelan, Columbia, Douglas, Ferry, Garfield, Grant, Lincoln, Okanogan, Pend Oreille, Spokane, Stevens, and Whitman counties:

U.S. District Court, Eastern District of Washington  
Clerk of the Court  
P.O. Box 1493, Spokane, WA 99210

For Benton, Franklin, and Walla Walla counties:

U.S. District Court, Eastern District of Washington  
825 Jadwin Avenue, Room 174, Richland, WA 99352

For Kittitas, Klickitat, and Yakima counties:

U.S. District Court, Eastern District of Washington  
PO Box 2706, Yakima, WA 98907

### **Western District of Washington**

Clallam, Clark, Cowlitz, Grays Harbor, Jefferson, Kitsap, Lewis, Mason, Pacific, Pierce, Skamania, Thurston, and Wahkiakum counties:

U.S. District Court, Western District of Washington  
1717 Pacific Avenue, Room 3100  
Tacoma, WA 98402-3200

Island, King, San Juan, Skagit, Snohomish, and Whatcom counties:

U.S. District Court, Western District of Washington  
700 Stewart Street Suite 2310, Seattle, WA 98101

## **WEST VIRGINIA (4<sup>TH</sup> CIRCUIT)**

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### **Northern District of West Virginia**

Brooke, Hancock, Marshall, Ohio, and Wetzel counties:

U.S. District Court, Northern District of West Virginia  
1125 Chapline Street, P.O. Box 471, Wheeling, WV 26003

Braxton, Calhoun, Doddridge, Gilmer, Harrison, Lewis, Marion, Monongalia, Pleasants, Ritchie, Taylor, Tyler counties:

U.S. District Court, Northern District of West Virginia  
500 West Pike Street, Room 301  
P.O. Box 2857, Clarksburg, WV 23602

Barbour, Grant, Hardy, Mineral, Pendleton, Pocahontas, Preston, Randolph, Tucker, Webster counties:

U.S. District Court, Northern District of West Virginia  
P.O. Box 1518, 300 Third Street, Elkins, WV 26241

Berkeley, Hampshire, Jefferson, and Morgan counties:

U.S. District Court, Northern District of West Virginia  
217 W. King Street, Room 102, Martinsburg, WV 25401

## **Southern District of West Virginia**

Beckley Division: Fayette, Greenbrier, Summers, Raleigh, and Wyoming counties:

U.S. District Court, Southern District of West Virginia  
Federal Building and Courthouse  
110 North Heber Street, Room 119, Beckley, WV 25801

Bluefield Division: Mercer, Monroe, McDowell counties:

U.S. District Court, Southern District of West Virginia  
601 Federal Street, Room 1037, Bluefield, WV 24701

Charleston Division: Boone, Clay, Jackson, Kanawha, Lincoln, Logan, Mingo, Nicholas, Putnam, Roane, Wirt, and Wood counties:

U.S. District Court, Southern District of West Virginia  
P. O. Box 2546, Charleston, WV 25329

Huntington Division: Cabell, Mason, and Wayne counties:

U.S. District Court, Southern District of West Virginia  
Sidney L. Christie Federal Building  
845 Fifth Avenue, Room 101, Huntington, WV 25701

## **WISCONSIN (7<sup>TH</sup> CIRCUIT)**

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**Eastern District of Wisconsin:** Brown, Calumet, Dodge, Door, Florence, Fond du Lac, Forest, Green Lake, Kenosha, Kewaunee, Langlade, Manitowoc, Marinette, Marquette, Menominee, Milwaukee, Oconto, Outagamie, Ozaukee, Racine, Shawano, Sheboygan, Walworth, Washington, Waukesha, Waupaca, Waushara, and Winnebago counties:

U.S. District Court, Eastern District of Wisconsin

517 East Wisconsin Avenue, Room 362, Milwaukee, WI 53202

**Western District of Wisconsin:** Adams, Ashland, Barron, Bayfield, Buffalo, Burnett, Chippewa, Clark, Columbia, Crawford, Dane, Douglas, Dunn, Eau Claire, Grant, Green, Iowa, Iron, Jackson, Jefferson, Juneau, La Crosse, Lafayette, Lincoln, Marathon, Monroe, Oneida, Pepin, Pierce, Polk, Portage, Price, Richland, Rock, Rusk, Sauk, St. Croix, Sawyer, Taylor, Trempealeau, Vernon, Vilas, Washburn, and Wood counties:

U.S. District Court, Western District of Wisconsin  
120 North Henry Street, Room 320  
Madison, WI 53701-0432

## **WYOMING (10<sup>TH</sup> CIRCUIT)**

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### **District of Wyoming**

U.S. District Court, District of Wyoming

2120 Capitol Ave., Room 2131 Cheyenne, WY 82001-3658

# APPENDIX N

## N.

### Constitutional Amendments

In this section you will find the text of the Constitutional Amendments which we refer to throughout this handbook. We have not included the Articles of the Constitution, which are descriptions of the duties of the Executive (the President), Judicial, and Legislative Branches of government, because they are not relevant to filing a Section 1983 claim.

#### The Bill of Rights and Amendments to the U.S. Constitution

**NOTE:** The first ten amendments to the Constitution are what is known as the "Bill of Rights."

#### The Preamble to the Bill of Rights

ARTICLES in addition to, and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.

#### Amendment I

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

#### Amendment II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

#### Amendment III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

#### Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

#### Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

#### Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

#### Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

#### Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

#### Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

#### Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

#### Amendment XI

Passed by Congress March 4, 1794. Ratified February 7, 1795.

**NOTE:** Article III, section 2, of the Constitution was modified by amendment 11.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

## Amendment XII

Passed by Congress December 9, 1803. Ratified June 15, 1804. Note: A portion of Article II, section 1 of the Constitution was superseded by the 12th amendment.

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; -- the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; -- The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

## Amendment XIII

Passed by Congress January 31, 1865. Ratified December 6, 1865.

**NOTE:** A portion of Article IV, section 2, of the Constitution was superseded by the 13th amendment.

## Section 1.

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

## Section 2.

Congress shall have power to enforce this article by appropriate legislation.

## Amendment XIV

Passed by Congress June 13, 1866. Ratified July 9, 1868. Note: Article I, section 2, of the Constitution was modified by section 2 of the 14th amendment.

## Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## Section 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,\* and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

## Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

#### Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

#### Section 5.

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

\*Changed by section 1 of the 26th amendment.

### **Amendment XV**

Passed by Congress February 26, 1869. Ratified February 3, 1870.

#### Section 1.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

#### Section 2.

The Congress shall have the power to enforce this article by appropriate legislation.

### **Amendment XVI**

Passed by Congress July 2, 1909. Ratified February 3, 1913. *Note: Article I, section 9, of the Constitution was modified by amendment 16.*

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

