The
Jailhouse Lawyer's Handbook

Appendix for Women Prisoners

Published by the
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and the
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APPENDIX for WOMEN PRISONERS

Table of Contents

CHAPTER ONE: INTRODUCTION……1

CHAPTER TWO: MEDICAL CARE: GYNECOLOGY, PRENATAL CARE, AND ABORTION……...1

A. Inadequate Medical Care for Women in Prison……1
B. Medical Needs of Pregnant Women……..2
C. Your Right to an Abortion in Prison……..3

CHAPTER THREE: CARING FOR YOUR CHILD IN PRISON……..5

CHAPTER FOUR: OBSERVATIONS AND SEARCHES BY MALE GUARDS……...6

A. Rights and Limitations……6
B. Special Issues in Observation and Search Cases……6

CHAPTER FIVE: HARASSMENT AND SEXUAL ABUSE……...7

A. Rape and Sexual Assault……..7
B. Outrageous Conduct vs. Unconstitutional Conduct……7
C. Challenging Prison Supervisors and Prison Policies……9

THE JAILHOUSE LAWYER'S HANDBOOK

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

APPENDIX FOR WOMEN PRISONERS

PUBLISHED BY THE **CENTER FOR CONSTITUTIONAL RIGHTS**
AND THE **NATIONAL LAWYERS GUILD**

centerforconstitutionalrights

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1st Edition of Appendix for Women Prisoners

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The Handbook is available on the internet at www.jailhouselaw.org or www.ccr-ny.org

Jailhouse Lawyers Handbook

Appendix For Women Prisoners

I. INTRODUCTION

This appendix discusses some issues of special concern to women prisoners, including gynecological care, prenatal care (medical care during pregnancy), abortion, parental rights, privacy from observation and searches, and sexual harassment and assault. The information provided below is not intended to replace any other information in this handbook. To fully understand your rights, you should read this appendix alongside the entire JLH, and especially Chapter Two, Section C, "Your Rights Under the U.S. Constitution."

As you learned in Chapter Two, Section C, Part 4, female prisoners have the same rights as male prisoners under the U.S. Constitution. However, although the number of women in prison is growing fast, women have been and still are a minority in prison. That means that most cases involving prisoners have been about male prisoners, and have been based on men's needs. One example is your constitutional right to medical care. Courts agree that prisons must respond to your "serious medical needs," but only a few courts have considered whether pregnancy or abortion should be considered serious medical needs.

II. MEDICAL CARE: GYNECOLOGY, PRENATAL CARE, AND ABORTION

Your right to medical care is guaranteed by the Eighth Amendment, which prohibits cruel and unusual punishment. When courts consider whether a prison official has violated your Eighth Amendment right to medical care, they apply the two-part test developed in *Estelle v. Gamble,* 429 U.S. 97 (1976) and explained in *Wilson v. Seiter*, 501 U.S. 294 (1991): first, there must be a "serious medical need"; second, a prison official must have shown "deliberate indifference" to that need. See "Your Right to Medical Care," p. 25.

This is a special appendix to the Jailhouse Lawyers Handbook. It covers a number of issues of special concern to women prisoners, including gynecological care, medical care during pregnancy (also called "prenatal care"), abortion, privacy from observation and searches, and sexual harassment and assault.

A. Inadequate Medical Care for Women in Prison

Despite these rights, women prisoners often do not get the medical care they need. A study in 1999 by Amnesty International, a human rights organization, found a number of serious problems with the medical care in correctional facilities for women in the U.S.. For example, they found that:

- Women's prisons do not have enough medical staff and women experienced severe delays in getting treatment.
- Women's health needs were being screened by officials with no medical training.
- According to statistics from 1996, only 46% of women prisoners received a medical exam when they entered prison. Although women often enter prison with a history of drug abuse and/or a history of sexual or physical abuse, Amnesty found that most women's prisons do not provide mental health professionals or treatment programs for prisoners.
- Finally, the study found that only one-half of the prisons investigated offered tests like mammograms and Pap smears to women prisoners, even though major medical organizations have said that these tests are very important for diagnosing and treating cancer among women.

For more information about this study, see Amnesty International's report, *Not part of my sentence: Violation of the Human Rights in Custody* (1999), or a summary of the report's findings, "Women in Prison: A Fact Sheet, Sexual Assault and Misconduct Against Women in Prison," *available at* http://www.amnestyusa.org/women/womeninprison.html.

Challenging inadequate medical care in court.

Women prisoners have successfully used the courts to improve the medical care they receive. In *Todaro v. Ward*, 565 F.2d 48 (2d Cir. 1977), for example, a class of women prisoners 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.

What medical services do women in prison need?

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, such as *Guidelines for Perinatal Care, 5th ed. (2002)* from the American Academy of Pediatrics and American College of Obstetricians and Gynecologists. (You can order this publication online at http://sales.acog.com/acb/stores/1/ or by telephone at 800-762-2264, ext. 192; the book costs $75.)

Some organizations have published guidelines for gynecological and prenatal care for women in prison, such as the American Correctional Association's *Performance-Based Standards for Adult Local Detention Facilities, 4th ed.* (2004). (This edition costs $35 and contains more than 400 standards covering more than 30 program areas including personnel, training, safety, sanitation, security, health care, and supervision. Order at http://www.aca.org/bookstore/ or contact the ACA for more information at American Correctional Association : 4380 Forbes Boulevard - Lanham, Maryland 20706-4322). 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 this book is available in the JLH.

While a court is not required to 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

Whenever you claim that your Eighth Amendment right to medical care has been violated, you must show (1) that there was a "serious medical need" and (2) that a prison official showed "deliberate indifference" to that need. Under *Wilson v. Seiter*, 501 U.S. 294 (1991), officials show "deliberate indifference" when they know of a prisoner's serious medical need and do not respond to it in a reasonable manner. This two-part test raises some special questions in the area of prenatal care.

- Is pregnancy a serious medical need? Courts disagree whether, under the test for cruel and unusual punishment, 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 pre-term 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 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 pre-trial detainee's complaints of severe vaginal bleeding *and* their supervisors, even though the supervisors were not directly involved in the case, because the supervisors encouraged jailers to rely on their own untrained medical judgment and to reduce the jail's medical costs even when it put pre-trial 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 "supervisory liability" claim, see page 33 of the JLH.

Is it acceptable to shackle a pregnant prisoner?

Although Amnesty International found in 1999 that it is common for pregnant prisoners to be shackled, 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).

For a state-by-state overview of the laws regarding shackling or restraining pregnant inmates, see *Amnesty International, Abuse of Women in Custody: Sexual Misconduct and Shackling of Pregnant Women*, *available at* http://www.amnestyusa.org/women/custody/abuseincustody.html.

C. Your Right to Abortion in Prison

In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court upheld a women's right to choose abortion (at least during the first trimester) 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 the abortion, or it may be able to require your parent's permission if you are 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 abortion in one of two ways. First, she can claim a violation of her Eighth Amendment right to medical care, using the two-part test described above. Second, she can claim a violation of her fundamental right to privacy under the Fourteenth Amendment. Both of these approaches have been successful, but they can also be challenging for a number of reasons.

Eighth Amendment Claim

Proving both a serious medical need and deliberate indifference can be very difficult in the area of abortion, which is very controversial in and out of prison.

Is abortion a serious medical need?

As noted above, some courts do not believe that pregnancy, let alone abortion, is a serious medical need. The debate among courts centers on abortions that are "elective"—that is, abortions that are not medically necessary to save the mother's life.

In one important case, *Monmouth County Correctional Institution Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987), a Court of Appeals determined that abortions, whether they are medically necessary to protect the health of the mother or not, are a serious medical need. 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 argued, 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 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. In *Doe v. Barron*, 92 F.Supp.2d 694 (S.D.Ohio 1999), the court explained that "neither the Sixth Circuit, nor the United States Supreme Court, has directly addressed the exact issue before this Court: whether a state prison can refuse a female prisoner access to abortion services," but went onto hold in favor of the inmate seeking an abortion, citing *Monmouth* as persuasive authority.

On the other hand, a very recent Fifth Circuit case, *Victoria W. v. Larpenter*,__ F.3d ___, 2004 WL 928682 (5th Cir. 2004), disagreed with the *Monmouth* argument that elective abortions are a serious medical need because of the unique nature of pregnancy, and upheld the denial of an inmate's request for an abortion. The court found that the prison's policy of requiring inmates 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 (see page 11 of the JLH and page 4 of this Appendix), even though that policy led to the delay that prevented the inmate from receiving an abortion.

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

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 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 even though 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, the prisoner 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 Gibson's abortion could not be attributed to any particular officials, and was only negligence, not deliberate indifference.

Not all courts reject claims of deliberate indifference, however. In the *Monmouth* case, explained above, a group of women prisoners sought to overturn a prison policy that required women seeking elective abortions to apply for and receive a court order allowing them to seek an abortion outside of the prison. The court held that the policy placed inappropriate burdens upon pregnant prisoners seeking abortion. The court relied on the fact that prison officials didn't even try to act quickly in following this policy, which caused serious delay problems. For this reason, the court held that the officials responsible for the policy acted with deliberate indifference.

Fourteenth Amendment Claim

The *Monmouth* court found that the prison's policy requiring either a determination of medical necessity by the prison physician or a court order before a pregnant prisoner could seek an abortion violated not only the Eighth Amendment, but also the Fourteenth Amendment. The Fourteenth Amendment protects certain rights that the Supreme Court has said are "fundamental." A "fundamental" right is a right that is very important. Examples are your right to marry, your right to raise a family, and your right to an abortion.

Unfortunately, your fundamental right to privacy in prison is not absolute. As with other constitutional rights, your right to an abortion must be weighed against the prison's interests in security and administration. The *Monmouth* court applied the four-part reasonableness test from *Turner v. Safley* (explained on page 11 of the JLH) to the prison policy in question and determined that the women prisoners' 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 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 abortion imposed some costs on the prison, giving prisoners proper prenatal care and access to hospitals for delivery imposes equal costs, so there is not a legitimate argument that eliminating the regulation would be too costly for the prison. The court also noted here 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 it simply asked the prison to accommodate the medical needs of *all* pregnant prisoners, not just those who wished to give birth.

III. CARING FOR YOUR CHILD IN PRISON

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 to care for their children, even infants. However, some states have tried to make parenting in prison easier.

You should check the law in your state to learn the law that applies to you. 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). 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.

The 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 B.W.*, 498 So. 2d 946 (Fla. 1986); *In re Staat*, 287 Minn. 501, 178 N.W.2d 709 (Minn. 1970); *In re J.D.*, 512 So. 2d 684 (Miss. 1987); *In re Sego*, 513 P.2d 831 (Wash. 1973); *In re Adoption of McCray*, 331 A.2d 652, 655 (Pa. 1975). 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. For some examples, you can read Tex. Fam.Code Ann. § 107.013(a)(1); Ark.Code Ann. § 9-27- 316(h)(1) (Supp.2003); *In re B.,* 285 N.E.2d 288 (N.Y. 1972).

You should 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.

IV. OBSERVATIONS AND SEARCHES BY MALE GUARDS

A. Rights and Limitations

Many women in prison feel uncomfortable or anxious when they are observed or searched by male guards for security purposes. 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. This issue is explored in some detail on page 22 of the Jailhouse Lawyers Handbook. However, when reading that material, it is important to understand that since the federal government prohibits employment discrimination based on gender, courts are reluctant to prevent men from doing certain types 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 his or her gender. This means that in general, an employer cannot refuse to hire someone for a certain job or give someone a promotion because of his or her 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 "bona fide occupational qualification" or a "BFOQ."

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 prisoners' 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.

In *Everson v. Michigan Department of Corrections*, 222 F.Supp.2d 864 (E.D. Mich. 2002), a district court found the gender of corrections officers was not a BFOQ. The Department of Corrections had been sued by female inmates charging that sexual misconduct by male guards violated their constitutional rights. As part of the settlement, the Department of Corrections agreed to use only female guards in women's prisons. However the guards then brought a lawsuit and successfully prevented the use of gender as a BFOQ. Settlement of another case regarding the same conditions brought by the United States succeeded in forcing changes in the way female prisoners and male prisoners interacted without forcing the use of only female officers.

B. Special Issues In Observation And Search Cases

1. Is there a history of abuse?

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).

2. Is there an emergency?

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 necessarily 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).

IV. SEXUAL HARASSMENT AND SEXUAL ABUSE

Many guards in women's prisons are men. As discussed in the previous section, these men are frequently responsible for observing every movement of women prisoners and searching these women and their belongings regularly. Women in prison rely on these guards for their safety and for daily needs like food and bedding. All too often, correctional officers take advantage of their great power over women prisoners and subject the women to sexual harassment and abuse. These women may be worried that if they report the harassment or abuse, they will be subject to retaliation by the officer or his friends. They are frightened into silence and the harassment and abuse continue.

The courts offer women some important protection from these abuses of power through the Eighth Amendment's prohibition on cruel and unusual punishment. However, as the following section discusses, there are frustrating and disturbing limits on your right to be free from sexual abuse.

A. Rape and Sexual Assault

You have the right to be free from rape and sexual assault in prison. Courts have agreed that rape or sexual assault of prisoners by correctional officers violates the Eighth Amendment. *Farmer v. Brennan*, 511 U.S. 825 (1994); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000). Although *Schwenk* involved the rape of a male prisoner, the court held that the gender of the guard and victim in the incident did not make a legal difference. While you usually need to meet a two-part test to prove an Eighth Amendment violation, the test is less difficult cases of rape and serious sexual assault. These cases definitely meet the first prong of the test—there is objectively serious harm or risk of harm. To meet the second prong of the test—deliberate indifference—the victim need only prove that the rape or assault took place. When no possible legitimate penological justification for a prison guard's behavior exists, the behavior may be evidence of deliberate indifference. *Boddie v. Schneider*, 105 F.3d 857, 861 (2d Cir. 1997); *Carrigan v. Davis*, 70 F.Supp.2d 448, 454 (D.Del 1999).

Almost all state legislatures have now passed laws criminalizing rape or sexual assault of an inmate by a correctional officer. For an overview of these laws, state-by-state, see Amnesty International, *Abuse of Women in Custody: Sexual Misconduct and Shackling of Pregnant Women*, *available at* http://www.amnestyusa.org/women/custody/abuseincustody.html. For more specific detail about these laws, see Stop Prisoner Rape (SPR), *Custodial Sexual Misconduct Laws: A State-by-State Legislative Review*, *available at* www.spr.org, under the heading "Law."

B. Outrageous Conduct vs. Unconstitutional Conduct

Unfortunately, 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 the behavior of prison guards "outrageous" or "reprehensible" but do not find it unconstitutional. For example, one court refused to find an Eighth Amendment violation where four maintenance workers approached a male prisoner and grabbed his buttocks briefly. *Berryhill v. Schriro*, 137 F.3d 1073 (8th Cir. 1998). The court noted that although the victim claimed to be humiliated and paranoid after the incident, he had not sought medical care for any psychological or emotional trouble. Another court found that it was not cruel and unusual punishment when a corrections official repeatedly made sexual comments about a women 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). Other cases that failed to find Eighth Amendment

violations, despite noting the seriously inappropriate behavior of prison officials, include *Morales v. Mackalm*, 278 F.3d 126 (2d Cir. 2002), and *Boddie v. Schneider*, 105 F.3d 857 (2d Cir. 1997). (It is worth noting that in many cases rejecting claims of sexual harassment in prison, the alleged harassment has been of male inmates presenting no history of sexual abuse, often by female officers.)

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.

More recently, in *Daskalea v. Dist. of Columbia*, 227 F.3d 433 (C.A.D.C. 2000), a Court of Appeals upheld an inmate's claims of sexual harassment and assault based on a series of incidents including a forced striptease in front of all the inmates 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 court similarly rejected the District's attempt to argue that it was not deliberately indifferent because it had a policy in place prohibiting such behavior (the policy required by *Women Prisoners*, discussed in the above paragraph), based on its finding that no inmate 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.

Psychological harm

As discussed on page 10 of the Handbook, the Prison Litigation Reform Act of 1996 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."* 42 U.S.C.A. § 1997e (e). You should note, as an initial matter, that the PLRA does *not* prohibit you from seeking injunctive or declaratory relief.

Few courts have addressed whether rape or sexual assault is a physical injury for the purposes of the PLRA, probably because they assume that it is, and at least one court has said so explicitly. *Kemner v. Hemphill*, 199 F.Supp.2d 1264 (N.D.Fl. 2002). Courts disagree as to whether verbal harassment or sexual touching short of intercourse cause "injury" to the extent that you could bring a money damages claim for mental or emotional injury in conjunction with allegations of this behavior.

At least one court has read the PLRA favorably to prisoners and held that an inmate may be entitled to at least some monetary damages for sexual harassment. In *Calhoun v. DeTella*, 319 F.3d 936 (7th Cir. 2003), a Court of Appeals acknowledged that although strip searches "may be unpleasant, humiliating, and embarrassing to prisoners," "not every psychological discomfort a prisoner endures amounts to a constitutional violation." Nonetheless, the Court held that the "Eighth Amendment prohibits unnecessary and wanton infliction of pain, thus forbidding punishment that is 'so totally without penological justification that it results in the gratuitous infliction of suffering," even when it does not produce serious or even physical injury. The court found that the strip search was conducted in "a harassing manner intended to humiliate and inflict psychological pain," and therefore held that money damages were available despite § 1997e (e) of the PLRA. The Court found that although Calhoun could not receive compensatory damages because he was claiming only psychological harm, he was still entitled to sue for nominal and punitive damages. The Court noted that any narrower interpretation of § 1997e (e) "would give prison officials free reign to maliciously and sadistically inflict psychological torture on prisoners, so long as they take care not to inflict any physical injury in the process."

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.

Today, the federal government and most states have statutes making it a crime for a correctional employee to have intercourse with an inmate, regardless of whether or not he or she consented. A federal law, 18 U.S.C. § 2243, criminalizes sexual intercourse or other physical conduct between an officer and prisoner in any federal prison. For a review of state laws on this issue, see Stop Prisoner Rape (SPR), *Custodial Sexual Misconduct Laws: A State-by-State Legislative Review*, *available at* www.spr.org, under the heading "Law."

C. Challenging Prison Supervisors and Prison Policies

If you are a victim of sexual abuse in prison, you may wish to challenge not only the person who abused you but also that person's supervisors or the policies of the prison in which you are incarcerated. The standard for supervisory liability for sexual abuse is the same basic two-part Eighth Amendment test used elsewhere—you must show that there was objectively serious harm or risk of harm and that the supervisor showed deliberate indifference. To prove deliberate indifference with respect to a supervisor, you must show that the supervisor "acted or failed to act despite his knowledge of the substantial risk of serious harm." *Beers-Capitol v. Whetzel*, 256 F.3d 120 (3rd Cir. 2001). You can prove that a defendant knew of a substantial risk by showing that there had been a history of similar occurrences or that the risk was very obvious. Unfortunately, this is a difficult argument to make. You must be able to show that there was an obvious risk of the specific defendant causing the specific type of harm, not just that there was a substantial risk of harm at the prison in general. *Berry v. Oswalt*, 143 F.3d 1127 (8th Cir. 1998).

Women prisoners in one major case successfully challenged the policies or enforcement of 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 inmate 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.

In another case, however, women prisoners attempted but failed to challenge a County's policies regarding sexual harassment after they were sexually abused by a prison employee. The court held a municipality can only be accountable for an Eighth Amendment violation when it shows deliberate indifference, and explained that deliberate indifference only exists under these circumstances 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 inmate-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).

V. RESOURCES FOR WOMEN PRISONERS

Women in Prison Health Packet
Oberlin Action Against Prisons
P.O. Box 285 Oberlin, OH 44074
A health manual free for women prisoners

Osborne Association Attn: Beverly Grant
36-31 38th Street Long Island City, NY 11101
Parenting from Inside/Out: The Voices of Moters in Prison, $12.00.

National Clearinghouse for the Defense of Battered Women
125 South 9th Street #302, Philadelphia PA 19107
Legal and other assistance for battered women.

Women's Prison Book Project
c/o Arise Bookstore 2441 Lyndale Ave.
S. Minneapolis MN 55405
Write with book request

Aid to Children of Imprisoned Mothers, Inc.
906 Ralph David Abernathy Blvd. SW
Atlanta, GA 30310
Information for incarcerated mothers

Legal Services for Prisoners with Children
1540 Market St., Suite 490
San Francisco, CA 94102
Manual for incarcerated parents in California