CHAPTER 23

YOUR RIGHT TO ADEQUATE MEDICAL CARE*

A. Introduction

The U.S. Constitution requires prison officials to provide all state and federal incarcerated people, as well as pretrial detainees (people in jail waiting for trial,) with adequate medical care.[1] If you think your right to medical care has been violated, this Chapter will help you determine whether you have a legal claim for which you can get relief.

Part B of this Chapter explains your right to medical care under the U.S. Constitution and state law. Part C provides specific examples of when you may have medical care rights. Some examples include: when you have a diagnosed medical condition, when you want an elective procedure (a voluntary, non-emergency operation), when you need psychiatric care, when you are exposed to second-hand smoke, and when you need dental care. Part D is about special medical issues for women who are incarcerated, including the right to basic medical and gynecological care, abortions, and accommodations for pregnant women. Part E talks about your right to receive information about your medical treatment before being treated and your right to keep your medical information confidential in prison. Part F explains the possible ways to seek relief in state and federal courts if your rights have been violated.

This Chapter will focus on federal law and some New York state laws. If you are incarcerated in a state prison, your right to adequate medical care might also be protected by your state's statutes, regulations, and tort law.[2] The New York Correction Law and the Official Compilation of Codes, Rules, and Regulations of the State of New York explain the right to adequate medical care for people incarcerated in the state of New York.[3] If you are in prison in another state, be sure to research the law in that state.

The rights of incarcerated people with mental illnesses, infectious diseases, or disabilities present special issues which are not included in this Chapter. For more information about the rights of incarcerated people with mental health concerns, see Chapter 29 of the *JLM*, "Special Issues for Incarcerated People with Mental Illness." For more information about the rights of incarcerated people with infectious diseases (and the rights of incarcerated people to avoid exposure to infectious diseases), see Chapter 26 of the *JLM*, "Infectious Diseases: AIDS, Hepatitis, Tuberculosis, and MRSA in Prisons." For more information on the rights of incarcerated people with disabilities, see Chapter 28 of the *JLM*, "Rights of Incarcerated People with Disabilities."

It is important that you speak up about any medical issue that you have while you are in prison and keep records of your requests for medical care. If you end up going to court to pursue your right to adequate medical care, a judge will ask for evidence that you tried to obtain medical care in a variety of ways within the prison first. Usually, you must prove "exhaustion" by showing that you went

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1. *See* Estelle v. Gamble, 429 U.S. 97, 103, 97 S. Ct. 285, 290, 50 L. Ed. 2d 251, 259 (1976) ("These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration.").

2. As a person incarcerated in a state prison, you may bring a lawsuit under either state law or federal law. *See* Part F(1) of this Chapter for a discussion of your options.

3. N.Y. CORRECT. LAW § 45(3) (McKinney 2014) (detailing the responsibilities of the Commission of Corrections, including the duty to "visit, and inspect correctional facilities . . . and appraise the management of such correctional facilities with specific attention to matters such as safety, security, health of inmates, sanitary conditions" and other things that affect an incarcerated person's well-being).

through the grievance procedures of your prison system before going to court. It is a good idea to keep a record of all of your requests for medical care and complaints to guards and medical professionals. A record of your requests and complaints can help prove that prison officials ignored your medical needs, which can be important if you bring a claim of "deliberate indifference" (discussed in Part B(1)). Keeping a record will also allow you to show that prison officials were aware of your medical problems (the "subjective part," discussed in Part B(1)(b)). In summary, be sure to tell the prison officials around you about your health concerns as soon as they come up and keep a log of everything you did to get the medical care you need.

If, after reading this Chapter, you think you are not receiving adequate medical care, you should first try to protect your rights through the administrative grievance procedures that your prison has set up for grievances (complaints). Courts are likely to dismiss your case if you do not "exhaust" (use up) all of the options available through your institution first.[4] To learn more about inmate grievance procedures and the exhaustion requirement, see Chapter 15 of the *JLM*, "Inmate Grievance Procedures." If you do not receive a favorable result through inmate grievance procedures, you can then do one of several things. You can bring a lawsuit under Section 1983 of Title 42 of the United States Code (42 U.S.C. § 1983); you can file a tort action in state court (or in the New York Court of Claims if you are in New York); or you can file an Article 78 petition in state court if you are in New York. More information on all of these types of cases can be found in Chapter 5 of the *JLM*, "Choosing a Court and a Lawsuit," Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 to Obtain Relief From Violations of Federal Law," Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," and Chapter 22 of the *JLM*, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules."

If you decide to pursue any claim in federal court, you **MUST** read Chapter 14 of the *JLM* on the Prison Litigation Reform Act ("PLRA"). You should also be aware of the negative consequences of filing lawsuits that are deemed "frivolous" or "malicious" (lawsuits which are based on lies or filed for the sole purpose of harassing someone) under Section 1932 of Title 28 of the United States Code (28 U.S.C. § 1932).[5]

B. The Right to Adequate Medical Care

1. Constitutional Law

The Eighth Amendment of the Constitution protects incarcerated people from "cruel and unusual punishment."[6] In 1976, the Supreme Court said in *Estelle v. Gamble* that a prison staff's "deliberate indifference" to the "serious medical needs" of incarcerated people is "cruel and unusual punishment"

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4. Porter v. Nussle, 534 U.S. 516, 520–523, 122 S. Ct. 983, 985–987, 152 L. Ed. 2d 12, 18–20 (2002) (finding all complaints about conditions and incidents in a correctional facility must first be taken through the administrative remedy procedure available at the facility before being brought to court); *see also* Booth v. Churner, 532 U.S. 731, 739–741, 121 S. Ct. 1819, 1825, 149 L. Ed. 2d 958, 966–967 (2001) (finding that it is mandatory to bring civil rights claims through the correctional institution's administrative procedures before bringing the claim to court); *Custis v. Davis*, 851 F.3d 358, 361 (4th Cir. 2017) (finding that prison officials may defend themselves from an incarcerated person's suit by showing that the incarcerated person failed to exhaust their administrative remedies, and noting that a court may dismiss a complaint when the alleged facts in the complaint prove that the incarcerated person failed to exhaust his administrative remedies). Regardless of whether your complaint is about one incident, many incidents, or an ongoing condition, the court will not hear it if your prison's grievance procedure provides a remedy for your problem but you have not used it.

5. 28 U.S.C. § 1932 states that for any civil action brought by an incarcerated person, the court may revoke earned good-time credit if the court finds that "(1) the claim was filed for a malicious purpose; (2) the claim was filed solely to harass the party against which it was filed; or (3) the claimant testifies falsely or knowingly presents false evidence or information to the court."

6. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

forbidden by the Eighth Amendment.[7] Therefore, if prison officials treated your serious medical needs with "deliberate indifference," they violated your constitutional right to be free from cruel and unusual punishment.

You must prove two things to show that prison officials treated your serious medical needs with "deliberate indifference" (and therefore violated your constitutional rights). You must first prove that your medical needs were sufficiently serious (the "objective" part).[8] Second, you must prove that prison officials knew about and ignored "an excessive risk to [your] health or safety" (the "subjective" part).[9] Since deciding *Estelle*, courts have tried to clarify how incarcerated people can prove these two things.[10] This Chapter explains each part separately below.

Note that the Constitution does not guarantee comfortable prisons; prison conditions may be "restrictive and even harsh."[11] However, the medical care you receive should meet an acceptable standard of care in terms of modern medicine and beliefs about human decency.[12]

(a) The Objective Part: "Sufficiently Serious" Medical Need

To establish the first part (the "objective" part) of an Eighth Amendment claim based on prison officials' deliberate indifference to your medical needs, you must show that your medical needs were sufficiently serious. Courts define "serious medical need" as "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily

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7. Estelle v. Gamble, 429 U.S. 97, 104–105, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976) ("We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the [8th] Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.").

8. Wilson v. Seiter, 501 U.S. 294, 303–304, 111 S. Ct. 2321, 2326–2327, 115 L. Ed. 2d 271, 282–283 (1991) (holding that an incarcerated person can bring an 8th Amendment claim by applying the deliberate indifference standard to a condition of confinement that denies an obvious human need, such as "food, warmth or exercise," and proving that a prison official was deliberately indifferent to that "identifiable human need").

9. Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) (deciding that for a prison official to violate the 8th Amendment, he must 1) know why a substantial risk of serious harm to an incarcerated person exists and 2) ignore that risk).

10. In 2011, the Second Circuit confirmed what an incarcerated person must show to establish deliberate indifference, and therefore, a violation of the Constitution. Cole v. Fischer, 416 F. App'x 111, 113 (2d Cir. 2011) (*unpublished*) ("Deliberate indifference has two necessary components, one objective and the other subjective."). The Second Circuit also has defined a serious medical need as "a condition of urgency, one that may produce death, degeneration, or extreme pain." Hathaway v. Coughlin, 37 F.3d 63, 66 (2d Cir. 1994) (quoting Nance v. Kelly, 912 F.2d 605, 607 (2d Cir. 1990) (Pratt, J., dissenting)). However, in *Brock* the Second Circuit rejected the notion that "only 'extreme pain' or a degenerative condition" meets the legal standard since "the [8th] Amendment forbids not only deprivations of medical care that produce physical torture and lingering death, but also less serious denials which cause or perpetuate pain." Brock v. Wright, 315 F.3d 158, 163 (2d Cir. 2003) (quoting Todaro v. Ward, 565 F.2d 48, 52 (2d Cir. 1977)). More recently however, the court reemphasized the "death, degeneration, or extreme pain" formula. Johnson v. Wright, 412 F.3d 398, 403 (2d Cir. 2005). Still, the *Brock* standard for seriousness remains the law of the Second Circuit. For additional guidance, see Berry v. City of Muskogee, 900 F.2d 1489, 1495–1496 (10th Cir. 1990) (holding that deliberate indifference requires more than negligence, but less than intentional and malicious infliction of injury); Anderson v. City of Atlanta, 778 F.2d 678, 686 (11th Cir. 1985) (finding that a policy of inadequate staffing of medical personnel may raise a question of deliberate indifference); Woodall v. Foti, 648 F.2d 268, 272 (5th Cir. 1981) (determining deliberate indifference by weighing the seriousness of an incarcerated person's mental illness and the length of his incarceration against the availability and expense of psychiatric care).

11. Rhodes v. Chapman, 452 U.S. 337, 347–349, 101 S. Ct. 2392, 2399–2400, 69 L. Ed. 2d 59, 69–70 (1981) (stating that placing two incarcerated people in a cell does not deprive incarcerated people of essential human needs or inflict needless pain such that the 8th Amendment would be violated).

12. Estelle v. Gamble, 429 U.S. 97, 102, 97 S. Ct. 285, 290, 50 L. Ed. 2d 251, 259 (1976) ("Thus, we have held repugnant to the [8th] Amendment punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society.'") (citing Trop v. Dulles, 356 U.S. 86, 101, 78 S. Ct. 590, 598, 2 L. Ed. 2d 630, 642 (1958)).

recognize the necessity of a doctor's attention."[13] To decide if a medical need is serious, the Second Circuit (the federal court which governs New York, Connecticut, and Vermont) considers several factors including, but not limited to, the following:

whether a reasonable doctor or patient would perceive the medical need in question as "important and worthy of comment or treatment," whether the medical condition significantly affects daily activities, and

whether "chronic and substantial pain" exists.[14]

Under the Prison Litigation Reform Act ("PLRA"), a medical need is only sufficiently serious if it involves physical injury.[15] For example, in one case a patient with HIV was denied his medication for several days.[16] His illness was clearly serious, but it was determined that missing a few days of medication caused him no physical harm. Generally, though, if your medical condition is extremely painful, your medical need could be considered "sufficiently serious." For example, in *Hemmings v. Gorczyk*, prison medical staff diagnosed a ruptured tendon as a sprain and , for two months, refused to send the incarcerated person to a specially trained doctor; however, the Second Circuit later found that the incarcerated person's condition was painful enough to be "sufficiently serious."[17] The general trend seems to be that the courts will consider injuries to be sufficiently serious if they significantly change an incarcerated person's quality of life. The Second Circuit has held that the denial of care has to be objectively serious enough to create "a condition of urgency"—a situation where death, permanent injury, or extreme pain appears likely to occur or has occurred.[18] Other circuits have similarly high requirements for what counts as a serious injury or denial of care.[19]

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13. Brown v. Johnson, 387 F.3d 1344, 1350–1352 (11th Cir. 2004) (holding HIV and hepatitis are serious needs) (citing and quoting Hill v. Dekalb Reg'l Youth Det. Ctr., 40 F.3d 1176, 1187 (11th Cir.1994)); *see also* Carnell v. Grimm, 872 F. Supp. 746, 755 (D. Haw. 1994) ("A 'serious' medical need exists if the failure to treat the need could result in further significant injury or 'unnecessary and wanton infliction of pain.'") (quoting Estelle v. Gamble 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976)), *appeal dismissed in part*, *aff'd in part,* Carnell v. Grimm, 74 F.3d 977 (9th Cir. 1996).

14. Brock v. Wright, 315 F.3d 158, 162 (2d Cir. 2003) (citing and quoting McGuckin v. Smith, 974 F.2d 1050, 1059—1060 (9th Cir. 1992)). The Second Circuit defined a serious medical need as "a condition of urgency, one that may produce death, degeneration, or extreme pain." Hathaway v. Coughlin, 37 F.3d 63, 66 (2d Cir. 1994) (quoting Nance v. Kelly, 912 F.2d 605, 607 (2d Cir. 1990) (Pratt, J., dissenting)). However, in *Brock*, the court rejected the notion that "only 'extreme pain' or a degenerative condition" meets the legal standard, since "the [8th] Amendment forbids not only deprivations of medical care that produce physical torture and lingering death, but also less serious denials which cause or perpetuate pain." Brock v. Wright, 315 F.3d 158, 163 (2d Cir. 2003) (citing Todaro v. Ward, 565 F.2d 48, 52 (2d Cir. 1977)). More recently, the court repeated the "death, degeneration, or extreme pain" formula. Johnson v. Wright, 412 F.3d 398, 403 (2d Cir. 2005). However, the *Brock* holding still seems to be the law of the Second Circuit.

15. See Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," for more information on the limits the PLRA imposes on your ability to bring a lawsuit while in prison.

16. Smith v. Carpenter, 316 F.3d 178, 181 (2d Cir. 2003) (holding that a jury may consider the lack of adverse medical effects to the incarcerated person in determining whether a denial of medical care meets the objective serious medical need requirement).

17. Hemmings v. Gorczyk, 134 F.3d 104, 109 (2d Cir. 1998) (holding that incarcerated person's Eighth Amendment claim of "deliberate indifference" to his serious medical needs warranted further factual development).

18. *See* Brock v. Wright, 315 F.3d 158, 163–164 (2d Cir. 2003) (finding that failing to adequately examine painful swollen tissue from a knife wound could constitute deliberate indifference); Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974) (finding possible deliberate indifference when a portion of an incarcerated person's ear had been cut off during a fight and prison officials merely stitched a stump of the incarcerated person's ear instead of attempting to suture the severed portion back on); *see also* Salahuddin v. Goord, 467 F.3d 263, 280 (2d Cir. 2006) (defining sufficiently serious as "whether 'a reasonable doctor or patient would find it important and worthy of comment,' whether the condition 'significantly affects an individual's daily activities,' and whether it causes 'chronic and substantial pain'") (quoting Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998)).

19. The Ninth Circuit held in Hunt v. Dental Dept., 865 F.2d 198, 200–201 (9th Cir. 1989), that failure to put an incarcerated person, who lost his dentures and suffered from bleeding and infected gums, on a soft food diet could be sufficient to state a claim of deliberate medical indifference. In Weeks v. Chaboudy, 984 F.2d 185,

Recent court decisions have emphasized pain and disability when evaluating incarcerated people's medical needs.[20] Drug or alcohol withdrawal is a serious medical need.[21] Gender dysphoria has been recognized as a serious medical need in some cases.[22] There might also be a "serious cumulative effect from the repeated denial of care" for minor problems.[23] Where medical treatment is delayed, courts

187 (6th Cir. 1993), the Sixth Circuit held that refusal to admit a paraplegic incarcerated person into an infirmary where he could use his wheelchair constituted deliberate indifference. The Fourth Circuit has held that the treatment must be so grossly incompetent, inadequate, or excessive that it shocks the conscience or is intolerable to fundamental fairness. *See* Miltier v. Beorn, 896 F.2d 848, 851 (4th Cir. 1990). The Seventh Circuit, in considering whether a medical need is "serious," considers such factors as the severity of the medical problem, the potential for harm if medical care is denied or delayed, and whether any such harm actually resulted from the lack of medical attention. *See* Gutierrez v. Peters, 111 F.3d 1364, 1370 (7th Cir. 1997). *See also* Rouse v. Plantier, 182 F.3d 192, 197 (3d Cir. 1999), Torraco v. Maloney, 923 F.2d 231, 234 (1st Cir. 1991).

20. Numerous courts have cited pain as an appropriate reason for finding that an incarcerated person's medical needs are serious. *See*, *e.g.,* Blackmore v. Kalamazoo Cnty., 390 F.3d 890, 899–900 (6th Cir. 2004) (holding that a two-day delay in treatment of appendicitis caused pain sufficient to pose serious risk of harm, even though the appendix did not in fact rupture); Spruill v. Gillis, 372 F.3d 218, 236 (3d Cir. 2004) (holding that a claim alleging a back condition that resulted in pain so serious it caused the incarcerated person to fall down sufficiently created a serious need); Farrow v. West, 320 F.3d 1235, 1244–1245 (11th Cir. 2003) (holding that pain, bleeding, and swollen gums of an incarcerated person who needed dentures helped show serious medical need); Boretti v. Wiscomb, 930 F.2d 1150, 1154 (6th Cir. 1991) (holding that needless pain that does not lead to permanent injury is still actionable); Moreland v. Wharton, 899 F.2d 1168, 1170 (11th Cir. 1989) (finding that an allegation of a "significant and uncomfortable health problem" was a serious need); Johnson-El v. Schoemehl, 878 F.2d 1043, 1055 (8th Cir. 1989) (holding that delay in medical care for a condition that is "painful in nature" is actionable). Miller v. King, 384 F.3d 1248, 1261 (11th Cir. 2004) (holding that paraplegia with inability to control passing urine is a serious medical need), *vacated and superseded on other grounds*, Miller v. King, 449 F.3d 1149 (11th Cir. 2006); Koehl v. Dalsheim, 85 F.3d 86, 88 (2d Cir. 1996) (finding that loss of vision may not be "pain" but it is "suffering"); Johnson v. Bowers, 884 F.2d 1053, 1056 (8th Cir. 1989) (determining that prison must provide treatment when a "substantial disability" exists); Monmouth Cnty. Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987) (finding that medical need is serious if it imposes a "life-long handicap or permanent loss").

21. *See* Stefan v. Olson, 497 F. App'x 568, 577 (6th Cir. 2012) (*unpublished*) ("[Plaintiff]'s extremely elevated .349 blood-alcohol level and verbal communication of a history of alcoholism accompanied by withdrawal seizures communicated an objectively serious medical need possessing the 'sufficiently imminent danger' that is 'actionable under the [8th] Amendment'"); Morrison v. Washington Cnty., 700 F.2d 678, 686 (11th Cir. 1983) (referring to patient who died after experiencing alcohol withdrawal as "seriously ill"); Kelley v. Cnty. of Wayne, 325 F. Supp. 2d 788, 791–792 (E.D. Mich. 2004) (finding that heroin withdrawal is a "serious medical condition").

22. Gender dysphoria ("GD") is distress because your gender identity does not match your biological sex. Gender Dysphoria, American Psychiatric Association, *available at* https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria (last visited November 6, 2020); *see also* Maggert v. Hanks, 131 F.3d 670, 671 (7th Cir. 1997). Many older cases will not use the term "gender dysphoria," but will state that "transsexualism" or "gender identity disorder" are serious medical needs. *See*, *e.g.,* Praylor v. Tex. Dept. of Crim. Justice, 430 F.3d 1208, 1209 (5th Cir. 2005) (per curiam) (assuming that "transsexualism" constitutes a serious medical need but deciding the case on other grounds); Cuoco v. Moritsugu, 222 F.3d 99, 106 (2d Cir. 2000) (assuming that "transsexualism" constitutes a serious medical need but deciding the case on other grounds). Note, however, that courts differ over the extent of prison officials' obligations to provide hormone therapy and surgery. *See* Battista v. Clarke, 645 F.3d 449, 455 (1st Cir. 2011) (finding that an incarcerated person who attempted to castrate herself due to prison officials prolonged failure to provide hormone therapy was entitled to relief); Praylor v. Tex. Dept. of Crim. Justice, 430 F.3d 1208, 1209 (5th Cir. 2005) (per curiam) (determining that denial of hormone therapy was not deliberate indifference under the circumstances); De'Lonta v. Angelone, 330 F.3d 630, 635–636 (4th Cir. 2003) (finding that an incarcerated person with "Gender Identity Disorder" was entitled to treatment for compulsion to self-mutilate after her hormone treatment was stopped); Kosilek v. Maloney, 221 F. Supp. 2d 156, 193 (D. Mass. 2002) (finding that the 8th Amendment requires that treatment decisions for an incarcerated person with "Gender Identity Disorder" be based on individualized medical evaluation rather than a general treatment policy). Even though these cases do not use up to date language, they can help you argue for trans-affirming medical care.

23. Blackmore v. Kalamazoo Cnty., 390 F.3d 890, 898 (6th Cir. 2004) (citing Napier v. Madison Cnty., Ky., 238 F.3d 739, 742 (6th Cir. 2001) (A "plaintiff's 'deliberate indifference' claim is based on the prison's failure to treat a condition adequately, or where the prisoner's affliction is seemingly minor or non-obvious. In such circumstances, medical proof is necessary to assess whether the delay caused a serious medical injury."); Jones v.

look at whether the *effects* of the delay or interruption—not the underlying medical condition—are objectively serious enough to present an Eighth Amendment question.[24] Whether a medical need is "serious" should be determined on a case-by-case basis and not only by a prison's "serious need list."[25] Prisons are not allowed to have a rigid list of serious medical needs without allowing some flexibility in individual evaluations of incarcerated people.[26] In addition, a treatment that a hospital or prison considers to be elective (voluntary and non-emergency) may still be a "serious medical need."[27]

(b) The Subjective Part (Prison Officials "Knew of and Disregarded a Risk")

After proving that your medical need was sufficiently serious, you must also prove that prison officials purposely allowed you to go without necessary medical help.[28] This is the second part of your Eighth Amendment claim (the "subjective" part). It is difficult to prove that prison officials knew about your serious medical need and meant to deny you necessary medical care. Section 3 of this Chapter explains the different ways you can prove that prison officials knew about and disregarded your serious medical need.

You have to prove two things to show that a prison official knew about and disregarded your serious medical need. First, the official has to have **known** facts that could have shown or proven that your health was in danger.[29] Second, after the official was aware of the threat to your health, the official must actually have **believed** that your health was in danger.[30] Courts have struggled to determine exactly how much knowledge a prison official must have in order to meet this standard. In general, the standard is very high, as you will see from the cases discussed below.

(c) The Deference Problem

It can be difficult to win a deliberate indifference claim when the incarcerated person and the prison officials have different opinions about what medical treatment is best for the incarcerated person. For example, a prison doctor might give an incarcerated person X medication for his medical condition, but the incarcerated person believes Y medication is better. As long as both X and Y

Evans, 544 F. Supp. 769, 775 n.4 (N.D. Ga. 1982) (finding that confiscating an incarcerated person's medically prescribed back brace might have serious enough effects to constitute an 8th Amendment violation).

24. Kikumura v. Osagie, 461 F.3d 1269, 1292, 1295–1296 (10th Cir. 2006), *overruled on other grounds as stated in* Robbins v. Oklahoma, 519 F.3d 1242 (10th Cir. 2008) (holding delay must be shown to have caused "substantial harm" and that pain caused by delay can amount to substantial harm); Spann v. Roper, 453 F.3d 1007, 1008–1009 (8th Cir. 2006) (holding that no medical evidence was needed for a jury to find that a three-hour delay in treating an overdose was objectively serious).

25. Martin v. DeBruyn, 880 F. Supp. 610, 614 (N.D. Ind. 1995) (holding that "[c]ourts determine what constitutes a serious medical need on a case-by-case basis" and that incarcerated person's ulcers were "serious" even though prison did not include ulcers in a list of serious medical needs).

26. Martin v. DeBruyn, 880 F.Supp. 610, 616 (N.D. Ind. 1995) (refusing to accept "an inelastic list of conditions which [a prison] considers 'serious medical needs'" because "the definition of such a need is necessarily elastic").

27. Johnson v. Bowers, 884 F.2d 1053, 1056 (8th Cir. 1989) (holding that a hospital's "gratuitous classification" of a surgery as "elective" does not remove prison's duty "to promptly provide necessary medical treatment").

28. *See* Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) ("We hold instead that a prison official cannot be found liable under the [8th] Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety.").

29. *See* Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) (holding that an inhumane treatment claim under the 8th Amendment requires that a prison official "*knows of* and disregards an excessive risk to inmate health or safety") (emphasis added).

30. Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) ("[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference").

medications are approved for treating the incarcerated person's disease, the incarcerated person will probably not win in court because the court will defer to (respect) the prison doctor's professional medical judgment that X was best for the incarcerated person. Even if you have your own outside doctor who says something different from the prison doctor, prison officials may rely upon their own doctor's judgment.[31]

A difference in opinion over medical treatment, or even an error in medical judgment, is not likely to win a case.[32] But that does not mean that you can never challenge a prison doctor's decisions; "a medical professional's erroneous treatment decision can lead to deliberate indifference liability if the decision was made in the absence of professional judgment."[33] Thus, the prison health official must actually use legitimate medical judgment.[34]

While general prison medical procedures might be fine for most incarcerated people, forcing some incarcerated people to follow those procedures might establish deliberate indifference to those *particular* incarcerated people's medical conditions. For example, the Second Circuit has held that a statewide prison medical policy that denied Hepatitis C treatment to incarcerated people with any substance abuse problems within the past two years might lead to deliberate indifference if applied to a particular incarcerated person. The prison followed the policy despite "the unanimous, express, and repeated recommendations of plaintiff's treating physicians, including prison physicians," to move away from the policy in the plaintiff's particular case.[35]

(d) Common Types of Deliberate Indifference

Listed below are some common situations in which courts have found prison medical staff to be deliberately indifferent to incarcerated people's serious medical needs. They include:

(1) Ignoring obvious conditions;
(2) Failing to provide treatment for diagnosed conditions;
(3) Failing to investigate enough to make an informed judgment;
(4) Delaying treatment;
(5) Interfering with access to treatment;
(6) Making medical decisions based on non-medical factors; and
(7) Making a medical judgment so bad it falls below professional medical standards.

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31. Vaughan v. Lacey, 49 F.3d 1344, 1346 (8th Cir. 1995) (holding that prison authorities can rely on prison doctors even where an incarcerated person's private physician holds a different medical opinion about appropriate treatment).

32. *See* Flores v. Okoye, 196 F. App'x 235, 236 (5th Cir. 2006) (*unpublished*) (per curiam) ("A doctor's failure to follow the advice of another doctor suggests nothing more than a difference in opinion . . . and is not evidence of deliberate indifference."); Smith v. Carpenter, 316 F.3d 178, 184 (2d Cir. 2003) (noting that "not every lapse in prison medical care will rise to the level of a constitutional violation").

33. Johnson v. Doughty, 433 F.3d 1001, 1013 (7th Cir. 2006); *see also* Greeno v. Daley, 414 F.3d 645, 654 (7th Cir. 2005) (finding that medical staff's stubborn refusal to change an incarcerated person's treatment, despite his reports that his medication was not working and his condition was worsening, could constitute deliberate indifference); McElligott v. Foley, 182 F.3d 1248, 1256–1257 (11th Cir. 1999) (finding that failure to inquire further into and treat severe pain, along with repeated delays in seeing the patient, could permit a jury to find deliberate indifference); Hunt v. Uphoff, 199 F.3d 1220, 1223–1224 (10th Cir. 1999) (finding that a doctor's denial of insulin and other treatments recommended by another doctor could constitute more than a mere difference of medical opinion, and that the incarcerated person could potentially prove deliberate indifference).

34. *See* Estate of Cole by Pardue v. Fromm, 94 F. 3d 254, 261–262 (7th Cir. 1996) ("[D]eliberate indifference may be inferred based upon a medical professional's erroneous treatment decision only when the medical professional's decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment.").

35. Johnson v. Wright, 412 F.3d 398, 404, 406 (2d Cir. 2005) (noting that "a deliberate indifference claim can lie where prison officials deliberately ignore the medical recommendations of a prisoner's treating physicians") (citing Gill v. Mooney, 824 F.2d 192, 196 (2d Cir. 1987)).

(i) Ignoring Obvious Conditions

One way to prove that prison officials were deliberately indifferent to your serious medical needs is to show that the problem was so obvious that they should have been aware of a serious and substantial risk to your health. Even if the prison official did not notice the risk (injury, disease, physical condition, etc.), the official can be held liable (responsible) if the risk to the incarcerated person was very obvious. In *Brice v. Virginia Beach Correction Center*, the court found that a prison guard may have ignored a serious and substantial risk (and thus may have been deliberately indifferent) when an incarcerated person received no medical care after a fight, even though the incarcerated person's mouth was bleeding and he complained of horrible pain.[36] In *Phelps v. Kapnolas*, the court said that a prison official disregarded an obvious risk by putting an incarcerated person in solitary confinement with inadequate food. The court said the official should have known that not having enough food would cause pain and distress.[37]

In *Phillips v. Roane County, Tenn.*, the Sixth Circuit ruled that correctional officers at the Roane County Jail were responsible for the death of a female incarcerated person. Medical examiners testified that the incarcerated person died from untreated diabetes. According to the court, prison authorities were aware of her deteriorating condition during the two weeks before her death, as she complained of vomiting, chest pain, fatigue, nausea, and constipation. Their failure to take her to a hospital was considered deliberate indifference to her medical needs.[38]

The risk to the incarcerated person must be very obvious because courts frequently find that the prison official is not responsible when he did not know enough about an incarcerated person's condition. In *Reeves v. Collins*, prison guards were not liable when they forced an incarcerated person to work, even after he had warned them that he had a previous back injury, was doubled over, and was complaining of excessive pain.[39] He was later taken to the infirmary and diagnosed with a double hernia. The court decided that the guards had not disregarded a substantial risk because even if the guards had checked the incarcerated person medical records (which they did not), they would not have learned of the incarcerated person's history of hernias due to a mistake in the records.

In *Sanderfer v. Nichols*, the court found that a prison doctor was not responsible for her failure to treat a patient's hypertension (even though the incarcerated person later died of a heart attack).[40] Although the plaintiff's medical records included a history of hypertension, the doctor was not liable because the plaintiff complained only of bronchitis when he met with the doctor. The incarcerated person never told the doctor that hypertension was a problem for him, and his blood pressure later was checked on three occasions and was normal. This means that it is very important that you speak up and tell prison officials about all of your health problems.

If you are making an Eighth Amendment claim that prison officials were deliberately indifferent to your serious medical needs, you should tell the court all of the reasons your medical needs should have been obvious to prison officials.

(ii) Failing to Provide Treatment for Diagnosed Conditions

The easiest way to establish prison officials' deliberate indifference to your medical needs is to prove that a prison doctor diagnosed you with a serious medical condition and prescribed treatment for you, but you never received that treatment. In *Hudson v. McHugh*, an incarcerated person was transferred from a halfway house to a county jail but was not given his medicine.[41] After eleven days without it, despite repeated requests to the jail's medical personnel, he had a seizure. The Seventh

36. Brice v. Va. Beach Corr. Ctr., 58 F.3d 101, 103–106 (4th Cir. 1995).

37. Phelps v. Kapnolas, 308 F.3d 180, 186–187 (2d Cir. 2002).

38. Phillips v. Roane Cnty., Tenn., 534 F.3d 531, 540–541 (6th Cir. 2008).

39. Reeves v. Collins, 27 F.3d 174, 176–177 (5th Cir. 1994).

40. Sanderfer v. Nichols, 62 F.3d 151, 155 (6th Cir. 1995) (finding that even though the doctor probably should have checked the incarcerated person's medical records, her failure to do so was at most negligence, not deliberate indifference).

41. Hudson v. McHugh, 148 F.3d 859, 861 (7th Cir. 1998).

Circuit held that this was the most obvious kind of case in which an incarcerated person could raise a claim: "[T]his is the prototypical case of deliberate indifference, an inmate with a potentially serious problem repeatedly requesting medical aid, receiving none, and then suffering a serious injury."[42] It is important to note that not only was the incarcerated person denied his medicine, but he also requested it several times before he became dangerously ill. *If you are making an Eighth Amendment claim that prison officials were deliberately indifferent to your serious medical needs, you should tell the court about your requests for medical treatment to show that officials knew of your needs.*

(iii) Failing to Investigate Enough to Make an Informed Judgment

If a court finds that prison officials never made an informed decision about your medical care, you may be able to establish an Eighth Amendment claim of deliberate indifference to your medical needs.[43] Prison officials may not have made an informed decision about your medical care if, in response to your complaints of a medical problem, they did not properly treat you, did not investigate the cause of your medical condition, did not order diagnostic tests, did not send you to a specialist, or did not consult your medical records before stopping medication.[44]

(iv) Delaying Treatment

You can also establish an Eighth Amendment claim of deliberate indifference to your serious medical needs by proving that (1) prison officials delayed your treatment, and (2) that delay caused serious consequences. Whether or not to delay treatment is sometimes an issue of professional opinion, but some delays are very serious and may prove deliberate indifference. If you suffered from a serious injury that prison officials knew about, but you had to wait a very long time before getting medical treatment, you may be able to bring a claim. Denial of or delay in access to medical personnel, or in providing treatment, can be deliberate indifference. [45] In determining whether or not a delay constitutes deliberate indifference, two factors are taken into account:

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42. Hudson v. McHugh, 148 F.3d 859, 864 (7th Cir. 1998); *see also* Erickson v. Pardus, 551 U.S. 89, 92–95, 127 S. Ct. 2197, 2199–2200, 167 L. Ed. 2d 1081, 1085–1086 (2007) (holding that refusal to continue prescribed treatment because of alleged theft of syringe used for the treatment could amount to deliberate indifference).

43. Tillery v. Owens, 719 F. Supp. 1256, 1308 (W.D. Pa. 1989) *aff'd*, Tillery v. Owens, 907 F.2d 418 (3d Cir. 1990) (holding that if an informed judgment has not been made, the court may find an 8th Amendment claim). The 8th Amendment protects you from cruel and unusual punishment. U.S. CONST. amend. VIII ("[N]or [shall] cruel and unusual punishments [be] inflicted.").

44. Gonzalez v. Feinerman, 663 F.3d 311, 314 (7th Cir. 2011) (holding that failure to properly treat plaintiff's hernia can constitute deliberate indifference if refusing surgery substantially departs from professional judgment); Arnett v. Webster, 658 F.3d 742, 754 (7th Cir. 2011) (holding that a doctor choosing an easier and less effective treatment can reflect deliberate indifference, even though the doctor didn't prescribe the proper medication for the medical condition because it wasn't available); McElligott v. Foley, 182 F.3d 1248, 1252, 1256–1257 (11th Cir. 1999) (finding that failure to inquire about and treat plaintiff's severe pain, and the doctor's repeated delays in seeing the patient, could constitute deliberate indifference). Greeno v. Daley, 414 F.3d 645, 653–654 (7th Cir. 2005) (finding that a failure to investigate the cause of incarcerated person's medical condition and the reasons why current treatment was not working could be deliberate indifference). *See* Perez v. Anderson, 350 F. App'x 959, 961–962 (5th Cir. 2009) (*unpublished*) (finding that deliberate indifference could exist where an incarcerated person didn't receive pain relief or x-rays for several months despite repeated requests after a severe beating from a fellow incarcerated person); Miltier v. Beorn, 896 F.2d 848, 853 (4th Cir. 1990) (finding that deliberate indifference could exist where doctor failed to perform tests for cardiac disease on incarcerated person with symptoms that called for such tests). *See* Greeno v. Daley, 414 F.3d 645, 655 (7th Cir. 2005) (finding that a doctor could be deliberately indifferent for refusing to send an incarcerated person to a specialist or to order an endoscopy despite the incarcerated person's complaints of severe pain, and noting that the doctor could not rely on lack of "objective evidence" since often there is no objective evidence of pain). *See* Steele v. Shah, No. 93-3396, 1996 U.S. App. LEXIS 23301 at *2–*4 (11th Cir. 1996) (*unpublished*) (denying summary judgment to prison doctor who discontinued psychiatric medication for an incarcerated person the doctor knew was at risk for suicide based on a cursory interview, without reviewing medical records).

45. *See* Tyler v. Smith, 458 F. App'x 597, 598 (9th Cir. 2011) (*unpublished*) (finding sufficient facts to allege deliberate indifference where an official knew of incarcerated person's pain and mobility problems but delayed in referring him to an orthopedist); Estate of Carter v. City of Detroit, 408 F.3d 305, 310 (6th Cir. 2005) (noting that

(1) the seriousness of the incarcerated person's medical need,[46] and
(2) whether the delay was objectively serious enough to present an Eighth Amendment question.[47]

Remember that prison officials may have had a valid reason for delaying your non-emergency medical treatment. For example, if no prison official who could properly take care of your non-emergency medical needs was on duty, a judge would probably find the delay justified.

A judge might also find that security concerns justify denying your request for a particular medical treatment. For instance, in *Schmidt v. Odell*, the court rejected the plaintiff's claim that failure to provide him with a wheelchair was a constitutional violation. The court found that having a wheelchair among the jail's population could pose a legitimate security risk. The court concluded that this was sufficient to show that the refusal to provide a wheelchair did not alone violate the Eighth Amendment.[48] However, the court noted that the prison's delay in providing a *shower* chair "appears to have resulted not only in the unnecessary infliction of pain, but also in a needless indignity that a jury could find was inconsistent with the Eighth Amendment."[49]

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an official who knew incarcerated person was exhibiting "the classic symptoms of a heart attack" and did not arrange transportation to a hospital could be found deliberately indifferent because of the immediate threat of the symptoms); Johnson v. Karnes, 398 F.3d 868, 875–876 (6th Cir. 2005) (finding that prison doctor's failure to schedule surgery for severed tendons despite knowing they were severed could constitute deliberate indifference); McElligott v. Foley, 182 F.3d 1248, 1256–1257 (11th Cir. 1999) (finding that a doctor's repeated delays in seeing a patient with constant severe pain, combined with a decision to continue ineffective medications and the doctor's failure to order diagnostic tests, could constitute deliberate indifference); Murphy v. Walker, 51 F.3d 714, 719 (7th Cir. 1995) (holding that a two-month failure to allow an incarcerated person with a head injury to see a doctor stated a sufficient claim for deliberate indifference); Smith v. Carpenter, 316 F.3d 178, 186 (2d Cir. 2003) (holding that delaying HIV medicine to an HIV-positive incarcerated person could state an 8th Amendment claim when the temporary interruption of medication causes significant harm). Wilhelm v. Rotman, 680 F.3d 1113, 1123 (9th Cir. 2012) (holding that a delay of more than one year for treatment of a diagnosed hernia due to the doctor's refusal to make a referral for surgery could amount to deliberate indifference); Cordero v. Ahsan, 452 F. App'x 150, 153–154 (3d Cir. 2011) (*unpublished*) (holding that deliberate indifference could exist where a doctor refuses to refer an incarcerated person to a specialist or to get an MRI, after the incarcerated person felt a "pop" in his shoulder); Spann v. Roper, 453 F.3d 1007, 1008–1009 (8th Cir. 2006) (finding that a nurse could be deliberately indifferent for leaving an incarcerated person in his cell for three hours when she knew he had taken an overdose of mental health medications intended for another); McKenna v. Wright, 386 F.3d 432, 437 (2d Cir. 2004) (holding that an extended delay in starting hepatitis C treatment constituted a valid claim of deliberate indifference).

46. *See* Gomez v. Randle, 680 F.3d 859, 865 (7th Cir. 2012) (holding that a condition is considered serious, even if not life threatening, if a lack of treatment would result in "further significant injury or unnecessary and wanton infliction of pain") (citation omitted); Roe v. Elyea, 631 F.3d 843, 857 (7th Cir. 2011) (holding that a medical condition is considered sufficiently serious if it has been diagnosed by a doctor as requiring treatment or if it is obvious to a layperson that a doctor's attention is needed)(citation omitted); Kikumura v. Osagie, 461 F.3d 1269, 1292 (10th Cir. 2006) (explaining that delay must be shown to have caused "substantial harm," including pain suffered while awaiting treatment), *overruled on other grounds as stated in* Robbins v. Oklahoma, 519 F.3d 1242 (10th Cir. 2008).

47. Snow v. McDaniel, 681 F.3d 978, 990 (9th Cir. 2012) (holding that for a condition to be sufficiently serious, the plaintiff must show that the delay in treatment of his hip injury led to further injury), *overruled on other grounds as stated in* Peralta v. Dillard, 744 F.3d 1076, 1083 (9th Cir. 2014); McClure v. Foster, 465 F. App'x 373, 375 (5th Cir. 2012) (*unpublished*) (holding that even if the incarcerated person could show deliberate indifference to his need for medical care for his cut wrist, the injury was not sufficiently serious nor did the delay cause sufficient injury to state a claim); Smith v. Knox Cnty. Jail, 666 F.3d 1037, 1040 (7th Cir. 2012) (holding that "even a few days' delay in addressing a severely painful but readily treatable condition suffices to state a claim of deliberate indifference"); Spann v. Roper, 453 F.3d 1007, 1008–1009 (8th Cir. 2006) (holding that a jury could find a three-hour delay in addressing a medication overdose to be objectively sufficiently serious). *But see* Smith v. Carpenter, 316 F.3d 178, 186–187 (2d Cir. 2003) (determining that brief interruptions of HIV medications, with no discernible adverse effects, did not present serious medical needs).

48. Schmidt v. Odell, 64 F. Supp. 2d 1014, 1029 (D. Kan. 1999).

49. Schmidt v. Odell, 64 F. Supp. 2d 1014, 1031 (D. Kan. 1999); *see also* Vines v. Buchler, No. 96-1677, 1996 U.S. App. LEXIS 28693, at *3–5 (7th Cir. Oct. 31, 1996) (*unpublished*) (explaining that an incarcerated

Even when there is no apparent reason for delay in treatment, a court might not find that officials acted with deliberate indifference if the delay does not cause a great deal of harm. In *Smith v. Carpenter*, the court said that it was proper for a jury to consider the fact that an incarcerated person did not suffer any bad effects after officials refused to give him treatment for his HIV-related illness for periods of five and seven days; the jury found no deliberate indifference.[50] In *Jolly v. Badgett*, the incarcerated person had epilepsy, a condition that causes seizures and high blood pressure. He took medication to prevent the life-threatening consequences of this disease, but officials refused to allow the incarcerated person to leave his cell to get water to take his medication until two hours after his prescribed time. The court found that officials did not act with deliberate indifference because there was no evidence that the officials knew the delay would have a dangerous effect.[51]

In general, if there is a reason for a delay in your treatment, or if you cannot prove officials knew that the treatment needed to be given to you immediately, you will have a hard time establishing deliberate indifference on the basis of delayed treatment.

(v) Interfering with Access to Treatment

You can also establish an Eighth Amendment claim of deliberate indifference to your serious medical needs by showing that prison officials interfered with your ability to obtain medical treatment. Prison guards and/or prison medical staff can prevent incarcerated people from getting treatment in many different ways, including:

(1) Denying you access to medical specialists who are qualified to address your health problem;[52]
(2) Allowing you to see a specialist but then refusing to carry out the specialist's recommendations (or refusing to carry out the recommendations of a specialist who directed treatment before you were incarcerated);[53] or
(3) Refusing to carry out or simply ignoring medical orders.[54]

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person who was denied his back brace for seven weeks and required to perform work on a sod-laying crew failed to show that prison officials were deliberately indifferent to his medical condition, since the back brace was prohibited for security reasons and prison officials did their due diligence to accommodate his health needs).

50. Smith v. Carpenter, 316 F.3d 178, 180, 189 (2d Cir. 2003).

51. Jolly v. Badgett, 144 F.3d 573, 573 (8th Cir. 1998).

52. *See* Mata v. Saiz, 427 F.3d 745, 756–759 (10th Cir. 2005) (finding that nurse's failure to refer an incarcerated person to a doctor after the incarcerated person showed symptoms of cardiac emergency could be deliberate indifference); Greeno v. Daley, 414 F.3d 645, 655 (7th Cir. 2005) (finding refusal to refer incarcerated person to a specialist or order an endoscopy for two years despite intense abdominal pain could be deliberate indifference); Hartsfield v. Colburn, 371 F.3d 454, 457–458 (8th Cir. 2004) (holding that six weeks' delay in sending an incarcerated person to a dentist that resulted in infection and loss of teeth raised an 8th Amendment claim); LeMarbe v. Wisneski, 266 F.3d 429, 440 (6th Cir. 2001) (determining that failure to make timely referral to a specialist or tell the patient to seek one out was deliberate indifference); Mandel v. Doe, 888 F.2d 783, 789–795 (11th Cir. 1989) (affirming an award of damages where a physician's assistant failed to diagnose a broken hip, refused to order an x-ray, and prevented the incarcerated person from seeing a doctor).

53. *See* Gil v. Reed, 535 F.3d 551, 557 (7th Cir. 2008) (finding that an incarcerated person stated a valid claim for deliberate indifference when prison staff prescribed the same medication that a prison specialist had warned against him taking); Miller v. Schoenen, 75 F.3d 1305, 1311 (8th Cir. 1996) (finding that prison officials not providing medical care that an outside doctor and outside hospitals said the incarcerated person needed supported a deliberate indifference claim); Starbeck v. Linn County Jail, 871 F. Supp. 1129, 1146–1147 (N.D. Iowa 1994) (explaining that when outside doctors had recommended surgery, prison officials who failed to provide the surgery must present evidence why they did not follow the outside doctors' recommendations).

54. Estelle v. Gamble, 429 U.S. 97, 104–105, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976) (holding that "intentionally interfering with the treatment once prescribed" can constitute an 8th Amendment claim); *see* Lawson v. Dallas County, 286 F.3d 257, 263 (5th Cir. 2002) (affirming that disregard for follow-up care instructions for a paraplegic incarcerated person could be deliberate indifference); Koehl v. Dalsheim, 85 F.3d 86, 88 (2d Cir. 1996) (holding denial of prescription eyeglasses needed to avoid double vision and loss of depth perception that resulted from prior head injury enough to allege deliberate indifference); Erickson v. Holloway, 77 F.3d 1078, 1080–1081 (8th Cir. 1996) (finding that an officer's denial of an emergency room doctor's request to admit the incarcerated person and take x-rays could show deliberate indifference); Boretti v. Wiscomb, 930 F.2d

For example, in *Brown v. Coleman*, the court found deliberate indifference because, although the prison medical staff repeatedly recommended surgery for an incarcerated person, officials with no medical training ignored the recommendations.[55] In *Martinez v. Mancusi*, the court found that the incarcerated person could bring a claim against prison officials who had used force to remove him from a hospital where he was recovering from leg surgery.[56] Prison officials ignored the doctor's instructions that the incarcerated person could not walk and removed the incarcerated person, who was partially paralyzed, without the doctor's permission. This caused the surgery to be unsuccessful. The incarcerated person was also denied the pain medication his surgeon prescribed him, and thus was left in constant pain. In *Woodall v. Foti*, an incarcerated person with suicidal tendencies had received treatment for manic depression before being incarcerated.[57] The incarcerated person's diagnosis was confirmed by the prison doctor. The incarcerated person claimed his condition worsened when he was denied treatment by the sheriff, who placed him in solitary confinement. On appeal, the court found that if these facts were true, the sheriff's actions could establish deliberate indifference because he interfered with the incarcerated person's access to medical treatment.

Refusing to treat an incarcerated person unless the incarcerated person complies with an official's order can also be considered deliberate indifference. In *Harrison v. Barkley*, a prison dentist refused to fill an incarcerated person's cavity unless the incarcerated person allowed the dentist to pull another one of the incarcerated person's teeth because the policy of the prison was to pull teeth that were in poor condition. Although the tooth was rotten, the incarcerated person did not want it removed because it was not painful and he only had a few teeth left.[58] The court said that in a situation like this one, the dentist's actions constituted deliberate indifference.[59] Similarly, in *Benter v. Peck*, a district court in Iowa found that doctors treating incarcerated people have a responsibility to provide them the medical care that they need.[60] In that case, the doctor had allowed the prison to withhold eyeglasses from an incarcerated person who could not function without them in order to force him to pay for the glasses. The court held that withholding the prescription glasses from the incarcerated person rose to the standard of deliberate indifference.

(vi) Making Medical Decisions Based on Non-Medical Factors

If the prison health staff is making medical decisions about you based on non-medical factors, you may also be able to establish an Eighth Amendment claim of deliberate indifference to your serious medical needs.[61] Prisons should not decide what medical treatment you get based on factors like the prison's lack of staff or lack of interpreters, the prison's budgetary restrictions, because you are about to be released, or because they want to punish you.[62] In particular, widespread "deficiencies in staffing,

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1150, 1156 (6th Cir. 1991) (finding a prison nurse's refusal after several direct requests to change the incarcerated person's wound dressings raised "a genuine issue" for trial); McCorkle v. Walker, 871 F. Supp. 555, 558 (N.D.N.Y. 1995) (finding the allegation that prison officials failed to obey a medical order to house an asthmatic incarcerated person on a lower tier was sufficient to state a claim).

55. Brown v. Coleman, No. 94-7183, 1995 U.S. App. LEXIS 16928, at *4–5 (10th Cir. July 12, 1995) (*unpublished*).

56. Martinez v. Mancusi, 443 F.2d 921, 924 (2d Cir. 1970).

57. Woodall v. Foti, 648 F.2d 268, 271–272 (5th Cir. 1981).

58. Harrison v. Barkley, 219 F.3d 132, 134 (2d Cir. 2000).

59. Harrison v. Barkley, 219 F.3d 132, 138 (2d Cir. 2000).

60. Benter v. Peck, 825 F. Supp. 1411, 1417 (S.D. Iowa 1993). *But see* Martin v. DeBruyn, 880 F. Supp 610, 614 (N.D. Ind. 1995) (determining that the 8th Amendment does not require the state to provide an incarcerated person with a necessary commodity that would not be free outside of the prison and which the incarcerated person has sufficient funds to purchase).

61. *See* Hartsfield v. Colburn, 371 F.3d 454, 457 (8th Cir. 2004) (finding that withholding a dental referral for incarcerated person's behavioral problems could be deliberate indifference); Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 704 (11th Cir. 1985) (finding prison's refusal to provide treatment without a court order was deliberate indifference).

62. Casey v. Lewis, 834 F. Supp. 1477, 1547–1548 (D. Ariz. 1993) (finding that a lack of staff to "diagnose and treat the serious mental health needs" of an incarcerated person constituted deliberate indifference).

facilities, or procedures [that] make unnecessary suffering inevitable" may support a finding of deliberate indifference.[63] In other words, you can establish that prison officials were deliberately indifferent to your medical needs even if they ignored your needs because of problems that were part of the prison system (its staffing, facilities, or other non-medical policies). Interestingly, a San Francisco judge refused to send a convicted robber to jail, citing the poor medical care the man would receive and equating a prison sentence to a death sentence.[64] While this was an extremely unusual situation, the case law may still help you develop a lawsuit based on problems that are affecting everyone's medical care at your prison.

(vii) "Medical" Judgment So Bad It's Not Medically Acceptable

You also can establish that prison officials were deliberately indifferent to your serious medical needs if you believe that your prison's health staff is making medical decisions that are so bad that no trained health professional would ever make the same decisions.[65] For example, in 2004, a federal court in California ordered a prison to arrange for a medical evaluation of an incarcerated person's eligibility for a liver transplant. Prison officials had refused to allow the evaluation, but the incarcerated person would die without a transplant. The court stated that the prison's failure to identify any alternative treatment that would save the incarcerated person's life supported the incarcerated person's deliberate indifference claim.[66] The court noted that:

> In order to prevail on a claim involving choices between alternative courses of treatment, a prisoner must show that the course of treatment the doctors chose was medically unacceptable in light of the circumstances and that they chose this course in conscious disregard of an excessive risk to plaintiff's health.[67]

Anderson v. County of Kern, 45 F.3d 1310, 1316 (9th Cir. 1994), *opinion amended on denial of reh'g*, Anderson v. County of Kern, 75 F.3d 448 (9th Cir. 1995) (explaining that failure to provide a translator for medical encounters can constitute deliberate indifference). Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1986) (holding that budget constraints could not justify deliberate indifference to an incarcerated person's serious medical needs); Peralta v. Dillard, 744 F.3d 1076 (9th Cir. 2014) (this case limits *Jones* by holding that only budgetary officials can be held accountable for indifference to an incarcerated person's medical needs); Starbeck v. Linn Cnty. Jail, 871 F. Supp. 1129, 1146 (N.D. Iowa 1994) (holding that refusal to allow an incarcerated person surgery because the State of Iowa did not want to pay the costs of guards during the incarcerated person's recovery could rise to deliberate indifference to the incarcerated person's serious medical need). McKenna v. Wright, 386 F.3d 432, 437 (2d Cir. 2004) (holding that an allegation that an incarcerated person was "denied urgently needed treatment for a serious disease because he might be released within twelve months of starting the treatment" was enough for a claim of deliberate indifference). Hartsfield v. Colburn, 371 F.3d 454, 457 (8th Cir. 2004) (finding that withholding a necessary dental referral because of an incarcerated person's behavioral problems could give rise to a finding of deliberate indifference).

63. Todaro v. Ward, 565 F.2d 48, 52 (2d Cir. 1977) (citing Bishop v. Stoneman, 508 F.2d 1224, 1226 (2d Cir. 1974)); *see also* Harris v. Thigpen, 941 F.2d 1495, 1505 (11th Cir. 1991) ("In institutional level challenges to prison health care . . . systemic deficiencies can provide the basis for a finding of deliberate indifference."); DeGidio v. Pung, 920 F.2d 525, 529 (8th Cir. 1990) (holding that lack of "adequate organization and control in the administration of health services" could constitute an 8th Amendment violation); *see also* Marcotte v. Monroe Corr. Complex, 394 F. Supp. 2d 1289, 1298 (W.D. Wash. 2005) (explaining that failure to remedy deficient infirmary nursing procedures and other health department citations, of which the prison was aware, was deliberate indifference).

64. Andy Furillo, *Ill. Man's Prison Term Blocked, S.F. Judge Cites Findings of Poor Medical Care, Says Move from Local Jail Could Equal a Death Sentence*, Sacramento Bee, Mar. 20, 2007, at A3; United States v. Kulwant Singh Sandhu, No. 2:15-cr-0231-GEB, 2016 U.S. Dist. LEXIS 105840, at *1 (E.D. Cal. Aug. 10, 2016) (*unpublished*).

65. *See* Estate of Cole v. Fromm, 94 F.3d 254, 261–262 (7th Cir. 1996) ("[D]eliberate indifference may be inferred based upon a medical professional's erroneous treatment decision only when the medical professional's decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment.").

66. Rosado v. Alameida, 349 F. Supp. 2d 1340, 1346 (S.D. Cal. 2004).

67. Rosado v. Alameida, 349 F. Supp. 2d 1340, 1344–1345 (S.D. Cal. 2004) (emphasis added).

A "medically unacceptable" treatment may be "an easier and less [effective] treatment" or simply no treatment at all.[68] Showing that prison health staff failed to follow professional medical standards or prison medical care procedures can help you make this deliberate indifference claim. These standards or protocols can serve as evidence that the prison official knew of the risk posed by particular symptoms or conditions and deliberately ignored that risk.[69]

2. Medical Negligence

(a) Medical Negligence Is Not Unconstitutional

You cannot win a federal constitutional claim of deliberate indifference by alleging only that prison medical staff acted negligently, no matter how often or repeatedly they were negligent. However, you still may be able to make a state tort claim of negligence, which is described in the next Subsection. "Negligence" is when a person fails to exercise care that a "reasonable person" would exercise to protect someone at risk.[70] Medical negligence is often called medical "malpractice." Again, "the Eighth Amendment does not protect prisoners from medical *malpractice*."[71]

At one time, negligence was grounds for liability.[72] After the Supreme Court's holding in *Farmer v. Brennan*, however, negligence—even repeated negligence—cannot by itself constitute deliberate indifference.[73] Therefore, in a class action suit brought by incarcerated people in Ohio, the court held that if the incarcerated people could only prove the prison doctor was repeatedly negligent in his treatment, but not that he was "subjectively aware of a substantial risk of serious harm," then the

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68. Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974) (holding that refusing an incarcerated person's request to reattach his ear and instead only sewing up the stump may constitute indifference if the procedure was medically possible); *see also* McElligott v. Foley, 182 F.3d 1248, 1256–1257 (11th Cir. 1999) (determining that medical staff's failure to examine and treat patient's severe pain, and repeated delays in examination of the patient, could support a finding of deliberate indifference).

69. Mata v. Saiz, 427 F.3d 745, 757 (10th Cir. 2005) (explaining that violation of prison medical protocols was circumstantial evidence that the nurse "knew of a substantial risk of serious harm").

70. *See Negligence*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining negligence as the "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation").

71. Rosado v. Alameida, 349 F. Supp. 2d 1340, 1344 (S.D. Cal. 2004) (emphasis added). This proposition was suggested earlier by Estelle v. Gamble, 429 U.S. 97, 105–106, 97 S. Ct. 285, 291–292, 50 L. Ed. 2d 251, 260–261 (1976). But note than an allegation of medical malpractice does not prevent a finding of deliberate indifference. Hathaway v. Coughlin, 99 F.3d 550, 553 (2d Cir. 1996).

72. For example, in Todaro v. Ward, 565 F.2d 48, 52 (2d Cir. 1977), the court held that "while a single instance of medical care denied or delayed, viewed in isolation, may appear to be the product of mere negligence, repeated examples of such treatment [indicate] a deliberate indifference by prison authorities." There are also three pre-*Farmer* cases finding that repeated negligence can indicate deliberate indifference: Harris v. Thigpen, 941 F.2d 1495, 1505 (11th Cir. 1991) (noting that although "[m]ere incidents of negligence or malpractice do not rise to the level of constitutional violations . . . systemic deficiencies can provide the basis for a finding of deliberate indifference"); DeGidio v. Pung, 920 F.2d 525, 533 (8th Cir. 1990) (holding that a "consistent pattern of reckless or negligent conduct" establishes deliberate indifference); Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980) (observing that in class action suits, "deliberate indifference to inmates' health needs may be shown [either] by proving repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff . . . or by proving there are such systemic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medical care"). For more information, see Part B(1)(d)(vi) of this Chapter, "Making Medical Decisions Based on Non-Medical Factors."

73. Farmer v. Brennan, 511 U.S. 825, 835–837, 114 S. Ct. 1970, 1977–1979, 128 L. Ed. 2d 811, 824–825 (1994) (holding deliberate indifference does not include negligence, even repeated acts of negligence, and to prove deliberate indifference, an incarcerated person must show the prison official actually knew about a "substantial risk of serious harm"). This proposition was suggested earlier by Estelle v. Gamble, 429 U.S. 97, 105–106, 97 S. Ct. 285, 291–292, 50 L. Ed. 2d 251, 260–261 (1976) (stating that "a complaint that a physician has been negligent" does not support an 8th Amendment claim and that "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to medical needs").

incarcerated person had not stated an Eighth Amendment claim.[74] Even if it is possible that an official's action led to the death of a incarcerated person, negligence alone is not enough to bring a federal constitutional claim.[75] Repeated acts of negligence can be evidence that a prison official is ignoring a substantial risk, but acts of negligence by themselves, without any other claim, cannot count as deliberate indifference.[76]

(b) State Law Negligence Claims Are Possible

If you believe that you were injured because prison medical staff acted negligently, you cannot make an Eighth Amendment deliberate indifference claim, but you can still make a negligence claim under state law. To prove negligence under state law, you must prove that (1) the defendant (your prison) owed a duty of care to you; and (2) that this duty was "breached," meaning that the prison was responsible for some aspect of your well-being and did not honor its responsibility.[77] Therefore, you must ask whether the prison's medical practitioner did for you what a reasonable health professional would have done for you in the same circumstances.[78]

You can find many of the duties a prison owes its incarcerated people listed in state laws. Thus, a person incarcerated in New York could use the state corrections law to prove that New York prisons have a duty to "provide reasonable and adequate medical care to incarcerated people."[79] State case law also provides clear definitions of what duties a prison owes to people who are incarcerated in that facility. In New York, in order to prove a medical malpractice claim, the incarcerated person must prove a departure from accepted practice and that this departure was the "proximate cause" of the injury. To prove proximate cause, you must show that the injury would not have occurred without the departure from accepted practice.[80] The court of claims also recognizes medical negligence as a cause of action. A state may be liable for "ministerial neglect" if employees fail to comply with the prison's

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74. Brooks v. Celeste, 39 F.3d 125, 129 (6th Cir. 1994) (making a clear distinction between the doctor being "merely repeatedly negligent" and acting with "deliberate indifference"); *see also* Hathaway v. Coughlin, 37 F.3d 63, 66 (2d Cir. 1994) (quoting Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994)) ("Deliberate indifference requires more than negligence . . . [A] prison official does not act in a deliberately indifferent manner unless that official 'knows of and disregards an excessive risk to inmate health or safety'").

75. Howard v. Calhoun Cnty., 148 F. Supp. 2d 883, 889–890 (W.D. Mich. 2001) (concluding that although it was possible that the official was negligent in the way she handled the collapse of an incarcerated person who then died of a heart attack, negligence alone did not meet the standard of deliberate indifference).

76. Judge Posner offers a long discussion of the difference in *Sellers v. Henman*, explaining, "[i]t is vital to keep negligence and deliberate indifference apart. It may be . . . that repeated acts of negligence are some evidence of deliberate indifference." Thus, "[t]he more negligent acts [prison officials] commit in a circumscribed interval, the likelier it is that they know they are creating *some* risk, and if the negligence is sufficiently widespread relative to the prison population[,] the cumulative risk to an individual prisoner may be excessive." Despite this, "the presence of multiple acts of negligence [merely offers some evidence to support a claim]; it is not an alternative theory of liability." Sellers v. Henman, 41 F.3d 1100, 1102–1103 (7th Cir. 1994); *see also* Brooks v. Celeste, 39 F.3d 125, 128 (6th Cir. 1994) ("[R]epeated acts, viewed singly and in isolation, would appear to be mere negligence; however, viewed together and as a pattern, the acts show . . . that *each act* was committed with deliberate indifference.").

77. *See* Part B(2) of Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," to learn more about negligence and negligence-based torts.

78. *See Negligence,* Black's Law Dictionary (11th ed. 2019) (defining negligence as the "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation").

79. N.Y. CORRECT. LAW § 70(2)(c) (McKinney 2014) (stating that correctional facilities must be established and maintained with due regard to the "health and safety of every person in the custody of the department."); N.Y. CORRECT. LAW § 23(2) (McKinney 2014) (permitting transfer of incarcerated people to outside hospital facilities for medical care); *see also* Rivers v. State, 159 A.D.2d 788, 789, 552 N.Y.S.2d 189, 189 (3d Dept. 1990) (noting that the state has a duty to provide reasonable and adequate medical care to incarcerated people); La Rocca v. Dalsheim, 120 Misc. 2d 697, 708, 467 N.Y.S.2d 302, 310 (Sup. Ct. Dutchess Cnty. 1983) (noting that the state has a duty to "provide a safe and humane place of confinement for its inmates").

80. Brown v. State, 192 A.D.2d 936, 938, 596 N.Y.S.2d 882, 884 (3d Dept. 1993) (emphasizing that plaintiff must establish that his injuries were "*caused*" by the prison's negligence).

own administrative procedures for providing medical care to incarcerated people.[81] If you want to make a state tort claim of medical negligence or medical malpractice, see Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions." You should note there is a difference between medical negligence and medical malpractice claims. A medical malpractice claim means a person believes their injury was a medical practitioner's fault. A medical negligence claim means a person had a prior injury or medical problem that was not treated or was not treated properly.

C. Specific Health Care Rights

This Part covers different situations in which you may have a right to medical treatment and includes examples of cases that might be useful to you. If you have specific questions about the rights of incarcerated people with mental illnesses or infectious diseases, make sure you also look at Chapter 29 of the *JLM*, "Special Issues for Incarcerated People with Mental Illness" and Chapter 26 of the *JLM*, "Infectious Diseases: AIDS, Hepatitis, Tuberculosis, and MRSA in Prisons." If you need to learn more about disability discrimination, see Chapter 28 of the *JLM*, "Rights of Incarcerated People with Disabilities."

1. Treatment for Diagnosed Conditions

Whether you have a viable (winnable) Eighth Amendment claim for lack of treatment for diagnosed medical illnesses and conditions depends on several factors. As discussed above, you must prove both the objective and subjective parts of "deliberate indifference." For the objective requirement, you must prove that your medical condition was "sufficiently serious." For the subjective requirement, you must prove that prison officials knew about the risk to your health and ignored it.

In the following examples, courts found that diagnosed medical conditions were "sufficiently serious." In *Montalvo v. Koehler*, the court found that a prison's failure to provide shower and sleeping facilities to an incarcerated person confined to a wheelchair was sufficiently serious. This was sufficiently serious because it posed a risk of serious bodily injury to the incarcerated person.[82] In *Koehl v. Dalsheim*, the court ruled that prison officials acted with deliberately indifference when they confiscated an incarcerated person's eyeglasses.[83] The double vision, headaches, and severe pain that the incarcerated person experienced without his eyeglasses were sufficiently serious. Failure to treat a serious hip condition requiring surgery, an infected and impacted wisdom tooth, and a hernia have all been found to establish a prison's deliberate indifference to incarcerated people's serious medical needs.[84]

The following are examples of harm that the courts did **not** consider to be sufficiently serious. In *Holmes v. Fell*, the court held that an incarcerated person's allergic reaction to a tuberculosis test, which caused swelling and a scar on the incarcerated person's arm, was not "sufficiently serious."[85] In fact, simple exposure to tuberculosis does not meet the standard when there is no reason to believe that the incarcerated person will actually catch the disease.[86] In *McGann v. Coombe,* the court ruled

81. Kagan v. State, 221 A.D.2d 7, 9-10, 646 N.Y.S.2d 336, 337-338 (2d Dept. 1996) (finding that the prison's breach of protocols governing medical standards caused the incarcerated person to lose her hearing and constituted ministerial neglect).

82. Montalvo v. Koehler, No. 90 Civ. 5218 (LJF), 1993 U.S. Dist. LEXIS 11785, at *4 (S.D.N.Y. Aug. 20, 1993) (*unpublished*). Note, however, that this incarcerated person lost his case because he failed to meet the subjective standard for deliberate indifference.

83. Koehl v. Dalsheim, 85 F.3d 86, 88 (2d Cir. 1996).

84. Hathaway v. Coughlin, 37 F.3d 63, 67 (2d Cir. 1994). Boyd v. Knox, 47 F.3d 966, 968–969 (8th Cir. 1995) (explaining that not all dental work meets the sufficiently serious standard, but in this case, the incarcerated person's mouth was so infected that "he could barely open it" and "pus regularly oozed from the infection"). Brown v. Coleman, 60 F.3d 837, 837 (10th Cir. 1995), *opinion reported in full at* Brown v. Coleman, No. 94-7183, 1995 U.S. App. LEXIS 16928, at *4–5 (10th Cir. July 12, 1995) (*unpublished*).

85. Holmes v. Fell, 856 F. Supp. 181, 183 (S.D.N.Y. 1994).

86. McCorkle v. Walker, 871 F. Supp. 555, 558 (N.D.N.Y. 1995) (noting that the incarcerated person "has not suffered" and was "unlikely . . . to suffer, an active case of TB" because he received preventive medication

that prison officials were not deliberately indifferent for prescribing medication for a condition that caused arthritis and gout in an incarcerated person's feet, even though they refused to provide orthopedic footwear.[87] In addition, courts have ruled that incarcerated people do not have Eighth Amendment claims when prison officials refuse to treat penile warts[88] or an old injury that has healed but still causes pain.[89]

2. Elective Procedures

Generally, you cannot win a claim that prison officials violated your Eighth Amendment rights based on their refusal to perform an elective procedure on you.[90] An elective procedure is an optional procedure. Although you would benefit from an elective procedure, it is not immediately necessary for your survival or relative well-being. The Supreme Court has held that the Constitution does not promise comfortable prisons and that conditions may be "restrictive and even harsh."[91]

However, prison officials cannot call a necessary procedure "elective" to avoid having to provide it.[92] Furthermore, if your condition gives you continual pain or discomfort for a long period of time, you may be able to bring a claim that your condition is sufficiently serious to warrant an elective procedure, even though the condition may not require immediate attention. Lengthy delays in providing incarcerated people with elective surgery for certain medical conditions can be unacceptable.[93] Courts recognize that there are some situations that are too serious to be considered elective, even though they are not serious enough to be considered emergencies. However, you may have to get a court order before you are allowed to be treated in such a situation.[94]

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after exposure).

87. McGann v. Coombe, *decision reported at* 131 F.3d 131, 131 (2d Cir. 1997), *opinion reported in full at* McGann v. Coombe, No. 97-2139, 1997 WL 738569, at *2 (2d Cir. Nov. 21, 1997) (*unpublished*).

88. Stubbs v. Wilkinson, *decision reported at* 52 F.3d 326, 326 (6th Cir. 1995), *opinion reported in full at* Stubbs v. Wilkinson, No. 94-3620, 1995 U.S. App. LEXIS 9471, at *6 (6th Cir. Apr. 20, 1995) (*unpublished*).

89. Banuelos v. McFarland, 41 F.3d 232, 235 (5th Cir. 1995) (finding that although the incarcerated person's work boots hurt his ankle, his medical report identified an "Old Ankle Injury" that doctors did not expect to produce very much pain, and x-rays proved that the bone was not broken or deformed and therefore the injury was not sufficiently serious).

90. *See* Grundy v. Norris, 26 F. App'x 588, 588-589 (8th Cir. 2001) (per curiam) (*unpublished*) (holding prison officials were not deliberately indifferent in delaying surgery for incarcerated person's injured shoulder in part because medical evidence showed the surgery was elective); Victoria W. v. Larpenter, 205 F. Supp. 2d 580, 601 (E.D. La. 2002) (holding that a "non-therapeutic abortion sought due to financial and emotional reasons" rather than medical necessity is *not* a "serious medical need" for 8th Amendment purposes), *aff'd*, Victoria W. v. Larpenter, 369 F.3d 475 (5th Cir. 2004).

91. Rhodes v. Chapman, 452 U.S. 337, 347, 101 S. Ct. 2392, 2399, 69 L. Ed. 2d 59, 69 (1981).

92. Johnson v. Bowers, 884 F.2d 1053, 1056 (8th Cir. 1989) ("The hospital's gratuitous classification of [the prisoner's] surgery as 'elective' . . . does not abrogate the prison's duty, or power, to promptly provide necessary medical treatment for prisoners.") (internal citation omitted); Baker v. Blanchette, 186 F. Supp. 2d 100, 105 n.4 (D. Conn. 2001) (stating that although the incarcerated person could wait to have surgery, merely classifying the surgery as elective does not abolish the prison's duty to provide treatment for a serious medical need); Delker v. Maass, 843 F. Supp. 1390, 1399 (D. Or. 1994) (holding that prison officials may not simply characterize a surgery as elective in order to avoid performing the procedure).

93. *See* Johnson v. Bowers, 884 F.2d 1053, 1056 (8th Cir. 1989) (holding that an incarcerated person who had to wait nine years for elective arm surgery had suffered a constitutional violation); West v. Keve, 541 F. Supp. 534, 539–540 (D. Del. 1982) (finding that a 17-month delay between recommendation and performance of elective surgery was unacceptable, but that defendants were not ultimately liable since their actions were in good faith).

94. *See* Victoria W. v. Larpenter, 369 F.3d 475, 484–485 (5th Cir. 2004) (upholding policy of requiring incarcerated people to obtain a court order to receive an elective medical procedure because the policy was "reasonably related to a legitimate penological interest"). Note this case involved seeking an abortion, which has its own case law—see Section D(1)(a) below.

3. Exposure to Second-Hand Smoke

Incarcerated people have the right to be free from exposure to *excessive* second-hand smoke.[95] Previously, courts rejected incarcerated people's claims for exposure to environmental tobacco smoke ("ETS").[96] The courts noted that the incarcerated people had not yet suffered serious injuries. However, in *Helling v. McKinney*, the Supreme Court rejected the argument that "only deliberate indifference to *current* serious health problems of inmates is actionable under the Eighth Amendment" by comparing forced exposure to ETS to live electrical wires, or communicable diseases.[97]The Court concluded that prison officials may violate the Eighth Amendment's prohibition of cruel and unusual punishment if they deliberately expose incarcerated people to high levels of ETS.[98]

To satisfy the objective requirement in a claim for a violation of the Eighth Amendment under *Helling* ("objective part" is discussed above, in Part B(1)(a)), you will have to show you are exposed to ETS levels that "pose an unreasonable risk of serious damage to [your] future health."[99] The ETS levels must violate contemporary standards of decency.[100] To obtain an injunction against further ETS exposure, you do not need to demonstrate any actual physical injury.[101]

Note that claiming prison officials are deliberately indifferent to the risk of future harm is different from claiming deliberate indifference to a current, ongoing harm.[102] You can claim that ETS exposure affects your current health, but you have to prove that the exposure is making a serious medical problem worse.[103] In *Talal v. White*, the Sixth Circuit ruled that a state prison violated the objective component of the *Helling* test by forcing a non-smoking incarcerated person with a serious medical need to share a cell with an incarcerated person who smoked.[104] However, the non-smoking incarcerated person had to provide a lot of evidence. For example, he documented that he suffered

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95. Helling v. McKinney, 509 U.S. 25, 34–35, 113 S. Ct. 2475, 2481–2482, 125 L. Ed. 2d 22, 32–33 (1993) (holding that an incarcerated person may prove that his involuntary exposure to environmental tobacco smoke is significant enough that his future health is unreasonably endangered).

96. *See* Grant v. Coughlin, No. 91 Civ. 3433 (RWS), 1992 U.S. Dist. LEXIS 8003, at *9 (S.D.N.Y. June 9, 1992) (*unpublished*) (explaining that throat and lung irritation and a risk of serious medical harm do not meet the serious medical requirement necessary for an 8th Amendment violation).

97. Helling v. McKinney, 509 U.S. 25, 33–34, 113 S. Ct. 2475, 2480–2481, 125 L. Ed. 2d 22, 31–32 (1993) (emphasis added).

98. Helling v. McKinney, 509 U.S. 25, 35, 113 S. Ct. 2475, 2481, 125 L. Ed. 2d 22, 33 (1993).

99. Helling v. McKinney, 509 U.S. 25, 35–36, 113 S. Ct. 2475, 2481–2482 125 L. Ed. 2d 22, 32–33 (1993) (finding that an incarcerated person whose cellmate smoked five packs of cigarettes a day, stated an 8th Amendment deliberate indifference cause of action against prison officials by alleging they "exposed him to levels of ETS that pose an unreasonable risk of serious damage to his future health"). Note that *Helling* provides for injunctive relief, not monetary damages; *see also* Fontroy v. Owens, 150 F.3d 239, 244 (3d Cir. 1998) (holding that no damages are available "for emotional distress allegedly caused by exposure to asbestos without proof of physical injury").

100. Helling v. McKinney, 509 U.S. 25, 32, 113 S. Ct. 2475, 2480, 125 L. Ed. 2d 22, 29 (1993).

101. Shepherd v. Hogan, 181 F. App'x 93, 95 (2d Cir. 2006) (*unpublished*) (finding that future risk can constitute a substantial risk of serious harm, even if no symptoms are currently present); Smith v. Carpenter, 316 F.3d 178, 188 (2d Cir. 2003) ("[A]n Eighth Amendment claim may be based on . . . exposing an inmate to an unreasonable risk of future harm and . . . actual physical injury is not necessary in order to demonstrate an Eighth Amendment violation.").

102. Lehn v. Holmes, No. 99-919-GPM, 2005 U.S. Dist. LEXIS 22653, at *11–13 (S.D. Ill. Sept. 28, 2005) (*unpublished*) (noting that the incarcerated person's ongoing symptoms, headaches, and burning eyes would be insufficient to meet the objective standard in a claim for current injury, but sufficient in a claim for future harm).

103. Goffman v. Gross, 59 F.3d 668, 671–672 (7th Cir. 1995) (ruling that prison officials had not acted with deliberately indifferent when they refused to give an incarcerated person a non-smoking cellmate because the incarcerated person had not shown a serious medical condition made worse by exposure to second-hand smoke—even though he had only one lung because of lung cancer); Grant v. Coughlin, No. 91 Civ. 3433 (RWS), 1992 U.S. Dist. LEXIS 8003, at *9 (S.D.N.Y. June 9, 1992) (*unpublished*) (holding that irritation of the throat and lungs caused by ETS was not a serious medical condition).

104. Talal v. White, 403 F.3d 423, 427 (6th Cir. 2005).

from ETS allergy, sinus problems, and dizziness.[105] Additionally, he showed that the prison medical staff had recommended that he have a non-smoking cell partner.[106] Two issues relevant to the subjective standard of deliberate indifference are whether your prison has adopted a smoking policy and how that policy is administered.[107]

4. Other Environmental Health and Safety Cases

Courts have ruled that other environmental and safety conditions can violate the Eighth Amendment. For example, courts have ruled that inadequate ventilation and deprivation of outdoor exercise can be unconstitutional.[108] In addition, courts have found that excessive heat, excessive cold, polluted water, toxic or noxious fumes, exposure to sewage, lack of fire safety, inadequate food or unsanitary food service, inadequate lighting or constant lighting, exposure to insects, rodents and other vermin, exposure to asbestos, and exposure to the extreme behavior of severely mentally ill incarcerated people violate incarcerated people's Eighth Amendment rights. [109]

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105. Talal v. White, 403 F.3d 423, 427 (6th Cir. 2005).

106. Talal v. White, 403 F.3d 423, 427 (6th Cir. 2005); *but see* Henderson v. Sheahan, 196 F.3d 839, 846 (7th Cir. 1999) (ruling that the plaintiff did not show a serious medical need when he alleged the "relatively minor" injuries of "breathing problems, chest pains, dizziness, sinus problems, headaches and a loss of energy").

107. Helling v. McKinney, 509 U.S. 25, 35–36, 113 S. Ct. 2475, 2481–2482, 125 L. Ed. 2d 22, 33–34 (1993) (ruling that an incarcerated person whose cellmate smoked five packs of cigarettes per day could have a cognizable claim under the 8th Amendment and that the subjective element of the claim (deliberate indifference) should be evaluated in light of prison policies on smoking); *see also* Shepherd v. Hogan, 181 F. App'x 93, 95 (2d Cir. 2006) (*unpublished*) (ruling that an incarcerated person sharing a room with a chain smoker for a month, a situation that was inappropriate under prison procedures and which the prison grievance committee condemned, was sufficient grounds for a reasonable jury to find a constitutional violation).

108. Keenan v. Hall, 83 F.3d 1083, 1089–1090 (9th Cir. 1996), *opinion amended on denial of reh'g*, Keenan v. Hall, 135 F.3d 1318 (9th Cir. 1998) (finding that depriving an incarcerated person of outdoor exercise for six months violated the 8th Amendment).

109. Gates v. Cook, 376 F.3d 323, 334, 339–340 (5th Cir. 2004) (ruling that a high probability of heat-related illness can provide the basis for an 8th Amendment claim); Gaston v. Coughlin, 249 F.3d 156, 164–166 (2d Cir. 2001) (finding that exposure to freezing and sub-zero temperatures due to a broken window can provide the basis for an 8th Amendment claim); Palmer v. Johnson, 193 F.3d 346, 352–353 (5th Cir. 1999) (finding outdoor and overnight confinement sufficient for a constitutional violation); Dixon v. Godinez, 114 F.3d 640, 643–644 (7th Cir. 1997) (ruling that prison officials' deliberate indifference to cold temperatures in an incarcerated person's cell and an incarcerated person's extended exposure to cold temperatures can provide the basis for a claim); Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992) (ruling that an incarcerated person may have a claim for black worms in drinking water); Jackson v. Arizona, 885 F.2d 639, 641 (9th Cir. 1989) (holding that a claim alleging polluted drinking water was not frivolous); Johnson-El v. Schoemehl, 878 F.2d 1043, 1054–1055 (8th Cir. 1989) (finding that spraying pesticides into housing units can provide the basis for a claim); Ramos v. Lamm, 639 F.2d 559, 569–570 (10th Cir. 1980) (finding that the plaintiff can basis a claim on inadequate ventilation causing mold and fungus growth); Cody v. Hillard, 599 F. Supp. 1025, 1032, 1048 (D.S.D. 1984) (finding that the incarcerated people could base a claim on inadequate ventilation of toxic fumes in their workplaces), *aff'd in part and rev'd in part on other grounds*, Cody v. Hillard, 830 F.2d 912 (8th Cir. 1987) (en banc). *But see* Givens v. Jones, 900 F.2d 1229, 1234 (8th Cir. 1990) (finding that there was no 8th Amendment violation where an incarcerated person suffered migraine headaches as a result of noise and fumes during three-week long housing unit renovation); DeSpain v. Uphoff, 264 F.3d 965, 977 (10th Cir. 2001) (finding that exposure to flooding and human waste can provide the basis for an 8th Amendment claim); McCord v. Maggio, 927 F.2d 844, 846–847 (5th Cir. 1991) (finding that backup of sewage in living spaces can provide the basis an 8th Amendment claim); Hoptowit v. Spellman, 753 F.2d 779, 783–784 (9th Cir. 1985) (holding that substandard fire prevention and other safety hazards that expose incarcerated people to an unreasonable threat of injury provide the basis for a claim); Phelps v. Kapnolas, 308 F.3d 180, 185–187 (2d Cir. 2002) (finding that providing a nutritionally inadequate diet to an incarcerated person, despite knowing that such a diet cause pain to the incarcerated person, can provide the basis for a claim); Gates v. Cook, 376 F.3d 323, 334–335 (5th Cir. 2004) (finding that inadequate lighting can provide the basis for an 8th Amendment claim); Keenan v. Hall, 83 F.3d 1083, 1090–1091 (9th Cir. 1996), *opinion amended on denial of reh'g*, Keenan v. Hall, 135 F.3d 1318 (9th Cir. 1998) (finding that constant illumination can provide the basis for an 8th Amendment claim); Gates v. Cook, 376 F.3d 323, 334 (5th Cir. 2004) (finding that mosquito infestation combined with filthy cells and too much heat can provide the basis for an 8th Amendment claim); Gaston v. Coughlin, 249 F.3d 156, 165–166 (2d Cir. 2001) (finding that the incarcerated person properly stated an 8th

5. An Incarcerated Person's Right to Psychiatric Care

This Section briefly summarizes your right to psychiatric (mental health) care. This includes your right to refuse treatment. For more information, read Chapter 29 of the *JLM*, "Special Issues for Incarcerated People with Mental Illness."

You have the same right to mental health care that you have to physical health care. Most courts recognize that there is no difference between an incarcerated person's right to physical and mental health treatment.[110] However, your right to mental health care may include only necessary treatment that does not cost an unreasonable amount or take an unreasonable amount of time.[111] Nonetheless, some courts have held that an increased level of care is necessary for mental health patients. For example, courts may require a minimum number of acute-care (active, short-term care for a severe injury or illness), intermediate-care beds, and specialized physicians on staff at all times.[112] In 2011, the Supreme Court upheld a "remedial order" (a court order requiring someone to comply with a duty) issued by a California court that requires prisons to provide adequate resources to incarcerated people with mental disorders.[113]

If you believe the prison has violated your right to mental health care, you can make a claim against prison officials for deliberate indifference to your Eighth Amendment rights. For example, in one case, the relatives of a person incarcerated in Georgia who committed suicide sued the state for deliberate indifference.[114] The incarcerated person had a history of mental illness and took anti-depressants, but the prison psychiatrist stopped his medications.[115] When a prison official learned that the incarcerated person was thinking about suicide, he did not do anything. The court found that these events could establish deliberate indifference to the incarcerated person's health in violation of the Eighth Amendment.

Amendment claim based on mice constantly entering cell, combined with freezing temperatures and occasional exposure to sewage water); Powell v. Lennon, 914 F.2d 1459, 1463–1464 (11th Cir. 1990) (finding that exposure to asbestos provide the basis for an 8th Amendment claim); *compare with* McNeil v. Lane, 16 F.3d 123, 125 (7th Cir. 1993) (holding that exposure to "moderate levels of asbestos" could not provide the basis for a claim); Gates v. Cook, 376 F.3d 323, 343 (5th Cir. 2004) (noting that exposure to the constant screaming and feces-smearing of mentally ill incarcerated people "contributes to the problems of uncleanliness and sleep deprivation, and by extension mental health problems, for the other inmates").

110. *See* Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977) (denying that there is a difference between the right to mental and physical treatment); *see also* Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 763 (3d Cir. 1979) (holding that seriously mentally ill incarcerated people have a right to adequate treatment and that psychiatric and psychological treatment should be held to the same standard as medical treatment for physical illnesses).

111. Bowring v. Godwin, 551 F.2d 44, 47–48 (4th Cir. 1977) (creating a three-part test for the provision of mental health services. The requirements are as follows. First, the incarcerated person's symptoms must show a serious disease or injury. Second, such a disease or injury must be curable or able to be substantially alleviated. And, third, there must be potential for substantial harm to the incarcerated person because of a delay or denial of care).

112. Laaman v. Helgemoe, 437 F. Supp. 269, 327 (D.N.H. 1977) (holding that incarcerated people were not being given adequate medical or mental health care, and ordering that the New Hampshire State Prison medical staff "consist of a full-time physician and five licensed nurses or qualified paramedics"; that at least two medical staffers be male; that emergency medical care be available "on a twenty-four hour basis, seven days a week"; and that a member of the medical staff be present at the prison "at all times").

113. Brown v. Plata, 563 U.S. 493, 493–498, 131 S. Ct. 1910, 1917–1920, 170 L. Ed. 2d 969, 976–979 (2011) (upholding the remedial order because (1) a shortage of prison medical and mental healthcare staff was causing significant delays in treatment, (2) overcrowding and unsanitary conditions made it difficult to deliver proper medical and mental healthcare, and (3) overcrowding promoted unrest and violence potentially detrimental to an incarcerated person's mental illness).

114. Greason v. Kemp, 891 F.2d 829, 834 (11th Cir. 1990) (holding that deliberate indifference to inadequate psychiatric care resulting in a suicide could be a violation of the 8th Amendment).

115. Greason v. Kemp, 891 F.2d 829, 835 (11th Cir. 1990).

6. Right to Refuse Psychiatric Treatment

You also have a limited right to refuse mental health treatment. In *Washington v. Harper*, the Supreme Court used a "rational basis test" (a test to determine whether the government's action was reasonably related to a legitimate goal)[116] to decide whether a prison could require an incarcerated person to undergo psychiatric treatment.[117] The Court held that if the prison's actions are reasonably related to legitimate prison interests, then the action is proper. "[G]iven the requirements of the prison environment, the Due Process Clause permits the State to treat an incarcerated person who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest."[118]

If you refuse to take drugs prescribed for your mental illness, the prison must go through certain procedures before they can force you to take the medication. The Court held that the following procedures satisfies the Due Process Clause:

> [A] medical finding, that a mental disorder exists which is likely to cause harm if not treated . . . [and] the medication must first be prescribed by a psychiatrist, and then approved by a reviewing psychiatrist, [which] ensures that the treatment in question will be ordered only if it is in the prisoner's medical interest.[119]

In other words, before a prison can give you medication against your will, a psychiatrist must prescribe medication. Additionally, a second psychiatrist must agree that you need the medication and that your mental disorder is likely dangerous if untreated.

In *Washington v. Harper*, the Court held the state's policy of medicating unwilling patients was constitutional because it met these requirements.[120] In *Washington*, the state regulation required that any decision to administer drugs against a patient's will must be made by a committee.[121] This committee was required to include a neutral psychiatrist and a neutral psychologist, neither of whom were currently treating the incarcerated person.[122] The prison superintendent could accept or reject the committee's decision, and the incarcerated person had the option to ask a court to review the committee's decision.[123]

You are also entitled to certain due process protections. These protections include a hearing, and must take place before prison authorities can transfer you to a psychiatric hospital.[124] In *Vitek v. Jones*, the Supreme Court ruled that it is unconstitutional to subject an incarcerated person to behavior modification treatment without a legitimate reason.[125]

In addition, different psychiatric programs are used to treat incarcerated people who were convicted of sex offenses. Sometimes, incarcerated people who have not been convicted of sex offenses can still be classified as "sex offenders." In some cases, prison officials can prevent these incarcerated people from getting paroled by claiming that the incarcerated people did not complete a required

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116. Black's Law Dictionary 592 (9th ed. 2009).

117. Washington v. Harper, 494 U.S. 210, 224–225, 110 S. Ct. 1028, 1038, 108 L. Ed. 2d 178, 200 (1990).

118. Washington v. Harper, 494 U.S. 210, 227, 110 S. Ct. 1028, 1039–1040, 108 L. Ed. 2d 178, 201–202 (1990).

119. Washington v. Harper, 494 U.S. 210, 222, 110 S. Ct. 1028, 1037, 108 L. Ed. 2d 178, 198 (1990).

120. Washington v. Harper, 494 U.S. 210, 236, 110 S. Ct. 1028, 1044, 108 L. Ed. 2d 178, 207 (1990).

121. Washington v. Harper, 494 U.S. 210, 215, 110 S. Ct. 1028, 1033–1034, 108 L. Ed. 2d 178, 183 (1990).

122. Washington v. Harper, 494 U.S. 210, 215, 110 S. Ct. 1028, 1033–1034, 108 L. Ed. 2d 178, 183 (1990).

123. Washington v. Harper, 494 U.S. 210, 229, 110 S. Ct. 1028, 1040, 108 L. Ed. 2d 178, 203 (1990).

124. Vitek v. Jones, 445 U.S. 480, 494–495, 100 S. Ct. 1254, 1264, 63 L. Ed. 2d 552, 566 (1980) (holding that before an incarcerated person is transferred to a mental facility, he should receive written and timely notice, legal counsel, a hearing before an independent decisionmaker with the opportunity to present and confront witnesses, and a written decision).

125. Vitek v. Jones, 445 U.S. 480, 493–494, 100 S. Ct. 1254, 1264, 63 L. Ed. 2d 552, 565–566 (1980); *see also* Clonce v. Richardson, 379 F. Supp. 338, 348–350 (W.D. Mo. 1974) (ruling that defendant is entitled to a pre-transfer hearing before the prison can subject him to a behavior modification treatment program).

therapeutic program. Courts disagree on whether a hearing is required before prison officials can make this classification.[126] See Chapter 36 of the *JLM*, "Special Considerations for Sex Offenders," for more information on mandatory sex offender programs.

7. Right to Dental Care

In some cases, the right to adequate medical care includes dental care.[127] The Second Circuit has ruled that a "claim regarding inadequate dental care, like one involving medical care, can be based on various factors, such as the pain suffered by the plaintiff, . . . the deterioration of the teeth due to a lack of treatment, . . . or the inability to engage in normal activities."[128] Furthermore, because of a federal class action lawsuit, the California Department of Corrections and Rehabilitation ("CDCR") agreed to provide dental care to all incarcerated people.[129]

Like inadequate medical care, dental care is also governed by the deliberate indifference/serious needs analysis.[130] To prove an Eighth Amendment claim of inadequate dental care, you have to show both deliberate indifference, like in other inadequate medical care claims,[131] *and* that the denial caused you "substantial harm."[132]

In practice, courts often distinguish between preventive dental care, such as cleanings or fluoride treatments, and dental emergencies, such as cavities. In *Dean v. Coughlin*, the court held that prison officials had violated the Eighth Amendment when they refused to provide serious dental treatments such as fillings and crowns.[133] However, the court also found that incarcerated people had no right to

126. *Compare* Neal v. Shimoda, 131 F.3d 818, 831 (9th Cir. 1997) (requiring the prison to conduct a hearing before classifying an incarcerated person who was not convicted of a sex offense as a "sex offender"), *with* Grennier v. Frank, 453 F.3d 442, 446 (7th Cir. 2006) (holding that a prison can label an incarcerated person as a "sex offender" without a hearing).

127. *See, e.g.*, Board v. Farnham, 394 F.3d 469, 480–482 (7th Cir. 2005) (finding that breaking off teeth rather than extracting them and denial of toothpaste for protracted periods support an 8th Amendment claim); Hartsfield v. Colburn, 371 F.3d 454, 457–458 (8th Cir. 2004) (finding that six weeks' delay in seeing a dentist, resulting in infection and loss of teeth, raised an 8th Amendment claim); Farrow v. West, 320 F.3d 1235, 1244–1247 (11th Cir. 2003) (holding that an incarcerated person with only two lower teeth who suffered pain, continual bleeding, swollen gums, and weight loss had a serious medical need, and that a delay of 18 months before the incarcerated person received dentures raised an issue concerning whether there was deliberate indifference); Boyd v. Knox, 47 F.3d 966, 969 (8th Cir. 1995) (finding that a three-week delay in dental care, coupled with knowledge of the incarcerated person's suffering, can support a finding of "deliberate indifference").

128. Chance v. Armstrong, 143 F.3d 698, 703 (2d Cir. 1998).

129. Perez v. Tilton, 2006 No. C 05-05241 JSW, 2006 U.S. Dist. LEXIS 63318, at *2 (N.D. Cal. Aug. 21, 2006) (*unpublished*).

130. *See, e.g.*, Board v. Farnham, 394 F.3d 469, 481–482 (7th Cir. 2005) (finding that there could be deliberate indifference when an incarcerated person asked for dental supplies 15 times and was repeatedly ignored); Hartsfield v. Colburn, 371 F.3d 454, 457 (8th Cir. 2004) (holding that extreme pain and swelling caused by infected teeth would have been obvious to a layperson and thus submission of verifying medical evidence was unnecessary); Farrow v. West, 320 F.3d 1235, 1244–1247 (11th Cir. 2003) (finding that some medical conditions are serious enough that even a few hours delay in treatment could constitute deliberate indifference); Harrison v. Barkley, 219 F.3d 132, 137–139 (2d Cir. 2000) (finding that refusal to treat incarcerated person's tooth cavity led to a sufficiently serious medical condition because it was a degenerative condition that could cause acute infections and pain).

131. *See* Clifton v. Robinson, 500 F. Supp. 30, 35 (E.D. Pa. 1980) (holding that because the incarcerated person claiming denial of dental care did not allege "substantial harm," the claim failed to show "deliberate indifference").

132. *See* Hunt v. Dental Dep't, 865 F.2d 198, 199–200 (9th Cir. 1989) (holding that a three-month delay in replacing dentures caused gum disease and possibly weight loss, constituting substantial harm).

133. Dean v. Coughlin, 623 F. Supp. 392, 404 (S.D.N.Y. 1985), *vacated in part and remanded on other grounds*, Dean v. Coughlin, 804 F.2d 207, 216 (2d Cir. 1986).

preventive care.[134] It is constitutional for the prison to require you to pay for preventative care yourself.[135]

But, note that in some circumstances, limiting care to pulling teeth that could be saved may be unconstitutional.[136] In *Chance v. Armstrong*, the court ruled that it was unconstitutional for the prison to pull an incarcerated person's teeth rather than repair them to save money.[137] The court emphasized that because of the prison's decision, the incarcerated person was in great pain for six months, could not chew properly, and lost his teeth.[138]

D. Medical Care for Female Incarcerated People

1. Accessing Medical Care

Like male incarcerated people, female incarcerated people have an Eighth Amendment constitutional right to medical care.[139] Female incarcerated people should read this entire Chapter, not only this Part, to understand prison health care rights. This Part of the Chapter only explains special medical issues and procedures for women, such as gynecological examinations, abortion, and pregnancy.

Though state and federal laws guarantee a right to the medical services described in this Part, prisons do not always provide these services.[140] As a result, it is important to know your rights. You should consult your prison's regulations about medical care, as well as federal and state law. For New York, the regulations about prison health care are found in Part 7651 of Title 9 (Executive) of the Codes, Rules and Regulations.[141] If your prison or the corrections department in your state does not have such regulations, you should find out if your institution has a health care manual or if your state's corrections department has an operation manual. In Texas, every correctional facility must have a written Health Services Plan describing procedures for regularly scheduled sick calls, emergency services, long-term care, and other medical services.[142] In California, health care provisions are found in Chapter Nine of the Department Operations Manual of the California Department of Corrections.[143]

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134. *See* Dean v. Coughlin, 623 F. Supp. 392, 404 (S.D.N.Y. 1985). Specifically, the court held: "[A] prisoner is entitled to treatment only for conditions that cause pain, discomfort, or threat to good health, not treatment to ward off such conditions." With regard to preventative dentistry, the court stated that "[a]lthough [it] would probably save the clinic time in the long run, the Constitution does not require wise dentistry, only dentistry which responds to inmates' pain and discomfort." *See also* Grubbs v. Bradley, 552 F. Supp. 1052, 1129 (M.D. Tenn. 1982) (holding that delaying an incarcerated person's access to routine and preventive dental care is not "deliberate indifference").

135. *See* Taylor v. Garbutt, 185 F.3d 869, 869 (9th Cir. 1999) (finding that a prison regulation requiring a co-payment for dental services that the incarcerated person requested does not violate the 8th Amendment); Hogan v. Russ, 890 F. Supp. 146, 149 (N.D.N.Y. 1995) ("Defendants did not deny plaintiff the ability to obtain specialized medical attention [with a periodontist]. They merely stated that it was not prison policy to pay for such specialized care and that such care would be made available to plaintiff at his own expense.").

136. Chance v. Armstrong, 143 F.3d 698, 703–704 (2d Cir. 1998) (ruling that pulling teeth because it was cheaper than saving them violated the 8th Amendment).

137. Chance v. Armstrong, 143 F.3d 698, 703–704 (2d Cir. 1998).

138. Chance v. Armstrong, 143 F.3d 698, 703–704 (2d Cir. 1998).

139. Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976) (holding that deliberate indifference to the serious medical needs of incarcerated people is banned by the 8th Amendment because it constitutes an "unnecessary and wanton infliction of pain") (citation omitted).

140. *See* 28 C.F.R. § 522.20 (2020) (requiring federal prisons to conduct health screenings on new incarcerated people); 28 C.F.R. § 549.10 (2020) (requiring federal prisons to manage and treat infectious disease); N.Y. CORRECT. LAW § 137(6)(c) (McKinney 2014) (directing that incarcerated people in solitary confinement must have a daily health check).

141. N.Y. COMP. CODES R. & REGS. tit. 9, §§ 7651.1–7651.33 (2020).

142. 37 TEX. ADMIN. CODE § 273.2 (2020).

143. Cal. Dept. of Corr. and Rehab. Adult Institutions, Programs, and Parole, Operations Manual, ch. 9 (2018), *available at* https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2019/07/Ch_9_2019_DOM.pdf (last visited Oct. 13, 2020).

Many woman who are incarcerated have an increased risk of chronic health problems, such as HIV, hepatitis, asthma, gynecological diseases, nutrition problems, and convulsive seizure disorders.[144] Federal law requires all federal incarcerated people to receive a medical examination within twenty-four hours of arriving at the prison.[145] During this exam, you should be tested for sexually transmitted infections ("STIs") and tuberculosis ("TB"). Some courts have ruled that these tests are also required at certain state prisons.[146] Many states have TB screening plans, which require screening of incarcerated people in facilities of certain sizes or after an incarcerated person has been held for a certain period of time.[147] Read Chapter 26 of the *JLM,* "Infectious Diseases: AIDS, Hepatitis, and Tuberculosis in Prison," for more information. Many female incarcerated people do not receive a medical exam after being admitted, even though prisons have a duty to perform these exams.[148] You should also receive check-ups and diagnostic tests. However, some prisons do not follow the law.[149]

(a) Abortion

According to *Roe v. Wade*, every woman has the right to decide whether to have an abortion or to go forward with a pregnancy.[150] However, states are allowed to place restrictions or limitations on a woman's right to an abortion, like requiring parental consent for minors, as long as they do not place an "undue burden" on a woman's right to choose.[151] Courts decide what kind of obstacles might count as an undue burden.

If you are a pregnant and incarcerated in federal prison, federal regulations require that prison officials offer you medical, religious, and social counseling before you have an abortion.[152] You may accept or decline this counseling, and officials should allow you to make the final decision on whether or not to have an abortion.[153] Once you have received the offer of counseling, and have notified the prison in writing that you wish to have an abortion, the prison must arrange for the abortion.[154]

If you are a pregnant and incarcerated in state prison, your rights will mostly depend on the abortion laws in your state. In New York, abortions are allowed if a doctor has a "reasonable belief that [the abortion] is necessary to preserve [your] life" or the abortion occurs in the first "twenty-four weeks . . . of [the] pregnancy."[155]

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144. *See* Amnesty Int'l, *Not Part of My Sentence: Violations of the Human Rights of Women in Custody* (1999), *available at* https://www.amnesty.org/download/Documents/144000/amr510191999en.pdf (last visited Oct. 13, 2020).

145. *See* 28 C.F.R. § 522.20 (2020) (requiring federal prisons to conduct health screenings on new incarcerated people).

146. *See, e.g.*, Lareau v. Manson, 651 F.2d 96, 109 (2d Cir. 1981) (noting that lack of screening for infectious diseases resulted in a serious threat to incarcerated people's well-being); Feliciano v. Gonzalez, 13 F. Supp. 2d 151, 208 (D.P.R. 1998) (holding that not screening incoming incarcerated people for infectious diseases, including TB, is unconstitutional); Inmates of Occoquan v. Barry, 717 F. Supp. 854, 867 (D.D.C. 1989) (holding lack of syphilis and TB testing to be a systemic failure showing deliberate indifference).

147. *See, e.g.*, 37 TEX. ADMIN. CODE § 273.7 (2020); CAL. PENAL CODE § 7573(b) (West 2011).

148. *See* Amnesty Int'l, "*Not Part of My Sentence": Violations of the Human Rights of Women in Custody* (1999), *available at* https://www.amnesty.org/download/Documents/144000/amr510191999en.pdf (last visited Oct. 13, 2020).

149. *See* Women Prisoners of the D.C. Dept. of Corr. v. District of Columbia, 968 F. Supp. 744, 747 (D.D.C. 1997) (holding that female incarcerated people have a right to diagnostic evaluations similar to those provided for men).

150. Roe v. Wade, 410 U.S. 113, 153–154, 93 S. Ct. 705, 727, 35 L. Ed. 2d 147, 177–178 (1973).

151. *See* Planned Parenthood v. Casey, 505 U.S. 833, 876–877, 112 S. Ct. 2791, 2820–2821, 120 L. Ed. 2d. 674, 714–715 (1992) (explaining the restrictions that could constitute an "undue burden").

152. 28 C.F.R. § 551.23(b) (2020).

153. 28 C.F.R. § 551.23(a)–(b) (2020).

154. 28 C.F.R. § 551.23(c) (2020).

155. N.Y. PENAL LAW § 125.05(3) (McKinney 2020).

Some states, like California and New York, have codes that say that woman who are incarcerated have the same right to an abortion as any other woman in the state.[156] In other states, there may be additional restrictions on incarcerated people seeking abortions. You should first look at your state code or prison regulations. Few courts have ruled on the issue of whether prisons may treat female incarcerated people differently than other women in the state when it comes to the right to get an abortion. The Third Circuit has held that female incarcerated people have the same right to an abortion as non-incarcerated women in the same state.[157] The court found that requiring a woman to get a court-ordered release for an elective abortion was an undue burden on her constitutionally-protected right to have an abortion, as well as a violation of her Eighth Amendment right to medical treatment in prison. The court classified an elective abortion as a "serious medical need" where denial or undue delay in providing the procedure could cause the incarcerated person's condition to become "irreparable."[158] The court also found that a prison is not required to pay for an incarcerated person's abortion, but if you request an abortion and are entitled to one under state law, then a prison official is required to transport you to a clinic.[159]

Some courts have decided that restrictions on elective abortions violate the Fourteenth Amendment, but not the Eighth Amendment.[160] In one case, the Eighth Circuit considered the constitutionality of a Missouri Department of Corrections ("MDC") policy prohibiting transportation of pregnant incarcerated people off-site for elective, non-therapeutic abortions. The court found that the MDC policy was unconstitutional under the Fourteenth Amendment, and that incarcerated women do not lose their right to abortions once incarcerated.[161] However, in a different case, the Fifth Circuit upheld a prison policy requiring incarcerated people to get a court order for abortions because the policy was implemented reasonably and was "rationally connected to the legitimate penological objectives [prison security] served."[162]

Note that if you ask for an abortion but never get one because of prison officials' negligence, you probably do not have a constitutional claim. In one case, a pretrial detainee requested an abortion, but because of administrative inefficiency and unreasonable delays by prison officials the abortion was scheduled too late to be performed.[163] The court found that the prison officials were not deliberately indifferent, only negligent, so their conduct was not in violation of the Eighth Amendment.[164] In a

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

157. Monmouth Cnty. Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 343–345 (3d Cir. 1987) (holding abortion restrictions were not justified by state's interest in childbirth because the interest does not further rehabilitation, security, or deterrence); *see also* Doe v. Barron, 92 F. Supp. 2d 694 (S.D. Ohio 1999) (holding that a state may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability).

158. Monmouth Cnty. Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 349 (3d Cir. 1987); *see also* Gibson v. Matthews, 926 F.2d 532 (6th Cir. 1991) (finding that an abortion qualifies as a serious medical need).

159. Monmouth Cnty. Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 341–342 (3d Cir. 1987); *see also* Roe v. Crawford, 514 F.3d 789, 797 (8th Cir. 2008) (holding that by completely eliminating any alternative means of obtaining an elective abortion, the prison's policy "represent[ed] precisely the 'exaggerated response to . . . security objectives'" forbidden by case law) (citation omitted). *But see* Victoria W. v. Larpenter, 369 F.3d 475, 487 (5th Cir. 2004) (deeming a prison policy that required incarcerated people to obtain court orders before they could leave the prison for elective medical procedures "rationally connected to the legitimate penological objectives served").

160. Roe v. Crawford, 514 F.3d 789, 796–797, 801 (8th Cir. 2008) (holding that refusal to provide an incarcerated person access to an elective, non-therapeutic abortion does not constitute an 8th Amendment violation, but that "an elective abortion . . . is a liberty interest protected under the Fourteenth Amendment").

161. Roe v. Crawford, 514 F.3d 789, 801 (8th Cir. 2008).

162. Victoria W. v. Larpenter, 369 F.3d 475, 487 (5th Cir. 2004). Note that, because the right to have an abortion is a constitutional right, any prison policy that restricts that right must be "reasonably related to legitimate penological interests." *See, e.g.,* Doe v. Arpaio, 214 Ariz. 237, 241, 150 P.3d 1258, 1262 (Ariz. Ct. App. 2007).

163. Bryant v. Maffucci, 923 F.2d 979, 980–982 (2d Cir. 1991).

164. Bryant v. Maffucci, 923 F.2d 979, 986 (2d Cir. 1991) (holding that prison officials' negligent failure to provide an abortion did not violate incarcerated person's rights).

similar case, the Sixth Circuit found that prison officials were merely negligent when they incorrectly estimated the due date of a pregnant incarcerated person and thus denied her access to abortion facilities.[165]

(b) Pregnancy

Your treatment during pregnancy is important.[166] Prisons should (but might not) have policies and procedures for risk assessment and treatment of pregnant incarcerated people, diet and nutrition, prenatal care, and counseling.

In New York State, you have a right to "comprehensive prenatal care . . . which shall include, but is not limited to, regular medical examinations, advice on appropriate levels of activity and safety precautions, nutritional guidance, and HIV education."[167] Shortly before you are about to give birth, you should be moved from the jail or prison to some other location "a reasonable time before the anticipated birth of [your] child," and "provided with comfortable accommodations, maintenance and medical care."[168] You will be returned to the prison or jail "as soon after the birth of [your] child as the state of [your] health will permit."[169] In California, a pregnant person incarcerated in a local (city, county, or regional) detention facility has a right to receive necessary medical services from the physician of her choice, but that individual must pay for any private doctors.[170] California recently amended its state regulations concerning incarcerated people who are pregnant. The new rules provide for routine physical examinations as well as mandatory nutritional guidelines to be followed by prison facilities when caring for incarcerated people who are pregnant.[171] In particular, the use of leg and waist restraints is subject to stringent requirements.[172]

In determining whether prison officials violated your Eighth Amendment rights by denying you medical care, courts generally consider the amount of time left before you reach the full term of your pregnancy, the symptoms of labor that you have exhibited, any previous or potential complications with your pregnancy, and the reaction of prison officials to your condition and requests.[173] In a federal case in Wisconsin, a woman who was incarcerated charged prison nurses with violating her Eighth Amendment rights by failing to bring her to the hospital when she was in labor.[174] The incarcerated person gave birth in her prison cell.[175] The court denied summary judgment and held that a reasonable jury could conclude that the nurses had shown "deliberate indifference" toward the pregnant incarcerated person because the nurses ignored the incarcerated person's request to go to the hospital and they "only examined [her] through the small tray slot in the cell door, rather than conducting a more comprehensive exam."[176]

Incarcerated people who are pregnant have also had some success in lawsuits alleging negligence against prisons. One court found a prison liable for the wrongful death of a premature baby born to an incarcerated person because the prison was negligent. Prison officials did not follow the prison's

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165. Gibson v. Matthews, 926 F.2d 532, 536–537 (6th Cir. 1991).

166. Books can help you learn to care for yourself while pregnant. One good resource is *What To Expect When You're Expecting* by Heidi E. Murkoff and Sharon Mazel (Workman Publishing Company 2008) (1984). If you do not have access to books like this one, consult a medical professional at your facility regarding questions you might have about your pregnancy. You can also find information online at websites like "What to Expect," *available at* http://www.whattoexpect.com (last visited Oct. 13, 2020).

167. N.Y. COMP. CODES R. & REGS. tit. 9, § 7651.17(a) (2020).

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

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

170. CAL. PENAL CODE § 4023.6 (West 2011).

171. CAL. PENAL CODE §§ 3403, 3406, 3424 (West 2011).

172. CAL. PENAL CODE § 3407 (West 2011).

173. Webb v. Jessamine Cty. Fiscal Court, 802 F. Supp. 2d 870, 880 (E.D. Ky. 2011).

174. Doe v. Gustavus, 294 F. Supp. 2d 1003, 1005 (E.D. Wis. 2003).

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

176. Doe v. Gustavus, 294 F. Supp. 2d 1003, 1009 (E.D. Wis. 2003); *see also* Webb v. Jessamine Cty. Fiscal Court, 802 F. Supp. 2d 870 (E.D. Ky. 2011) (rejecting summary judgment for the defendant).

procedures, failed to diagnose the labor despite complaints of bleeding and abdominal pain, and did not bring the incarcerated person to a hospital until it may have been too late to prevent the premature birth.[177]

Shackling incarcerated people in labor is unfortunately still common, and many departments of corrections and the Federal Bureau of Prisons allow the use of restraints during labor.[178] This may be changing, however. California has banned shackling you by the wrists or ankles during labor, delivery, and recovery, unless it is necessary for the safety and security of you, the staff, or the public.[179] Similarly, New York does not allow the use of restraints on you during delivery.[180] A D.C. court has struck down a practice of shackling women in their third trimester with leg shackles, handcuffs, a belly chain, and a box that connects the handcuffs and belly chain.[181] The court held these practices violated the Eighth Amendment; leg shackles alone provide sufficient security during the third trimester and even these must be removed during labor and for a short period thereafter.[182] The Eighth Circuit also ruled that that a reasonable jury could find that a prison officer violated the Eighth Amendment by shackling an incarcerated person after she went into labor.[183] According to the court, a jury could infer that the officer "recognized that the shackles interfered with [the incarcerated person's] medical care, could be an obstacle in the event of a medical emergency, and caused unnecessary suffering at a time when [the incarcerated person] would have likely been physically unable to flee."[184] The court also wrote in a footnote that a jury could determine the officer was aware of the risks involved in labor because they were obvious.[185]

E. Your Right to Informed Consent and Medical Privacy

1. Informed Consent

Before you are treated, you should ask your doctor or other prison health staff what to expect from a medical procedure and its risks and alternatives. Depending on your state, you may have both a statutory and constitutional right to receive this information and agree to treatment *before* you are treated. Giving "informed consent" means that you agree to your particular medical treatment after your doctor has told you about the purpose of the treatment, its possible side effects, and other alternative treatments.[186]

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177. Calloway v. City of New Orleans, 524 So. 2d 182, 187 (La. Ct. App. 1988); *see also* Wells v. La. Dept. of Pub. Safety & Corr., 72 So. 3d 910 (La. App. 2 Cir. 2011) (holding that the standard of care imposed upon a confining authority in providing for the medical needs of inmates is that the services be reasonable).

178. ACLU REPRODUCTIVE FREEDOM PROJECT & ACLU NAT'L PRISON PROJECT, *ACLU Briefing Paper: The Shackling of Pregnant Women & Girls in U.S. Prisons, Jails, & Detention Centers* (2013) *available at* https://www.aclu.org/files/assets/anti-shackling_briefing_paper_stand_alone.pdf (last visited Oct. 13, 2020).

179. CAL. PENAL CODE § 3407(b) (West 2018) ("A pregnant [incarcerated person] in labor, during delivery, or in recovery after delivery, shall not be restrained by the wrists, ankles, or both, unless deemed necessary for the safety and security of the inmate, the staff, or the public.").

180. N.Y. CORRECT. LAW § 611(1)(c) (McKinney 2014) ("No restraints of any kind shall be used when [an incarcerated] woman is in labor, admitted to a hospital, institution or clinic for delivery, or recovering after giving birth.").

181. Women Prisoners of D.C. Dept. of Corr. v. District of Columbia, 877 F. Supp. 634, 646 (D.D.C 1994), *vacated in part and remanded on other grounds,* Women Prisoners of D.C. Dept. of Corr. v. District of Columbia, 93 F.3d 910, 920–923 (D.C. Cir. 1996).

182. Women Prisoners of D.C. Dept. of Corr. v. District of Columbia, 877 F. Supp. 634, 668–669 (D.D.C 1994), *vacated in part and remanded on other grounds,* Women Prisoners of D.C. Dept. of Corr. v. District of Columbia, 93 F.3d 910, 920–923 (D.C. Cir. 1996); *see also* Women Prisoners of D.C. Dept. of Corr. v. District of Columbia, 968 F. Supp. 744 (D.D.C. 1997) (describing settlement after appellate proceedings).

183. Nelson v. Corr. Med. Servs., 583 F.3d 522, 530–532 (8th Cir. 2009).

184. Nelson v. Corr. Med. Servs., 583 F.3d 522, 530 (8th Cir. 2009).

185. Nelson v. Corr. Med. Servs., 583 F.3d 522, 530 n.5 (8th Cir. 2009).

186. To learn more about informed consent issues for incarcerated people with mental illness, see Chapter 29 of the *JLM,* "Special Issues for Incarcerated People with Mental Illness."

In New York, if you did not give informed consent before you received a medical treatment (meaning that you did not agree to the treatment or were never fully told of the treatment's risks and alternatives), you can bring a state law claim against your doctor or other prison officials for acting without your informed consent.[187] To prove that you did not give your informed consent, you must show (1) that your doctor did not tell you about the risks of the treatment and the alternative treatments available, (2) that a reasonable patient in your position would not have agreed to the treatment if he had been fully informed, and (3) that the lack of consent caused your injury.[188] You must have been injured as a result of the lack of informed consent in order for your claim to succeed.

You may also be able to bring a similar constitutional claim. The Second Circuit held that your constitutionally protected interest in refusing medical treatment under the Fourteenth Amendment includes the related "right to such information as a reasonable patient would deem necessary to make an informed decision regarding medical treatment."[189] In order to succeed on this claim, you must meet a different test. Specifically, you will have to show (1) that government officials failed to provide you with the kind of information that a reasonable patient would need to make an informed decision, (2) that you would have refused the medical treatment if you had been so informed, and (3) that the officials showed deliberate indifference to your right to refuse medical treatment when they failure to provide you with information about the treatment.[190] However, a prison official can still forcibly give you medical treatment even if you do not consent as long as the official reasonably determines that it "furthers a legitimate penological purpose"—for example, one related to prison security.[191]

2. Medical Privacy

You have constitutional privacy rights protecting your medical information.[192] You are entitled to confidentiality of information about your medical condition and treatment.[193] But like all incarcerated

187. N.Y. PUB. HEALTH LAW § 2805-d(2) (McKinney 2012) ("The right of action to recover for . . . malpractice based on lack of informed consent is limited to . . . either (a) non-emergency treatment, procedure or surgery, or (b) a diagnostic procedure which involved invasion or disruption of the integrity of the body.").

188. N.Y. PUB. HEALTH LAW § 2805-d (McKinney 2012); *see also* Foote v. Rajadhyax, 268 A.D.2d 745, 745, 702 N.Y.S.2d 153, 154 (3d Dept. 2000) (granting an incarcerated person a new trial to show that she had not consented to a root canal).

189. Pabon v. Wright, 459 F.3d 241, 246 (2d Cir. 2006) (finding a constitutionally protected interest, but affirming the grant of summary judgment to prison officials because of qualified immunity); see also White v. Napoleon, 897 F.2d 103, 113 (3d Cir. 1990) ("Prisoners have a right [under the 14th Amendment] to such information as is reasonably necessary to make an informed decision to accept or reject proposed treatment."); Benson v. Terhune, 304 F.3d 874, 884–885 (9th Cir. 2002) (explaining that the recognition of the right to medical information is a "reasonable application of Supreme Court precedent").

190. Pabon v. Wright, 459 F.3d 241, 246 (2d Cir. 2006).

191. Pabon v. Wright, 459 F.3d 241, 246 (2d Cir. 2006).

192. Powell v. Schriver, 175 F.3d 107, 111 (2d Cir. 1999) ("'[T]he right to confidentiality includes the right to protection regarding information about the state of one's health . . . [because] . . . there are few matters that are quite so personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control over.'") (quoting Doe v. City of New York, 15 F.3d 264, 267 (2d Cir. 1994)); see also Hunnicutt v. Armstrong, No. 04-1565-pr, 152 F. App'x. 34, 35–36 (2d Cir. Oct. 13, 2005) (*unpublished*) (finding that an incarcerated person stated a constitutional privacy claim where the incarcerated person alleged prison publicly discussed his mental health issues in front of other incarcerated people and "allowed non-health staff access to [incarcerated people's] confidential health records").

193. Doe v. Delie, 257 F.3d 309, 315–317 (3d Cir. 2001) (noting that a right to privacy in medical information extends to prescription medications and is "particularly strong" for HIV status); Powell v. Schriver, 175 F.3d 107, 111 (2d Cir. 1999) (finding a right to privacy in "transsexuality"); O'Connor v. Pierson, 426 F.3d 187, 201 (2d Cir. 2005) ("Medical information in general, and information about a person's psychiatric health and substance-abuse history in particular, is information of the most intimate kind."); Hunnicutt v. Armstrong, No. 04-1565-pr, 152 F. App'x. 34, 35–36 (2d Cir. Oct. 13, 2005) (*unpublished*) (finding an allegation that an incarcerated person's mental health consultations in a housing unit within earshot of other incarcerated people stated a constitutional privacy claim).

people's rights, your privacy rights are limited by the needs of prison administration and depend on the circumstances.[194]

Courts have "long recognized the general right to privacy in one's medical information: 'There can be no question that . . . medical records, which may contain intimate facts of a personal nature, are well within the [scope] of materials entitled to privacy protection.'"[195] The Third Circuit has held that you have a Fourteenth Amendment privacy interest in your medical information because it is among those rights that "are not inconsistent with [your] status as [a] prisoner or with the legitimate penological objectives of the corrections system."[196] Similarly, the Second Circuit held that you have a constitutional right to keep previously undisclosed medical information confidential as long as the disclosure "is *not* reasonably related to a legitimate penological interest."[197]

In 1996, Congress passed the Health Insurance Portability and Accountability Act ("HIPAA"), which contains significant protections for incarcerated people's medical privacy rights.[198] Under the final HIPAA privacy rule, identifiable health information pertaining to you has been deemed "protected health information," or "PHI." A hospital providing prison health care may disclose PHI to a "correctional institution" or a law enforcement official having lawful custody of an incarcerated person if the correctional institution or law enforcement official represents that disclosing such protected health information is necessary for:

> (1) the provision of health care to such individuals;
> (2) the health and safety of such individual or other incarcerated people;
> (3) the health and safety of officers, employees, or others at the correctional institution;
> (4) the health and safety of such individuals and officers or other persons responsible for the transport of incarcerated people or their transfer from one institution, facility, or setting to another;
> (5) the health and safety of law enforcement on the premises of the correctional institution; or
> (6) the administration and maintenance of the safety, security, and good order of the correctional institution. [199]

A prison hospital is allowed to share PHI to entities outside the hospital if the entity says that the information is necessary for any of the purposes listed above. Furthermore, a prison hospital may reasonably rely upon any such representations from public officials regarding your health. However, when you are released from custody—including probation, parole, and supervised release—you are no longer categorized as an "inmate," and these permitted use and disclosure provisions no longer apply.[200]

You should also note that some courts have held prison officials liable for disclosing an incarcerated person's confidential medical information, not because they violated the incarcerated person's privacy rights but because by disclosing the information, the officials put the incarcerated person in danger.

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194. *See generally* Hudson v. Palmer, 468 U.S. 517, 527, 104 S. Ct. 3194, 3200, 82 L. Ed. 2d 393, 403 (1984) (explaining that an incarcerated person's expectation of privacy is reasonable only when the incarcerated person's interest in having privacy is greater than the interest of the prison).

195. Doe v. Delie, 257 F.3d 309, 315 (3d Cir. 2001) (quoting United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980)).

196. Doe v. Delie, 257 F.3d 309, 315–317 (3d Cir. 2001) (quoting Pell v. Procunier, 417 U.S. 817, 822, 94 S. Ct. 2800, 2804, 41 L. Ed. 2d 495, 501 (1974)).

197. Powell v. Schriver, 175 F.3d 107, 112 (2d Cir. 1999) (concluding that "the gratuitous disclosure of [an incarcerated person's] confidential medical information as humor or gossip" is not reasonably related to penological interests and violates the prisoner's constitutional right to privacy). The court noted that "disclosure of an inmate's HIV-positive status [could] further legitimate penological interests" when, for example, a prison needs to segregate HIV-positive incarcerated people or when prison officials need "to warn prison officials and inmates who otherwise may be exposed to contagion." Powell v. Schriver, 175 F.3d 107, 112–113 (2d Cir. 1999).

198. 45 C.F.R. §§ 160, 162, 164 (2020).

199. 45 C.F.R. § 164.512(k)(5)(i) (2020).

200. 45 C.F.R. § 164.512(k)(5)(iii) (2020) (stating that there is "[n]o application [of this section] after release [from custody]" because "an individual is no longer an inmate when released on parole, probation, supervised release, or otherwise is no longer in lawful custody").

For example, the Seventh Circuit indicated that prison employees would violate an incarcerated person's Eighth Amendment rights against cruel and unusual punishment if, "knowing that an inmate identified as HIV positive was a likely target of violence by other inmates yet indifferent to his fate, [the employees] gratuitously revealed his HIV status to other inmates and a violent attack upon him ensued."[201]

F. Actions You Can Bring When You Are Denied Medical Care

Now that you know your rights, it is important to be able to enforce them. This Part describes the actions you can bring when your right to adequate medical care is violated. Remember that in almost every instance, your case will be helped by attempting to go through your institution's complaint process. For more information on doing so, see Chapter 15 of the *JLM*, "Inmate Grievance Procedures."

1. Remedies for People Incarcerated by the State

(a) 42 U.S.C. § 1983 Actions

Section 1983 is a federal statute that allows you to bring a lawsuit when your federal constitutional rights have been violated. When persons acting under state authority (for example, prison guards, prison doctors, and prison administrators) violate your right to adequate medical care, you may use Section 1983 to bring a lawsuit in federal court. For a discussion of Section 1983 actions, see Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law."

(b) Tort Actions

As discussed in Part B of this Chapter, the federal constitutional standard established by *Wilson* and *Farmer* cannot be proven by claiming only negligence.[202] If the facts of your case are not enough to prove a constitutional violation, but only show negligence, you may want to consider bringing a tort action against state officials instead of a constitutional claim. See Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," to learn how to do so.

To succeed on a negligence claim you must prove three things:

(1) "Duty of Care"—that the defendants had a duty of care towards you;
(2) "Breach of Duty"—that the defendants failed to meet that duty; and
(3) "Injury"—that you were injured as a result of that failure. [203]

There are several ways to prove that the prison has a duty of care towards you. First, as discussed above, *Estelle v. Gamble* held that prison officials have a duty to provide adequate medical care.[204] Second, a state statute may declare, or require, a prison's duty of care. Many states have statutes that

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201. Anderson v. Romero, 72 F.3d 518, 523 (7th Cir. 1995).

202. *See* Sanderfer v. Nichols, 62 F.3d 151, 155 (6th Cir. 1995) (finding that even though the doctor probably should have checked the incarcerated person's medical records, her failure to do so was at most negligence, not deliberate indifference); *see also* Flint v. Kentucky Dept. of Corr., 270 F.3d 340, 354 (6th Cir. 2001) (finding that prison officials violated an incarcerated person's 8th Amendment rights after they failed to take action to protect the incarcerated person from death threats made by another incarcerated person because the prison officials were aware the murdered incarcerated person's life was in danger and "did not have to undertake any further investigation, or draw any inferences . . . to conclude that a risk to [the incarcerated person's] health and safety existed").

203. Brown v. Sheridan, 894 F. Supp. 66, 69–72 (N.D.N.Y. 1995) (finding that prison officials were not negligent for failing to treat an incarcerated person's broken leg because the officials were not told by the incarcerated person of his injury and it was not unreasonable for the officials to not have discovered the injury: "the record shows that these [officials] took reasonable steps to ascertain and monitor plaintiff's condition, and that when plaintiff disclosed his injury to them he received prompt medical attention.").

204. Estelle v. Gamble, 429 U.S. 97, 103–106, 97 S. Ct. 285, 290–292, 50 L. Ed. 2d 251, 259–261 (1976). Note that the Court in *Estelle v. Gamble* found that "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner," and that a proper claim for breach of this duty must include allegations of "acts or omissions sufficiently harmful to evidence deliberate indifferences to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251, 261 (1976).

require prison officials to provide adequate medical care. For example, in New York, Section 70(2)(c) of the New York State Correction Law directs Department of Corrections and Community Supervision officials to maintain and operate correctional facilities "with due regard to . . . [t]he health and safety of every person in the custody of the Department."[205] There are also common law (law made through judge's opinions, rather than by statute) claims of medical malpractice and negligence actions that you may bring.

The most common method of proving that a defendant breached a duty is to have an expert provide testimony that the defendant did not use the usually accepted procedures. For example, in *Stanback v. State*, the plaintiff's expert testified that an x-ray of plaintiff's knee would have revealed his torn ligament. However, prison doctors only offered ace bandages, braces, and painkillers and did not x-ray the knee for over three years.[206] Expert testimony is not always necessary. In *Rivers v. State*, the court held that "[a] medical expert's testimony is not required where a lay person, relying on common knowledge and experience, can find that the harm would not have occurred in the absence of negligence."[207] In other words, if an ordinary person could have used common sense to find out that negligence must have occurred, you do not need an expert witness. Thus, no expert testimony was necessary in *Rivers* to prove that a doctor was negligent when he performed a hernia operation on an incarcerated person's right side, even though the patient required the operation on his left side and the hernia was visible on the left side.[208] As previously noted in Part B of this Chapter, there are differences between medical malpractice and medical negligence claims. The need for an expert is linked to this distinction: if you decide to file a medical malpractice claim, you may need an expert witness to support your claim that a reasonable medical practitioner would not have caused the injury you claim was caused.

Finally, you must prove that the breach of duty was the direct cause of your injury. This element is not usually difficult to prove, but if you interfere with your treatment in any way, you may fail to prove direct causation. For example, in *Brown v. Sheridan*, the plaintiff lost his case when the court found that he did not receive immediate treatment because of his own failure to disclose the nature of his injury, and that defendants "took reasonable steps to ascertain and monitor plaintiff's condition."[209] The court noted that the incarcerated person did not openly display symptoms of his injury, and refused to cooperate with psychiatric care that could have aided defendants in discovering and treating his injury sooner.[210] Also, in *Marchione v. State*, the plaintiff, who was given medication for hypertension and became permanently impotent as a result, lost on his negligence claim because he did not report his symptoms in time.[211] At trial, medical experts found that the impotence would have occurred if not treated within eight hours after the onset of symptoms. Although the incarcerated person noticed the symptoms by ten o'clock in the morning, he did not indicate his situation was an emergency and delayed making a specific report of his symptoms until the evening.[212]

An advantage to filing a state tort claim is that you only need to establish negligence, which is easier than establishing deliberate indifference. A disadvantage to filing a state tort claim is that you can only get money damages, while Section 1983 claims provide both "declaratory relief" (a judgment that is binding on both parties in the present and the future) and "injunctive relief" (a court order that

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205. N.Y. CORRECT. LAW § 70(2)(c) (McKinney 2014).

206. Stanback v. State, 163 A.D.2d 298, 298–299, 557 N.Y.S.2d 433, 433–434 (2d Dept. 1990); *see also* Kagan v. State, 221 A.D.2d 7, 16–18, 646 N.Y.S.2d 336, 342–343 (2d Dept. 1996) (upholding a damage award for an incarcerated person who repeatedly complained of ear pain caused by a respiratory infection but was not seen by a doctor until she had lost all hearing in her ear).

207. Rivers v. State, 142 Misc. 2d 563, 567, 537 N.Y.S.2d 968, 971 (N.Y. Ct. Cl. 1989), *rev'd on other grounds*, Rivers v. State, 159 A.D.2d 788, 552 N.Y.S.2d 189 (3d Dept. 1990).

208. Rivers v. State, 142 Misc. 2d 563, 567, 537 N.Y.S.2d 968, 971 (N.Y. Ct. Cl. 1989), *rev'd on other grounds*, Rivers v. State, 159 A.D.2d 788, 552 N.Y.S.2d 189 (3d Dept. 1990).

209. Brown v. Sheridan, 894 F. Supp. 66, 72 (N.D.N.Y. 1995).

210. Brown v. Sheridan, 894 F. Supp. 66, 71 (N.D.N.Y. 1995).

211. Marchione v. State, 194 A.D.2d 851, 855, 598 N.Y.S.2d 592, 594–595 (3d Dept. 1993).

212. Marchione v. State, 194 A.D.2d 851, 855, 598 N.Y.S.2d 592, 595 (3d Dept. 1993).

prohibits or commands action to undo some wrong or injury) in addition to money damages. Furthermore, a negligence action may only be filed in state court, while a Section 1983 claim can be filed in either federal or state court.

(c) Article 78 Proceedings in New York State

In New York, there is a legal procedure called an Article 78 proceeding that allows you to challenge a decision made by a state official.[213] If you are denied medical care, you can bring a complaint under Article 78 to require the prison to provide that care. In an Article 78 proceeding, you can recover only limited money damages.[214] To be successful, you must be able to show that the prison authorities were deliberately indifferent to your serious medical needs.[215] The statute of limitations requires that the proceeding be brought within four months of the denial or you cannot bring the claim.[216] Administrative remedies must be exhausted before beginning an Article 78 proceeding. See Chapter 22 of the *JLM*, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules," for more information on Article 78 proceedings in New York.

2. Remedies for People Incarcerated by the Federal Government

(a) *Bivens* Actions Under 28 U.S.C. § 1331

A *Bivens* action is the federal incarcerated person's equivalent to a state incarcerated person's Section 1983 action, and this action can be brought after all available administrative remedies are used.[217] In a *Bivens* action, you must prove that the prison doctor or official showed deliberate indifference to your serious medical needs. For more on *Bivens* actions, see Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law."

(b) Federal Tort Claims Act

Under the Federal Tort Claims Act ("FTCA"),[218] you can obtain relief if a prison doctor or official was negligent.[219] In other words, you can sue the federal government if something a government

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213. N.Y. C.P.L.R. § 7801 (McKinney 2008).

214. Money damages are limited to those "incidental to the primary relief sought," and must be such "as [the plaintiff] might otherwise recover on the same set of facts in a separate action . . . in the supreme court against the same body or officer in its or his official capacity." N.Y. C.P.L.R. § 7806 (McKinney 2008).

215. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251, 261 (1976) (holding that an incarcerated person needs to show "deliberate indifference to serious medical needs" in order to show a violation of the 8th Amendment); Wooley v. N.Y. State Dept. of Corr. Servs., 15 N.Y.3d 275, 282–283, 934 N.E.2d 310, 316, 907 N.Y.S.2d 741, 747 (2010) (finding no deliberate indifference in refusal to treat chronic viral infection with method not approved by federal government when other approved methods are used); Scott v. Goord, 32 A.D.3d 638, 638–639, 819 N.Y.S.2d 618, 619–620 (3d Dept. 2006) (finding no deliberate indifference when prison officials permitted incarcerated person to undergo surgery to alleviate pain in hurt arm, but refused to permit a different surgery to fix the injury); Hernandez v. City of New York, 8 Misc.3d 758, 761, 799 N.Y.S.2d 369, 371 (Sup. Ct. N.Y. County 2005) (noting that medical malpractice or the failure to pursue alternative treatments alone does not violate the Constitution).

216. N.Y. C.P.L.R. § 217(1) (McKinney 2019).

217. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971); *see also* Porter v. Nussle, 534 U.S. 516, 524, 122 S. Ct. 983, 988, 152 L. Ed. 2d 12, 21 (2002) (holding that an incarcerated person wishing to bring a *Bivens* suit must use all available administrative remedies first); Ross v. Blake, 136 S. Ct. 1850, 1858–1860 (2016) (holding that incarcerated people seeking to bring a lawsuit only need to exhaust the administrative remedies that are available to them, but do not need to exhaust an administrative process when (1) the administrative process has no potential to provide relief, (2) no ordinary incarcerated person can discern or navigate the process, or (3) prison officials prevent incarcerated people from using the process); *see also* Chapter 14 of the *JLM* "The Prison Litigation Reform Act."

218. 28 U.S.C. §§ 1346(b), 2671–2680.

219. *See* United States v. Muniz, 374 U.S. 150, 150–152, 163–164, 83 S. Ct. 1850, 1852, 1858, 10 L. Ed. 2d 805, 808–809, 815–816 (1963) (allowing suit under the FTCA in two cases: one based on incarcerated person's claim that the negligence of prison employees was responsible for the delay in diagnosis and removal of the tumor which caused incarcerated person's blindness, and another based on incarcerated person's claim that prison

employee did or failed to do while working for the government harmed you.[220] Courts look to see whether the behavior would be a tort in the state where the behavior occurred.[221] If it is a tort in that state, you can sue the federal government.

If the injury was caused by intentional behavior, however, a claim cannot be brought under the FTCA.[222] For example, an allegation of assault and battery (considered purposeful behavior under the law) could not be brought as an FTCA claim. If the act or omission that caused your injury arose from a discretionary duty, you cannot sue under the FTCA.

If you do meet FTCA suit requirements, you must bring it against the United States, not the federal employees who caused your injury. If you name employees as defendants, the FTCA authorizes the court to substitute the United States as the sole defendant.[223]

(c) Choosing Between a *Bivens* Claim and an FTCA Action

If you are a federal incarcerated person, you may have the choice of bringing either a *Bivens* suit or an FTCA claim. While it is easier to bring a successful FTCA action because it allows suit for mere medical malpractice, there are several advantages to bringing a *Bivens* action not available under the FTCA. First, while you cannot bring an FTCA action for an intentional tort, you can bring a claim for an intentional tort in a *Bivens* suit against an individual. Second, under the FTCA you can only sue the federal government, while in a *Bivens* action you can sue the individuals who mistreated you. Third, under the FTCA you can only receive compensatory damages (money equal to the cost of repairing or compensating the actual injury you suffered), while in a *Bivens* suit you may receive punitive damages (extra money awarded as a penalty against the wrongdoer). Fourth, in an FTCA action, you cannot later sue the individuals who injured you, but in a *Bivens* action, if you are unable to collect on the judgment against the individual employees, you can bring a suit against the government. Finally, a judge hears an FTCA suit, but a jury hears a *Bivens* suit.

If your injury occurred because of a violation of your constitutional rights and also from a tort, you can bring both an FTCA and a *Bivens* action. If you do not wish to bring both, you can choose between them.

G. Conclusion

The Constitution and state law protect your right to adequate medical care. Part B explained what you need to prove to show you have been denied adequate medical care in violation of the Eighth Amendment. You must show that you suffered serious harm because you did not receive medical treatment (the objective test),[224] and that the prison official who denied you treatment "[knew] of and

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officials were negligent for failing to provide sufficient prison guards to prevent an assault on the incarcerated person that resulted in injury); Moreno v. United States, 387 F. App'x 159, 161 (3d Cir. 2010) (*per curiam*) (*unpublished*) (dismissing FTCA claim because surgeon was a contractor and not a federal official when a botched surgery allegedly caused an incarcerated person to go blind); Kikumura v. Osagie, 461 F.3d 1269, 1300 (10th Cir. 2006) (permitting action under the FTCA for alleged negligence when prison officials took hours to bring very sick incarcerated person to doctor).

220. For the FTCA, conduct is within the scope of the government agent's "employment" where there is a "reasonable connection between the act and the agent's duties and responsibilities" and where the act is not "manifestly or palpably beyond the agent's authority." Celauro v. IRS, 411 F. Supp. 2d 257, 266 (E.D.N.Y. 2006) (citing Yalkut v. Gemignani, 873 F.2d 31, 34 (2d Cir. 1989)).

222. 28 U.S.C. §§ 1346(b), 2671–2680.

222. You can bring a *Bivens* action for intentional torts. You may also bring a state tort claim. See *JLM* Chapter 17, "The State's Duty to Protect You and Your Property: Tort Actions," for more information about state tort claims. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

223. *See* Hui v. Castaneda, 559 U.S. 799, 801, 130 S. Ct. 1845, 1848, 176 L. Ed. 2d 703, 708 (2010) ("When federal employees are sued for damages for harms caused in the course of their employment, the [FTCA] . . . generally authorizes substitution of the United States as the defendant.").

224. Wilson v. Seiter, 501 U.S. 294, 303–305, 111 S. Ct. 2321, 2326–2328, 115 L. Ed. 2d 271, 282–283 (1991); *see also* Rhodes v. Chapman, 452 U.S. 337, 345–347, 101 S. Ct. 2392, 2398–2399, 69 L. Ed. 2d 59, 68–69

[ignored] an excessive risk to [your] health or safety" (the subjective test).[225] Part C talked about how courts treat certain common incarcerated person health complaints. Part D explained specific health rights for incarcerated women. Part E explained your right to receive information before you are treated and your right to keep your medical records confidential. Part F talked about the different ways you can go to court if your rights have been violated. Because this Chapter focused on federal and New York state law, you will need to research the law in your own state if you are in a prison outside of New York. Also, read Chapters 26, 28, and 29 of the *JLM* for more information on your rights with respect to infectious diseases, disabilities, and mental illness.

If you believe you are not receiving adequate medical care, the first step is to assert your rights through your institution's grievance procedure. If your problem is not addressed, you will have preserved your right to bring a lawsuit in court. You can only bring your lawsuit in federal court, or state court in New York (an Article 78 proceeding), after you are unsuccessful or do not receive a favorable result through the inmate grievance procedure. Read Chapter 15 of the *JLM* to learn about Inmate Grievance Procedures.

(1981) (noting that objective standards must be used as much as possible in determining whether incarcerated people suffered harm in violation of the 8th Amendment); Mitchell v. Keane, No. 98-2368, 1999 U.S. App. LEXIS 4363, at *5 (2d Cir. 1999) (*unpublished*) (noting that sewage dripping through ceiling, if due to prison official's deliberate indifference, might satisfy the objective test); Rodriguez v. City of New York, 802 F. Supp. 2d 477, 482 (S.D.N.Y. 2011) (finding that a three-day delay in treatment for minor injuries resulting from a beating failed to satisfy the objective test).

225. Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994); *see also* Caiozzo v. Koreman, 581 F.3d 63, 72 (2d Cir. 2009) (holding that the subjective test was not met when a prison official mistakenly thought no injury was imminent from alcohol withdrawal); Williams v. Carbello, 666 F. Supp. 2d 373, 380 (S.D.N.Y. 2009) (holding that the subjective test is not met when prison officials believed the bathroom was sanitary because it was steam-cleaned three times a day).