CHAPTER 29

SPECIAL ISSUES FOR INCARCERATED PEOPLE WITH MENTAL ILLNESS*

A. Introduction

This Chapter will explain your rights as an incarcerated person with a mental illness. Part A discusses basic information you will need in order to understand how the law applies to incarcerated people with a mental illness (including the definitions of important terms such as "mental illness" and "treatment"). Part B explains your right to receive treatment for a mental illness. Part C explains how and when you can refuse unwanted treatment and transfer, and the consequences of transfer for hospitalization. Part D gives details about conditions of confinement, and explains how they overlap with mental health issues. Part E describes things to consider if you are a pretrial detainee with a mental illness. Part F explains the resources that are available to help you plan for your release. Part G describes resources available to you as an incarcerated person.

For more information on topics that might be important to incarcerated people with a mental illness, see Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care," and Chapter 28, "Rights of Incarcerated People with Disabilities." You should also read Part E of Chapter 23 to learn more about your right to medical privacy.

In addition, if you decide to file a lawsuit based on your rights in federal court, you *must* read *JLM*, Chapter 14, "The Prison Litigation Reform Act." Failing to you do not follow the requirements of the Prison Litigation Reform Act can lead to negative consequences such as the loss of your good-time credits or the loss of your right to bring future claims in federal court without immediately paying the full filing fee. Also, if you plan to bring a lawsuit because you believe your federal constitutional rights have been violated, you should read *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law." "Section 1983" (42 U.S.C. § 1983) is the law that allows you to sue when your constitutional rights are violated. Although this manual is intended to help you file your own lawsuit, keep in mind that it is always useful, if possible, to get assistance with your claims from a family member, friend, fellow incarcerated person, or lawyer. For advice on how to find a lawyer to help with your civil claims against the prison, please see Part C of Chapter 4 of the *JLM*, "How to Find a Lawyer."

1. Defining "Mental Illness" and "Treatment"

(a) What Is Mental Illness?

This Chapter is written for incarcerated people with behavioral (involving the way that you act or behave) or psychological (involving your mental or emotional state) illnesses and symptoms or risks that can be diagnosed by a doctor. You might have heard people use the terms mental illness, serious mental illness, major mental illness, mental disorder, mental abnormality, mental sickness, serious and persistent mental illness, or mentally retarded. People (including courts and legislatures) use the terms as if they mean the same thing, but they do not. Many people say "mentally ill prisoners" or "prisoners with a mental illness" when they are referring to different groups of people, such as people who are not guilty by reason of insanity (also known as "NGIs"), those incompetent to stand trial, or people with developmental disabilities (that is, low intellectual function that usually starts at childhood). When you read this Chapter, pay close attention to the way different terms are used to mean different things. The differences between different terms are important for you and any lawsuit you may decide to file.

There are many kinds of "mental illness," but some common types include Bipolar Disorder, Borderline Personality Disorder, Major Depression, Obsessive-Compulsive Disorder ("OCD"), Panic

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Disorder, Post-Traumatic Stress Disorder ("PTSD"), and Schizophrenia. Others include Dissociative Disorders, Dual Diagnosis or MICA (Mentally Ill and Chemically Addicted—mental illness with substance abuse), Eating Disorders, Schizoaffective Disorder, Tourette's Syndrome, and Attention-Deficit/Hyperactivity Disorder.[1] This Chapter will not discuss the separate issues of NGIs, sexual offenders, incarcerated people with developmental disabilities, or incarcerated people who do not identify with the biological gender they were given at birth. For more information on issues related to sex offenders, see Chapter 32 of the *JLM*, "Special Considerations for Sex Offenders."

Many state laws define "mental illness" to include only behavioral or psychological problems with noticeable symptoms. According to the American Psychiatric Association ("APA"), a person has a mental disorder if he suffers from a significant disturbance in "behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning . . . mental disorders are usually associated with significant distress or disability in social and occupational activities."[2] This definition of a mental disorder refers to daily activities and not psychological responses to particular events (like the death of a loved one) or certain behaviors (like sexual offenses).[3] Mental illnesses may last for varying periods of time. Some last for a short period and then disappear; others are constantly ongoing. Courts have also recognized that immediate psychological trauma (a sudden event that causes a lot of stress) also deserves mental health treatment,[4] generally "serious" mental illnesses last longer, affect behavior, and have noticeable symptoms or risks.

In order to prove that you have a mental disorder, most state laws require you show that you have (1) a behavioral or psychological problem; (2) a symptom as a result of the problem; and (3) a diagnosis of mental illness by a professional, such as a doctor.[5] For instance, in New York, "mental illness" means having "a mental disease or mental condition which is [expressed as] … a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person with the illness afflicted

1. *See Mental Health Conditions*, NATIONAL ALLIANCE ON MENTAL ILLNESS, http://www.nami.org/Learn-More/Mental-Health-Conditions (last visited Feb. 1, 2020).

2. Awais Aftab, *Mental Disorders and Naturalism*, 11 AM. J. OF PSYCHIATRY RESIDENTS' J. 10, 11 (2016).

3. *See*, *e.g.*, Kansas v. Crane, 534 U.S. 407, 412–413, 122 S. Ct. 867, 870–871, 151 L. Ed. 2d 856, 862–853 (2002) (requiring the state to distinguish dangerous sexual offenders with mental illnesses from ordinary criminals for civil commitment purposes); AM. PSYCHIATRIC ASS'N, HIGHLIGHTS OF CHANGES FROM DSM-IV-TR TO DSM-5 18 (2013), available at: https://psychiatry.msu.edu/_files/docs/Changes-From-DSM-IV-TR-to-DSM-5.pdf (last visited Oct. 4, 2020) (explaining that in the DSM-5, paraphilias (intense sexual arousal to objects, children, or nonconsenting adults) are not automatically considered mental disorders).

4. *See* Carnell v. Grimm, 872 F. Supp. 746, 756 (D. Haw. 1994) (holding that "an officer who has reason to believe someone has been raped and then fails to seek medical *and psychological* treatment for the victim after taking her into custody manifests deliberate indifference to a serious medical need") (emphasis added), *appeal dismissed in part*, *aff'd in part*, 74 F.3d 977, 979 (9th Cir. 1996) (finding that the 8th Amendment prohibition of cruel and unusual punishment, which includes denying medical and psychological care, applies to pretrial detainees).

5. *See*, *e.g.*, Public Welfare & Related Activities, MINN. STAT. ANN. §253B.02(13) (2015) ("an organic disorder of the brain or a substantial psychiatric disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or to reason or understand that is manifested by instances of grossly disturbed behavior or faulty perceptions."); OHIO PUBLIC WELFARE ANN. § 5122.01(A) (Baldwin 2010) ("'Mental illness' means a substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life."); TEX. HEALTH & SAFETY CODE ANN. § 571.003(14) (Vernon 2012) ("[I]llness, disease, or condition, other than epilepsy, substance abuse or intellectual disability that: (A) substantially impairs a person's thought, perception of reality, emotional process, or judgment; or (B) grossly impairs behavior as demonstrated by recent disturbed behavior.").

requires care and treatment."[6] Like the APA approach, some state laws specifically exclude sexual offenses, substance abuse, and mental retardation from the definition of mental illness.[7]

(b) What the Law and This Chapter Mean by "Treatment"

The definition of "treatment" under the law generally includes three steps: (1) diagnosis (a finding by a doctor or mental health specialist that there is a mental illness), (2) intervention (a decision to treat the illness with therapy, drugs, or other care), and (3) planning (developing a method to relieve suffering or find a cure for their illness).[8]

A particular medical action is considered as "treatment" when it is medically necessary and whether it will substantially help or cure your medical condition. An action is medically necessary when it involves a serious medical need, which "could well result in the deprivation of life itself" if untreated.[9] The test to determine whether an incarcerated person should go to a mental health facility is not whether the person suffers from mental illness but instead whether that mental illness "requires care and treatment."[10]

The law assumes that doctors are the best people to make medical choices to treat mental illness. Therefore, whether something is an appropriate treatment is a decision that judges and lawmakers leave to medical professionals. Just because an incarcerated person or a judge prefers a particular course of action to treat mental illness does not mean it is a *necessary* course of treatment under the law.[11] In New York, the Commissioner of the Department of Correctional Services and the Commissioner of the Office of Mental Health (the head of the department that handles mental illness issues) are responsible for establishing treatment plans that can be done in correctional facilities rather than in hospitals. Although treatment plans need only satisfy what the Commissioner of the Department of Correctional Services "deem[s] appropriate" for the treatment of incarcerated people with mental illnesses, the law does require that "[i]nmates with serious mental illnesses shall receive therapy and programming in settings that are appropriate to their clinical (activities relating to the observation and treatment of patients) needs while maintaining the safety and security of the facility."[12] While adequate medical and health services must always be provided,[13] different states require different levels of psychiatric care.[14]

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6. N.Y. CORR. LAW § 400(6) (McKinney 2014). Additionally, the private settlement agreement in the case Disability Advocates, Inc. v. N.Y. State Office of Mental Health, No. 1:02-cv-04002 (S.D.N.Y. 2007) includes a definition of "serious mental illness" that provides a heightened level of care for prisoners in Special Housing Units and keeplock. The settlement requires that the heightened level of care take effect after several different programs and facilities, including a residential mental health unit, are established. After the settlement, New York passed a statute defining "serious mental illness" for prisoners who are in disciplinary segregated confinement in a way that closely resembles the settlement agreement's definition. Case profile is available at: https://www.clearinghouse.net/detail.php?id=5560 (last visited Feb. 2, 2020).The statute went into effect on July 1, 2011. *See* N.Y. CORR. LAW § 137(e) (McKinney 2014). The settlement agreement is available at https://www.clearinghouse.net/chDocs/public/PC-NY-0048-0002.pdf (last visited Feb 2, 2020).

7. *See*, *e.g.*, ALABAMA STAT. § 22-52-1.1(1) (2012) (stating that mental illness "excludes the primary diagnosis of epilepsy, mental retardation, substance abuse, including alcoholism, or a developmental disability").

8. 88 N.Y. Jur. 2d Public Welfare and Elder Assistance §24 (2014).

9. Estelle v. Gamble, 429 U.S. 97, 103, 97 S. Ct. 285, 290, 50 L. Ed. 2d 251, 259 (1976) (finding that an incarcerated person must rely on prison authorities to treat his medical needs, and in the worst case, failure to treat "may actually produce physical 'torture or a lingering death'"); Bowring v. Goodwin 551 F.2d 44, 47 (4th Cir. 1977) (finding that federal courts have required provision of treatment for serious medical needs and that "the failure or refusal to treat 'could well result in the deprivation of life itself'"); Fitzke v. Shappell, 468 F.2d 1072, 1076 fn. 5 (6th Cir. 1972) (quoting McCollum v. Mayfield, 130 F. Supp. 112, 115 (N.D. Cal. 1955)).

10. See, e.g., U.S. ex rel. Schuster v. Herold, 410 F.2d 1071, 1084 (2d Cir. 1969) (holding that, before a prisoner may be transferred to a mental health facility, it must be shown that he suffers from a mental disease that requires "care and treatment").

11. See Bowring v. Godwin, 551 F.2d 44, 47–48 (4th Cir. 1977) ("We disavow any attempt to second-guess the propriety or adequacy of a particular course of treatment."); see also Russell v. Sheffer, 528 F.2d 318, 318–319 (4th Cir. 1975) (stating that a prisoner must show that his medical mistreatment or the correctional facility's denial of medical treatment can be characterized as "cruel and unusual punishment" to bring a § 1983 claim).

12. N.Y. Correct. Law § 401 (McKinney 2014).

13. Estelle v. Gamble, 429 U.S. 97, 103–104, 97 S. Ct. 285, 290–291, 50 L. Ed. 2d 251, 259–260 (1976) (citing Spicer v. Williamson, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926)) ("It is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.").

14. See, e.g., Ariz. Rev. Stat. Ann. § 31-201.01(B) (2002) ("In addition to the medical and health services to

You do not have a right to decide your treatment plan,[15] however, you do have access to the following rights. You have the right to mental health care that meets the standards of the medical profession.[16] Next, you have the right to information about your treatment's risks and alternatives. Finally, you have a limited right to refuse treatment (see Part C of this Chapter). Once a decision to treat your mental illness has been made, you cannot specify which treatment alternatives (such as medication, counseling, or therapy) you should receive.[17] You may, however, be able to protect yourself against unfair medical treatment by arguing that a certain treatment is not necessary.

2. Understanding Treatment Facilities

There are three basic types of psychiatric care that are used to treat incarcerated people:[18]

(1) Acute (or crisis) care, which is twenty-four hour care for incarcerated people whose symptoms of psychosis (losing contact with reality), suicide risk, or dangerousness justify intensive care and forced medication;
(2) Sub-acute (or intermediate) care, usually outside of a hospital for incarcerated people suffering from severe and chronic conditions that require intensive care management, psychosocial interventions (treatment that is both social and psychological), crisis management, and psychopharmacology (drugs that affect the mind) in a safe and contained environment; and
(3) Outpatient care is for incarcerated people who can function relatively normally. It can—but does not have to—include medication, psychotherapy (meeting with a psychiatrist or other trained mental health professional), supportive counseling, and other interventions.

The most common type of care that incarcerated people receive is outpatient care. If you require more intensive care, you may be treated in a hospital within the prison system or at an off-site medical facility set up specifically to treat people with mental illnesses. The severity of mental illness, the types and availability of facilities, and the doctor's medical diagnosis will all determine where, of the three facilities, you will receive treatment.

The Division of Forensic Services at the New York State Office of Mental Health ("OMH") runs the New York psychiatric facility system. There are four forensic psychiatric care centers, which are medical facilities that provide examinations for and treat incarcerated people with mental health issues. One of them, Central New York Psychiatric Center, is both a regional forensic unit and the inpatient psychiatric hospital that services all incarcerated people in the state prisons and operates the many "satellite mental health units" and "mental health units" located within New York State prisons.[19] You should note that administrative segregation, such as solitary confinement or

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be provided pursuant to [this statute], the director may . . . provide to prisoners psychiatric care and treatment.") (emphasis added).

15. See Barrett v. Coplan, 292 F. Supp. 2d 281, 285–286 (D.N.H. 2003) (noting that the right to adequate medical care "does not mean that an inmate is entitled to the care of his or her choice, simply that the care must meet minimal standards of adequacy"); see also Estelle v. Gamble, 429 U.S. 97, 107–108, 97 S. Ct. 285, 292–293, 50 L. Ed. 2d 251, 262 (1976) (rejecting a prisoner's claim of mistreatment based on the number of care options that were not pursued).

16. Barrett v. Coplan, 292 F. Supp. 2d 281, 285 (D.N.H. 2003) (noting that adequate medical treatment requires qualified medical personnel to provide services that meet "prudent professional standards in the community" and that meet the particular needs of prisoners).

17. *See, e.g.*, Barrett v. Coplan, 292 F. Supp. 2d 281, 285–286 (D.N.H. 2003) (noting the right to adequate medical care "does not mean that an inmate is entitled to the care of his or her choice, simply that the care must meet minimal standards of adequacy"); *see also* Estelle v. Gamble, 429 U.S. 97, 107, 97 S. Ct. 285, 292–293, 50 L. Ed. 2d 251, 262 (1976) (rejecting a prisoner's claim of mistreatment based on the fact that a number of care options were not pursued).

18. *Ill Equipped: U.S. Prisons and Offenders with Mental Illness*, HUMAN RIGHTS WATCH 128 (2003). Available at: https://www.hrw.org/reports/2003/usa1003/usa1003.pdf (last visited Feb. 1, 2020).

19. The New York Office of Mental Health's forensic facilities include Mid-Hudson Forensic Psychiatric Center, Kirby Forensic Psychiatric Center, Rochester Regional Forensic Unit located within Rochester Psychiatric Center, and Central New York Psychiatric Center and Northeast Regional Forensic Unit located within Central New York Psychiatric Center. Within State correctional facilities, OMH operates 29 satellite and mental health units. *New York State Office of Mental Health Division of Forensic Services*, NEW YORK STATE OFFICE OF MENTAL HEALTH, http://www.omh.ny.gov/omhweb/forensic/bfs.htm (last visited Feb. 2, 2020).

disciplinary segregated confinement in "special housing units" ("SHUs") or "keeplock," is not a treatment facility. Many mental health experts, advocates, and clinicians believe that those forms of isolated confinement make mental health conditions worse, and courts also recognize the harm they cause. For more information on isolation and mental health, see Part D(1) of this Chapter.

(a) Treatment Facility Admissions in New York

In New York, whenever the doctor of a prison, jail, or other correctional institution believes you need hospitalization because of a mental illness, the doctor must tell the facility superintendent, who will then submit a commitment order to a judge to request that you be taken to a hospital. The judge will require two other doctors to examine you.[20] In New York City, the two doctors may examine you in your prison or you may be transferred to a county hospital for the examination.[21] First, the doctors have to consider whether options other than taking you to a hospital would provide appropriate treatment for your mental illness..[22] If not, the doctors must both agree that you have a mental illness and need care or treatment in order for you to be hospitalized.[23] If you were previously treated by a doctor for mental illness, then the doctors performing your evaluation while you are currently incarcerated must try to contact your previous doctor.[24]

If the two doctors agree that you need to be hospitalized to treat a mental illness, the prison superintendent will apply to a judge for permission to commit you.[25] You should receive notice of any court order and have a chance to challenge it.[26] In addition, your wife, husband, father, mother, or nearest relative must also receive notice of the decision to commit you. If you have no known relatives within the state, that notice must be given to any known friend of yours.[27] If you decide to challenge the decision, you have a right to know the hospital's placement procedure. You also have the right to a lawyer, a hearing, an independent medical opinion, and judicial review including a jury trial.[28] However, you do not have a right to a hearing in an emergency, during which two doctors agree that your mental illness is likely to result in serious immediate harm to you or to other incarcerated people.[29] In that case, you are still entitled to notice, a lawyer, an independent medical opinion, a hearing, and a jury trial, but only *after* you arrive at a hospital.[30]

B. Your Right to Receive Treatment

This Part explains two doctrines (that is, rules) that relate to your right to psychiatric medical care. Section 1 of this Part discusses whether the prison must provide psychiatric care, and how much care the prison must provide. Section 1 also mentions special considerations for incarcerated people with substance-related disorders and what medical treatment they should receive. Section 2 addresses your rights if psychiatric medical care is delayed or denied.

1. What to Do if the Psychiatric Medical Care You Receive Is Inadequate

This Subsection discusses situations in which an incarcerated person claims that the medical care he received is inadequate. You have a right to adequate medical care and treatment. Under the Eighth Amendment of the Constitution,[31] the federal government has an obligation to provide medical care to

20. N.Y. CORR. LAW § 402(1) (McKinney 2014).
21. N.Y. CORR. LAW § 402(1) (McKinney 2014).
22. N.Y. CORR. LAW § 402(1) (McKinney 2014).
23. *See generally* N.Y. MENTAL HYG. LAW § 9.27(a) (McKinney 2020); *see also* U.S. *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1084 (2d Cir. 1969) (suggesting that to be found in need of care and treatment through inpatient hospitalization, you must be found, after proper procedures, to be so mentally ill that you pose a danger to yourself or others).
24. N.Y. CORR. LAW § 402(1) (McKinney 2014).
25. N.Y. CORR. LAW § 402(1), (3) (McKinney 2014).
26. N.Y. CORR. LAW § 402(3) (McKinney 2014).
27. N.Y. CORR. LAW § 402(3) (McKinney 2014).
28. N.Y. CORR. LAW § 402(3) (McKinney 2014).
29. N.Y. CORR. LAW § 402(9) (McKinney 2014).
30. N.Y. CORR. LAW § 402(9) (McKinney 2014).
31. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*.") (emphasis added).

incarcerated people.[32] This right includes the regular medical care that is necessary to maintain your health and safety. Many states also have state laws requiring prisons to provide medical care to incarcerated people.[33] For more information about this general right, see Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care."

(a) Your Right to Adequate Psychiatric Care

The Eighth Amendment requires that mental health care of incarcerated people be governed in the same way as physical health care. Most federal circuits have held the right to adequate medical care includes any *psychiatric* care that is necessary to maintain incarcerated people's health and safety.[34] In *Bowring v. Godwin*, the Fourth Circuit Court of Appeals included treatment of mental illnesses as part of the right to medical care. The court noted that there is "no underlying distinction between the right [of an incarcerated person] to medical care for physical ills and its psychological or psychiatric counterpart."[35]

The *Bowring* court developed a three-part test to determine whether an incarcerated person has a right to psychiatric care. Under the test, an incarcerated person who suffers from a mental illness is likely to have a right to mental health treatment if a health care provider decides that:

(1) the incarcerated person has the symptoms of a serious disease or injury;
(2) that disease or injury can be cured, or can be substantially improved; and
(3) the likelihood of harm to the incarcerated person (in terms of safety and health, including mental health) is substantial if treatment is delayed or denied.[36]

However, the right to psychiatric treatment is still limited to reasonable medical costs and a reasonable length of time for treatment.[37] Therefore, psychiatric treatment will be given to the incarcerated person on the basis of what is necessary, not what is desirable.[38]

You should note that the *Bowring* test is the law only in the Fourth Circuit, which only includes Maryland, North Carolina, South Carolina, Virginia, and West Virginia. Therefore, the only courts that *must* apply the *Bowring* test are federal courts in Maryland, North Carolina, South Carolina, Virginia, and West Virginia. However, other courts are likely to consider using the *Bowring* test in

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32. Estelle v. Gamble, 429 U.S. 97, 103–104, 97 S. Ct. 285, 290–291, 50 L. Ed. 2d 251, 259–260 (1976) (holding that the 8th Amendment prohibits the denial of needed medical care).

33. *See*, *e.g.*, ARIZ. REV. STAT. ANN. § 31-201.01(D) (West 2002 & Supp. 2012); GA. CODE ANN. § 42-5-2 (2009).

34. *See* Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977) (finding that a prisoner is entitled to psychiatric treatment where a doctor has concluded that the prisoner has a serious disease that might be curable, and where a delay in treatment might cause potential harm); Clark-Murphy v. Foreback, 439 F.3d 280, 292 (6th Cir. 2006) (stating that a prisoner's right to mental health care, not just physical medical care, is clearly established under the 8th Amendment); Riddle v. Mondragon, 83 F.3d 1197, 1202 (10th Cir. 1996) ("The states have a constitutional duty to provide necessary medical care to their inmates, including psychological or psychiatric care."); Woodall v. Foti, 648 F.2d 268, 272 (5th Cir. 1981) ("In balancing the needs of the prisoner against the burden on the penal system, the district court should be mindful that the essential test is one of medical necessity and not one simply of desirability."); Doty v. Cnty. of Lassen, 37 F.3d 540, 546 (9th Cir. 1994) ("[W]e now hold that the requirements for mental health care are the same as those for physical health care needs."); Torraco v. Maloney, 923 F.2d 231, 234 (1st Cir. 1991) ("The extension of the Eighth Amendment's protection from physical health needs, as presented in Estelle [v. Gamble], to mental health needs is appropriate because, as courts have noted, there is no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart." (internal quotation marks omitted)); Langley v. Coughlin, 888 F.2d 252, 254 (2d Cir. 1989) ("We think it plain that from the legal standpoint psychiatric or mental health care is an integral part of medical care. It thus falls within the requirement of Estelle v. Gamble . . . that it must be provided to prisoners."); Gates v. Cook, 376 F.3d 323, 332, 343 (5th Cir. 2004) ("[M]ental health needs are no less serious than physical needs."); Inmates of Allegheny Cnty. Jail v. Pierce, 612 F.2d 754, 763 (3d Cir. 1979) (explaining that prisoners with serious mental illness have a right to adequate treatment, and that psychiatric or psychological treatment should be held to the same standard as medical treatment for physical ills).

35. Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977).

36. Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977).

37. Bowring v. Godwin, 551 F.2d 44, 47–48 (4th Cir. 1977) (stating that the right to treatment is limited by reasonable cost and time, and that the test is what is medically necessary, not what is "merely desirable"); *but see* Kosilek v. Maloney, 221 F. Supp. 2d 156, 161 (D. Mass. 2002) (noting that it is not permissible to deny a prisoner adequate medical care just because the treatment is costly).

38. Bowring v. Godwin, 551 F.2d 44, 47–48 (4th Cir. 1977).

similar cases,[39] especially because no court has issued a disagreeing opinion. So, you should still cite to *Bowring* even if you are not bringing a case in the Fourth Circuit, because the court in your circuit might find *Bowring* persuasive. For more information on what you may cite in your jurisdiction, see Chapter 2 of the *JLM*, "Introduction to Legal Research."

(b) Your Right to Treatment for Substance Abuse

The American Psychiatric Association incorporates in its definition of mental illness "substance-related disorders," as illnesses like substance use, abuse, and withdrawal.[40] The law, however, does not always consider such diseases as serious enough[41] to require prison authorities to provide medical care to treat the diseases.[42] However, many courts have found that incarcerated people have the right to treatment for substance abuse in certain circumstances. The sections below describe these situations.

(i) You Have No Right to Drug and Alcohol Rehabilitation in Prison

As a general rule, you have no right to rehabilitation while in prison.[43] Individual states or corrections departments may decide that rehabilitation is an important goal and may implement programs to achieve that aim, but the Constitution does not require them to do so because one application of this rule is that there is no right to narcotics or alcohol treatment programs in prison.[44] However, courts have at times ordered prisons to implement drug and alcohol treatment programs where the denial of these programs would otherwise lead to conditions that were so bad that they violated incarcerated people' rights to medical care. Incarcerated people often raise these issues successfully when filing broader claims about unconstitutional conditions of confinement.[45] Additionally, at least one court has found that incarcerated people should be "free to attempt

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39. *See* Riddle v. Mondragon, 83 F.3d 1197, 1202 (10th Cir. 1996) (citing the *Bowring* test).

40. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 481 (5th ed. 2013).

41. A prisoner having a "serious medical need" triggers an analysis under Estelle v. Gamble, 429 U.S. 97, 104–105, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976), which provides that deliberate indifference to that serious medical need violates the 8th Amendment's ban on cruel and unusual punishment. Cases like Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977), have extended this rule requiring treatment to the psychiatric context, but only where the prisoner has an illness that might be curable and where delay might cause substantial harm. For more information on your rights when necessary treatment has been denied or delayed, please see Part B(2) of this Chapter, "Denied or Delayed Treatment."

42. *See*, *e.g.*, Pace v. Fauver, 479 F. Supp. 456, 458–459 (D.N.J. 1979) ("The Court does not regard plaintiffs' desire to establish and operate an alcoholic rehabilitation program within . . . [p]rison as a serious medical need for purposes of Eighth Amendment and § 1983 analysis."), *aff'd*, 649 F.2d 860 (3d Cir. 1981). *But see Marshall v. United States*, 414 U.S. 417, 432 n.3, 94 S. Ct. 700, 709 n.3, 38 L. Ed. 2d 618, 629 n.3 (1974) (Marshall, J., dissenting) (citing Senate Report characterizing drug addiction as a disease); State v. Sevelin, 554 N.W.2d 521, 524, 204 Wis. 2d 127, 134 (Wis. Ct. App. 1996) ("The unambiguous meaning of 'medical care' includes treatment of all diseases. Alcoholism is a disease.").

43. Marshall v. United States, 414 U.S. 417, 421–422, 94 S. Ct. 700, 704, 38 L. Ed. 2d 618, 623 (1974) (explaining that there is no "fundamental right" to rehabilitation from narcotics addiction after conviction of a crime and confinement in a penal institution rather than in a civil facility); *see also* Hutto v. Finney, 437 U.S. 678, 686 n.8, 98 S. Ct. 2565, 2571 n.8, 57 L. Ed. 2d 522, 531 n.8 (1978) ("[T]he Constitution does not require that every aspect of prison discipline serve a rehabilitative purpose."); Grubbs v. Bradley, 552 F. Supp. 1052, 1124 (M.D. Tenn. 1982) (finding that a lack of rehabilitative programs does not violate the Constitution).

44. *See*, *e.g.*, Gibson v. Fed. Bureau of Prisons, 121 F. App'x 549, 551 (5th Cir. 2004) (holding that an incarcerated person does not have a protected liberty interest in participating in a drug treatment program); Abraham v. Danberg, 832 F. Supp. 2d 368, 375 (D. Del. 2011) ("Prisoners have no constitutional right to drug treatment or other rehabilitation."); Bullock v. McGinnis, 5 F. App'x 340, 342 (6th. Cir. 2001) ("[A] prisoner has no constitutional right to rehabilitation[.]"); Pace v. Fauver, 479 F. Supp. 456, 460 (D.N.J. 1979) (stating that prison authorities, not the court, should decide whether to provide alcoholism treatment to incarcerated people), *aff'd*, 649 F.2d 860 (3d Cir. 1981).

45. *See, e.g.*, Palmigiano v. Garrahy, 443 F. Supp. 956, 989 (D.R.I. 1977) (ordering prison to establish drug and alcohol treatment program conforming to public health standards); Alberti v. Sheriff of Harris Cnty., 406 F. Supp. 649, 677 (S.D. Tex. 1975) (requiring prison to establish treatment program for prisoners suffering from alcoholism and drug abuse in consultation with trained specialist); Barnes v. Gov't of Virgin Islands, 415 F. Supp. 1218, 1235, 13 V.I. 122, 158 (D.V.I. 1976) (ordering prison to introduce drug and alcohol rehabilitation program); *see also* Laaman v. Helgemoe, 437 F. Supp. 269, 316–317 (D.N.H. 1977) ("The absence of an affirmative program of training and rehabilitation may have constitutional significance where in the absence of such a program conditions and practices exist which actually militate against reform and rehabilitation" (internal citations ommitted).

rehabilitation or the cultivation of new socially acceptable and useful skills and habits."[46] It might be possible to argue that failure to receive drug treatment violates that freedom.

There is also no right to methadone or to the establishment of methadone maintenance programs in prison.[47] On the other hand, a few courts have found that if you are already participating in a drug treatment program, then you *do* have the right to continue drug treatment.[48] This right primarily protects you pretrial.[49] Pretrial detainees are people who have not been found guilty but still must remain in jail because they cannot afford to post bail or they have been determined to be a flight risk or danger to the community. These individuals cannot be punished beyond detention.[50] Courts view forced rehabilitation as a punishment. They also view the pain suffered when methadone is discontinued as a punishment. For more information on your right to treatment as a pretrial detainee, please see Part E(1) of this Chapter.

(ii) Your Right to Avoid Deterioration (Getting More Sick) While Incarcerated

Many courts have held that even if you do not have an absolute constitutional right to treatment for certain illnesses like substance abuse; you do have a right to avoid having your illness get worse while you are in prison.[51] Some courts have not found a right that protect incarcerated people getting sicker while incarcerated, several have at least found that where conditions are "so bad that serious physical or psychological deterioration is inevitable," you can state an Eighth Amendment claim of cruel and unusual punishment.[52]

So, if your drug or alcohol addiction is likely to worsen your condition, you might be able to make a claim that failure to receive adequate treatment violates your right to avoid getting sicker while in prison. Even though different federal circuits have established different rules as to the extent of that right, at a minimum, if your deterioration results from the State's intent to cause harm,[53] you can claim the State violated your rights.

(iii) Your Right to Care for Withdrawal from Drugs and Alcohol

Another exception to the general rule that prisons do not need to provide medical care for substance-related disorders is that prisons *do* need to provide care for withdrawal, which can be excessively painful and dangerous, and is therefore considered a serious medical condition.[54] Because

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46. Laaman v. Helgemoe, 437 F. Supp. 269, 316–317 (D.N.H 1977) (explaining that the absence of training and rehabilitative programs may have significance where their absence causes significant deterioration).

47. *See, e.g.*, Norris v. Frame, 585 F.2d 1183, 1188 (3d Cir. 1978) (overturned on other grounds) ("There is no constitutional right to methadone …"); Hines v. Anderson, 439 F. Supp. 12, 17 (D. Minn. 1977) (stating that even though prisons cannot take away prescriptions without doctor's approval, prisons are not required to administer methadone as part of a maintenance program).

48. *See* Norris v. Frame, 585 F.2d 1183, 1189 (3d Cir. 1978) (stating that interference with pretrial detainee's status as recipient of methadone infringed his rights); Cudnik v. Kreiger, 392 F. Supp. 305, 312–313 (N.D. Ohio 1974) (stating that it violates fundamental due process rights to deny pretrial detainees methadone that they are already receiving as part of drug treatment).

49. Cudnik v. Kreiger, 392 F. Supp. 305, 313 (N.D. Ohio 1974) (stating that it violates due process to deny pretrial detainees methadone that they are already receiving as part of drug treatment).

50. *See* Cudnik v. Kreiger, 392 F. Supp. 305, 311 (N.D. Ohio 1974) (explaining that since pretrial detainees are considered innocent in the eyes of the law, they should be entitled to all liberties they would have were they not imprisoned, except that which is necessarily lost through detention).

51. Battle v. Anderson, 564 F.2d 388, 403 (10th Cir. 1977) ("We believe that while an inmate does not have a federal constitutional right to rehabilitation, he is entitled to be confined in an environment which does not result in his degeneration or which threatens his mental and physical well-being."); Ramos v. Lamm, 639 F.2d 559, 566 (10th Cir. 1980) (extending the right to avoid deterioration established in *Battle* to medical care context); Laaman v. Helgemoe, 437 F. Supp. 269, 316 (D.N.H 1977) (holding prisoners have an interest in avoiding physical and mental deterioration). *But see* Reddin v. Israel, 561 F.2d 715, 718 (7th Cir. 1977) ("[T]he state need not avoid conduct which may result in detrimental psychological effects unless the state acts in a torturous or barbarous manner or with a wanton intent to inflict pain" (internal citation omitted)).

52. Grubbs v. Bradley, 552 F. Supp. 1052, 1124 (M.D. Tenn. 1982).

53. *See* Reddin v. Israel, 561 F.2d 715, 718 (7th Cir. 1977) ("[T]he state need not avoid conduct which may result in detrimental psychological effects unless the state acts in a torturous or barbarous manner or with a wanton intent to inflict pain.").

54. *See, e.g.*, Kelley v. Cnty. of Wayne, 325 F. Supp. 2d 788, 791 (E.D. Mich. 2004) ("Heroin withdrawal is

of the seriousness of withdrawal symptoms, you are entitled to treatment.[55] Most of the cases have come up in the context of pretrial detainees going through withdrawal just after arrest, but the courts have not explicitly limited the right to treatment to pretrial detainees. If a convicted incarcerated person experiences a serious medical need due to withdrawal then he should receive treatment.

2. What to do if Treatment is Denied or Delayed

This Subsection focuses on your rights when the treatment you need has been *deliberately* (purposely) denied or delayed.[56] Although courts do not like second-guessing doctors' decisions,[57] a prison official who denies or delays treatment knowing that you need that treatment might be violating your constitutional right to be free of "cruel and unusual punishment" under the Eighth Amendment.[58] A court that finds this deliberate denial or delay will step in to help you. Not every delay in medical care is a violation of the Constitution.

A prison official only violates the Eighth Amendment when two requirements are met.[59] The first requirement is that the denial of your medical care is "sufficiently serious." The second requirement is that the prison official must have acted with a culpable (bad) state of mind and ignored your health needs on purpose.[60] To meet this standard you must show that you have actually been deprived of adequate medical care, and that the lack of treatment has caused you harm, or will cause you harm in the future.[61] The second requirement for an Eighth Amendment violation is that the prison official acted with "deliberate indifference" to your medical or mental health needs.[62] These requirements are discussed in more detail below. If care has been denied, the court will look at whether "a reasonable doctor or patient would find [it] important and worthy of comment," whether the condition significantly affects your daily activities, and whether it causes "chronic and substantial pain."[63] In cases where treatment has been delayed or interrupted, the question of how serious the situation is focuses on the impact of the delay and not on the main medical condition alone.[64]

(a) You Must Satisfy the Deliberate Indifference Standard

The Supreme Court has decided that a prison official shows deliberate indifference when he "knows of and disregards an excessive risk to inmate health or safety."[65] For example, an

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a serious medical condition."); Morrison v. Washington County, 700 F.2d 678, 681 (11th Cir. 1983) (finding that *delirium tremens* is a severe form of alcohol withdrawal that should be monitored because of the risk of death).

55. *See, e.g.*, Pedraza v. Meyer, 919 F.2d 317, 319–320 (5th Cir. 1990) (finding that pretrial detainee who had not received treatment for his heroin withdrawal symptoms could have stated a claim of deliberate indifference to serious medical needs); Walker v. Fayette Cnty., 599 F.2d 573, 576 (3d Cir. 1979) (*per curiam*) (where pretrial detainee had informed jail that he was addicted to heroin, failure to treat him for withdrawal could show deliberate indifference).

56. *See*, *e.g.*, Pinon v. Wisconsin, 368 F. Supp. 608, 610 (E.D. Wis. 1973) (explaining that courts usually refuse to second-guess whether a prisoner's treatment is adequate, but that the situation is different where the prisoner alleges that the facility has completely denied him treatment). See Part B(3) of Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care," for more information on delayed or denied medical treatment.

57. *See*, *e.g.*, Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991) (finding prisoner's disagreement with medical treatment did not rise to the level of violating his rights); Smith v. Marcantonio, 910 F.2d 500, 502 (8th Cir. 1990) (granting doctor immunity where prisoner disagreed with the doctor-ordered treatment).

58. Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976) (citing Gregg v. Georgia, 428 U.S. 153, 173, 96 S. Ct. 2909, 2925, 49 L. Ed. 2d 859, 875 (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.").

59. *See* Farmer v. Brennan, 511 U.S. 825, 847, 114 S. Ct. 1970, 1984, 128 L. Ed. 2d 811, 832 (1994) ("[A] prison official may be held liable under the [8th] Amendment . . . only if he knows that inmates face a substantial risk of serious harm and disregards that risk . . . .").

60. Wilson v. Seiter, 501 U.S. 294, 298–299, 111 S. Ct. 2321, 2324–2325, 115 L. Ed. 2d. 271, 278–280 (1991).

61. Helling v. McKinney, 509 U.S. 25, 32–33, 113 S.Ct. 2475, 2480–2481,125 L.Ed.2d 22, 30–31 (1993) (holding that prisoners may complain about both current harm and "very likely" future harm).

62. Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251, 261 (1976) ("[A] prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.").

63. Chance v. Armstrong,143 F.3d 698, 702 (2d Cir. 1998).

64. Smith v. Carpenter, 316 F.3d 178, 186 (2d Cir.2003) ("[I]t's the particular risk of harm faced by a prisoner due to the challenged deprivation of care, rather than the severity of the prisoner's underlying medical condition . . . that is relevant for Eighth Amendment purposes.").

65. Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251, 261 (1976) ("[A] prisoner must

incarcerated person might submit evidence that prison officials "refused to treat him, ignored his complaints, [or] intentionally treated him incorrectly."[66]

A prison official can be "deliberately indifferent" by: (1) taking action (doing something), or (2) refusing to act (not doing something).[67] An example of an act showing deliberate indifference might be *knowingly* taking away an incarcerated person's asthma inhaler, knowing that it will really harm the incarcerated person. An example of a deliberate failure to act might be refusing to provide necessary medication[68] or refusing to treat a prisoner's cavity.[69]

Although the deliberate indifference standard traditionally applied to physical injury and medical care, it also applies to medically necessary treatment for mental illnesses.[70] Deliberate indifference to the serious mental health needs of a prisoner violates the Eighth Amendment just as much as deliberate indifference to physical medical needs.[71]

Many deliberate indifference claims about inadequate prison mental health care argue that the facility's mental health staff is too small to meet prisoners' needs or that the staff members are unqualified.[72] Several courts have found that the lack of an on-site psychiatrist in a large prison is

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allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.").

66. Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985) (refusing to hold for plaintiff where he did not present evidence of deliberate indifference).

67. Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251, 261 (1976) ("In order to state a cognizable claim [of deliberate indifference], a prisoner must allege *acts or omissions* sufficiently harmful to evidence deliberate indifference to serious medical needs.") (emphasis added).

68. McElligott v. Foley, 182 F.3d 1248, 1257 (11th Cir. 1999) (holding that a jury could find that the medication provided to a prisoner was so cursory as to amount to a deliberate indifference to the prisoners' serious medical needs); *see also* West v. Keve, 571 F.2d 158, 162 (3d Cir. 1978) (finding that a prisoner's post-operative treatment, which consisted of aspirin but no prescription-strength medication, may constitute deliberate indifference to his serious medical needs).

69. Harrison v. Barkley, 219 F.3d 132, 137 (2d Cir. 2000) (holding that prison officials' refusal to treat cavity in one of prisoner's teeth unless he consented to extraction of another tooth constituted deliberate indifference).

70. *See* Torraco v. Maloney, 923 F.2d 231, 234 (1st Cir. 1991) (reiterating that there is no underlying distinction between medical care for physical and psychological ills); Belcher v. City of Foley, 30 F.3d 1390, 1396 (11th Cir. 1994) (holding that the right to treatment "encompasses a right to psychiatric and mental health care").

71. *See*, *e.g.*, Gibson v. Cnty. of Washoe, 290 F.3d 1175, 1187 (9th Cir. 2002) ("Th[e] duty to provide medical care encompasses detainees' psychiatric needs."); Partridge v. Two Unknown Police Officers, 791 F.2d 1182, 1187 (5th Cir. 1986) ("A serious medical need may exist for psychological or psychiatric treatment, just as it may exist for physical ills.").

72. Greason v. Kemp, 891 F.2d 829, 837–840 (11th Cir. 1990) (stating that prison clinic director, prison system mental health director, and prison warden could be found deliberately indifferent based on their knowing toleration of a "clearly inadequate" mental health staff); Waldrop v. Evans, 871 F.2d 1030, 1036 (11th Cir. 1989) (finding that doctor's failure to refer a suicidal prisoner to a psychiatrist could constitute deliberate indifference); Cabrales v. Cnty. of L.A., 864 F.2d 1454, 1461 (9th Cir. 1988) (deliberate indifference was established where mental health staff could only spend "minutes per month" with disturbed prisoners), *vacated*, 490 U.S. 1087, 109 S. Ct. 2425, 104 L. Ed. 2d 982 (1989), *reinstated*, 886 F.2d 235, 236 (9th Cir. 1989); Inmates of Occoquan v. Barry, 717 F. Supp. 854, 868 (D.D.C. 1989) ("woefully short" mental health staffing supported a finding of unconstitutionality), *rev'd in part sub nom.* Brogsdale v. Barry, 926 F.2d 1184, 1191 (D.C. Cir. 1991) (finding qualified immunity protected mayor and correctional officials from liability, since they could not reasonably have known their conduct in permitting overcrowding violated prisoners' rights); Tillery v. Owens, 719 F. Supp. 1256, 1302–1303 (W.D. Pa. 1989) (stating that "gross staffing deficiencies" and lack of mental health training of nurses supported finding of deliberate indifference), *aff'd*, 907 F.2d 418 (3d Cir. 1990); Langley v. Coughlin, 715 F. Supp. 522, 539–540 (S.D.N.Y. 1989), *appeal dismissed*, 888 F.2d 252 (2d Cir. 1989) (use of untrained or unqualified personnel with inadequate supervision by psychiatrist supported constitutional claims); Inmates of Allegheny Cnty. Jail v. Peirce, 487 F. Supp. 638, 643 (W.D. Pa. 1980) (holding that systemic deficiencies in mental health staffing can be held to constitute deliberate indifference); Ruiz v. Estelle, 503 F. Supp. 1265, 1339 (S.D. Tex. 1980) (setting forth six components of a minimally adequate mental health treatment program), *aff'd in part and rev'd in part on other grounds*, 679 F.2d 1115 (5th Cir. 1982), *amended in part and vacated in part on other grounds*, 688 F.2d 266 (5th Cir. 1982).

unconstitutional.[73] The failure to train correctional staff to work with prisoners with mental illness can also be considered deliberate indifference.[74]

Courts have considered the following issues with prison mental health care to be "deliberately indifferent":

(1) the lack of or inadequate mental health screening on intake,[75]
(2) the failure to follow up with prisoners who have known or suspected mental disorders,[76]
(3) the failure to hospitalize prisoners whose conditions cannot adequately be treated in prison,[77]
(4) failing to follow professional standards in treatment,[78] and
(5) the failure to separate prisoners with severe mental illness from those without mental illness.[79]

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73. Balla v. Idaho State Bd. of Corr., 595 F. Supp. 1558, 1577 (D. Idaho 1984) ("There must be at least the equivalent of one full-time psychiatrist to provide treatment to those inmates capable of deriving benefit and to establish written procedures whereby inmates are analyzed and their progress monitored.").

74. Langley v. Coughlin, 709 F. Supp. 482, 483–485 (S.D.N.Y. 1989) (finding deliberate indifference where, among other reasons, officers lacked the training necessary to address issues of abuse, stress, and unsanitary living conditions); Kendrick v. Bland, 541 F. Supp. 21, 25–26 (W.D. Ky. 1981) (holding that incidents arising from failure to adequately train staff constituted cruel and unusual punishment); *see also* Sharpe v. City of Lewisburg, 677 F. Supp. 1362, 1367–1368 (M.D. Tenn. 1988) (upholding jury verdict based on city and county's failure to train police to deal with mentally disturbed individuals).

75. Ruiz v. Estelle, 503 F. Supp. 1265, 1339 (S.D. Tex. 1980), *aff'd in part and rev'd in part on other grounds*, 679 F.2d 1115 (5th Cir. 1982), *amended in part and vacated in part on other grounds*, 688 F.2d 266 (5th Cir. 1982); *see also* Inmates of Occoquan v. Barry, 717 F. Supp. 854, 868 (D.D.C. 1989), *rev'd in part sub nom.* Brogsdale v. Barry, 926 F.2d 1184, 1191 (D.C. Cir. 1991) (finding qualified immunity protected mayor and correctional officials from liability, since they could not reasonably have known their conduct in permitting overcrowding violated prisoners' rights); Balla v. Idaho State Bd. of Corr., 595 F. Supp. 1558, 1577 (D. Idaho 1984) (adopting the Ruiz v. Estelle elements of minimally adequate care, which include screening on intake); Inmates of Allegheny Cnty. Jail v. Peirce, 487 F. Supp. 638, 642–644 (W.D. Pa. 1980); Pugh v. Locke, 406 F. Supp. 318, 324 (M.D. Ala. 1976), *aff'd in part and modified sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part sub nom.* Alabama v. Pugh, 438 U.S. 781, 98 S. Ct. 3057, 57 L. Ed. 2d 1114 (1978).

76. Clark-Murphy v. Foreback, 439 F.3d 280, 289–292 (6th Cir. 2006) (holding certain staff members were not entitled to qualified immunity for failing to get psychiatric assistance for an obviously psychotic prisoner); *see also* Terry *ex rel.* Terry v. Hill, 232 F. Supp. 2d 934, 943–944 (E.D. Ark. 2002) (holding lengthy delays in transferring detainees with mental illness to mental hospital were unconstitutional); Arnold *ex rel.* H.B. v. Lewis, 803 F. Supp. 246, 257 (D. Ariz. 1992) (finding 8th Amendment violation in part because of the lack of an adequate system for referring prisoners with behavioral problems to psychiatric staff).

77. Arnold v. Lewis, 803 F. Supp. 246, 257–258 (D. Ariz. 1992) (holding that prison officials' actions constituted deliberate indifference to serious medical needs which violated the 8th Amendment).

78. Smith v. Jenkins, 919 F.2d 90, 93 (8th Cir. 1990) (holding that care which "so deviated from professional standards that it amounted to deliberate indifference" would violate the Constitution); *see also* Greason v. Kemp, 891 F.2d 829, 835 (11th Cir. 1990) ("grossly inadequate psychiatric care" can be deliberate indifference); Waldrop v. Evans, 871 F.2d 1030, 1033–1035 (11th Cir. 1989) (finding that "grossly incompetent or inadequate care"—here, that prisoner's medication was discontinued abruptly and without reason—can constitute deliberate indifference); Langley v. Coughlin, 715 F. Supp. 522, 540–541 (S.D.N.Y. 1989) (stating that "consistent and repeated failures … over an extended period of time" could establish deliberate indifference).

79. Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556, 560–561 (1st Cir. 1988) (holding that transferring a prisoner with mental illness to general population in a crowded jail with no psychiatric facilities constituted deliberate indifference); *see also* Inmates of Occoquan v. Barry, 717 F. Supp. 854, 868 (D.D.C. 1989) (stating that prisoners with mental health problems must be placed in a separate facility and not in the administrative/punitive segregation area), *rev'd in part sub nom.* Brogsdale v. Barry, 926 F.2d 1184, 1191 (D.C. Cir. 1991) (finding qualified immunity protected mayor and correctional officials from liability); Langley v. Coughlin, 709 F. Supp. 482, 484–485 (S.D.N.Y. 1989) (placement of prisoners with mental illness in punitive segregation resulted in conditions that might violate the 8th Amendment), *appeal dismissed*, 888 F.2d 252 (2d Cir. 1989); Tillery v. Owens, 719 F. Supp. 1256, 1303–1304 (W.D. Pa. 1989) (holding that the Constitution requires separate unit for those with severe mental illness, i.e., those who will not take their medication regularly, maintain normal hygienic practices, accept dietary restrictions, or report symptoms of illness), *aff'd*, 907 F.2d 418 (3d Cir. 1990); Finney v. Mabry, 534 F. Supp. 1026, 1036–1037 (E.D. Ark. 1982) (finding that the Constitution requires separate facility for the "most severely mentally disturbed" prisoners); Inmates of Allegheny Cty. Jail v. Peirce, 487 F. Supp. 638, 644 (W.D. Pa. 1980) (requiring that jail must establish a separate area for prisoners who "are seriously disturbed and require observation, protection, or restricted confinement"); *see also* Morales Feliciano v. Hernandez Colon, 697 F. Supp. 37, 48 (D.P.R. 1988) (stating that prisoners with mental illness may not be housed in a jail for more than 24 hours), *aff'd on other grounds sub nom.* Morales-Feliciano v. Parole Bd. of P.R., 887 F.2d 1 (1st Cir. 1989); Delgado v. Cady, 576 F. Supp. 1446, 1452, 1456 (E.D. Wis. 1983) (upholding the housing of psychotic prisoners in segregation unit and finding unconstitutional the coerced double celling of suicidal prisoners with other prisoners: "[I]t is cruel and unusual punishment to *force* an inmate to share a cell with a suicidal person solely to act as a prophylactic agent. It is the duty of the staff and not the inmates to provide

Mixing incarcerated people with mental illness with those who do not have mental illnesses might violate the constitutional rights of both groups.[80] Courts have also held that housing incarcerated people with mental illness under conditions of extreme isolation is unconstitutional.[81] However, for this claim, some courts may ask you to show that prison officials *knew* about the risk that isolation would harm your mental health. Another common violation is stopping psychiatric medications without reason, often with terrible results.[82]

In a landmark decision in 2011, *Brown v. Plata*, the Supreme Court held that California prisons provided inadequate mental health care, which violated the Eighth Amendment.[83] However, the Supreme Court did not say whether any *particular* delay or lack of medical treatment would itself violate the Constitution.[84] Instead, the Court looked at the combination of problems that put incarcerated people at risk of "substantial risk of serious harm."[85] The elements considered by the Court included similar factors as those mentioned above, such as not enough staff, not enough space for the staff to perform their jobs, delays in treatment, and "unsafe and unsanitary living conditions," which prevent effective delivery of medical and mental health care.[86]

It is important to remember that the "deliberate indifference" standard applies to a *significant denial or delay*[87] of adequate medical care. If you feel that you have been denied mental health treatment, or if you feel that it has been unnecessarily delayed, and you wish to claim deliberate indifference, you must:

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surveillance over suicidal inmates.").

80. DeMallory v. Cullen, 855 F.2d 442, 444–446 (7th Cir. 1988) (finding the allegation of an incarcerated people without mental illness that he was knowingly housed in a high-security unit with prisoners with mental illness, where those mentally ill prisoners caused filthy and dangerous conditions, stated an 8th Amendment claim against prison officials); Nolley v. Cty. of Erie, 776 F. Supp. 715, 738 (W.D.N.Y. 1991) (finding that the automatic segregation of an HIV-positive prisoner with prisoners with mental illness violated the prisoner's due process rights because "the stigma associated with being involuntarily placed in [the segregated ward, which was] known to house inmates who were ... psychologically unstable [in addition to HIV-positive] … could have engendered serious adverse consequences for her" and, therefore, her confinement "was qualitatively different from the punishment normally suffered by a person convicted of a crime"), *rev'd in part on other grounds*, 798 F. Supp. 123 (W.D.N.Y. 1992); Tillery v. Owens, 719 F. Supp. 1256, 1303 (W.D. Pa. 1989) (citing increased tension for prisoners without mental illness and danger of retaliation against those with mental illness), *aff'd*, 907 F.2d 418 (3d Cir. 1990); Langley v. Coughlin, 709 F. Supp. 482, 484–485 (S.D.N.Y. 1989), *appeal dismissed*, 888 F.2d 252 (2d Cir. 1989); Langley v. Coughlin, 715 F. Supp. 522, 543–544 (S.D.N.Y. 1988); *see* Hassine v. Jeffes, 846 F.2d 169, 178 n.5 (3d Cir. 1988) (holding prisoners could seek relief from the consequences of other prisoners' failure to receive adequate mental health services).

81. Jones'El v. Berge, 164 F. Supp. 2d 1096, 1125–1126 (W.D. Wis. 2001) (granting preliminary injunction requiring removal of prisoners with serious mental illness from "supermax" prison, where inmates spend all but four hours per week in their cells); Madrid v. Gomez, 889 F. Supp. 1146, 1265–1266 (N.D. Cal. 1995) (holding keeping prisoners with mental illness or those at a high risk of suffering injury to mental health in Pelican Bay isolation unit unconstitutional), *rev'd in part on other grounds*, 190 F.3d 990 (9th Cir. 1999). *But see* Scarver v. Litscher, 434 F.3d 972, 976–977 (7th Cir. 2006) (holding that prison officials who were not shown to have known that keeping a psychotic prisoner under conditions of extreme isolation and heat would aggravate his mental illness could not be found deliberately indifferent).

82. *See* Greason v. Kemp, 891 F.2d 829, 831–833 (11th Cir. 1990) (holding the law protects incarcerated people from deliberate indifference to their psychiatric needs in case in which prisoner killed himself); *see also* Waldrop v. Evans, 871 F.2d 1030, 1032 (11th Cir. 1989) (holding there was a factual issue as to whether prison psychiatrist acted with deliberate indifference by withholding depression medication where prisoner blinded and castrated himself); Wakefield v. Thompson, 177 F.3d 1160, 1164 (9th Cir. 1999) (holding 8th Amendment requires prison officials to provide prisoners with mental illness with a supply of medication upon release). *But see* Campbell v. Sikes, 169 F.3d 1353, 1367–1368 (11th Cir. 1999) (holding discontinuation of medication by doctor who misdiagnosed a prisoner, having not obtained her medical records but having read a summary, was not deliberate indifference).

83. Brown v. Plata, 563 U.S. 493, 543–544, 131 S. Ct. 1910, 1947, 179 L. Ed. 2d 969, 1007–1008 (2011) (holding California's medical and mental health care fell below standard of decency required by 8th Amendment and that no remedy could be achieved without a reduction in overcrowding).

84. Brown v. Plata, 563 U.S. 493, 494, 131 S. Ct. 1910, 1918, 179 L. Ed. 2d 969, 976 (2011) (holding California had violated 8th Amendment with respect to entire class of mentally ill prisoners in California and entire class of California prisoners with serious medical conditions).

85. Brown v. Plata, 563 U.S. 493, 551, 131 S. Ct. 1910, 1951, 179 L. Ed. 2d 969, 1012 (2011).

86. Brown v. Plata, 563 U.S. 493, 495, 131 S. Ct. 1910 at 1919, 179 L. Ed. 2d 969, 978 (2011).

87. *See*, *e.g.*, Monmouth Cty. Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 346–347 (3d Cir. 1987) (holding that prison officials are deliberately indifferent if they delay care "in order to make [you] suffer," or if they "erect arbitrary and burdensome procedures that result in interminable delays" to care) (internal citations omitted).

(1) state facts that allege a serious medical need for which medical care has not been provided; and
(2) claim that a prison official must have been aware of the need for medical care, or at least aware of facts which might have led the official to believe there was a need for medical care.[88]

(i) You Must Show Serious Medical Need

The first part of your deliberate indifference claim must include facts that show you had a serious medical need and did not receive treatment. A medical need is "serious" when there is a large risk that you will suffer serious harm without adequate treatment.[89] Courts have also found a need diagnosed as requiring treatment or a need that is so obvious a non-doctor could easily recognize it to be a "serious medical need."[90] For example, where a prisoner has attempted suicide, the court has found a serious medical need.[91]

(ii) You Must Show Actual Knowledge of Your Serious Medical Need

For the second part of your deliberate indifference claim, you must show that prison officials *actually knew* you needed mental health care but still did not treat you.[92] In *Farmer v. Brennan*, the Supreme Court explained a prison official "knows" of a risk when he is not only aware of facts that would lead him to conclude that an incarcerated person faces a substantial risk of serious harm, but also actually comes to that conclusion.[93] In other words, this part of the deliberate indifference test is subjective (from the point of view of that particular prison official); he must actually believe you will suffer some serious harm before a court will find he had "knowledge" of the risk.[94] But, if the risk is *extremely* obvious, a jury can assume the prison official knew of the risk. For example, the *Farmer* Court noted that if a plaintiff shows the risk of prisoner attacks was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it," that evidence could be enough to show actual knowledge of the risk.[95]

(c) What *Does Not* Count as Deliberate Indifference?

Courts will refuse to find deliberate indifference in some situations. The deliberate indifference standard is meant to deal with "unnecessary and wanton infliction of pain."[96] Acts or failures to act that are not on purpose, or where the prison officials had no reason to know you might suffer serious

88. Farmer v. Brennan, 511 U.S. 825, 845–846, 114 S. Ct. 1970, 1983–1984, 128 L. Ed. 2d 811, 830–831 (1994).
89. Harrison v. Barkley, 219 F.3d 132, 136–137 (2d Cir. 2000) (holding that prison officials are deliberately indifferent when they refuse to treat a cavity in a prisoner's tooth unless the prisoner consents to the extraction of another tooth which he wishes to keep).
90. *See*, *e.g.*, Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987)
91. *See, e.g.*, Perez v. Oakland Cty., 466 F.3d 416, 423–425 (6th Cir. 2006) (finding that the prisoner's suicide attempts raised a genuine issue as to whether the treating doctor had been deliberately indifferent to a serious medical need); *see also* Sanville v. McCaughtry, 266 F.3d 724, 733 (7th Cir. 2001) (holding that the "serious need" element was met where the prisoner suffered from a mental illness that led him to commit suicide, and finding that mental illness more generally poses a serious medical need).
92. Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) ("[A] prison official cannot be found liable under the [8th] Amendment . . . unless the official knows of and disregards an excessive risk to inmate health or safety.").
93. Farmer v. Brennan, 511 U.S. 825, 838, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) ("[A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.").
94. 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.").
95. Farmer v. Brennan, 511 U.S. 825, 842, 114 S. Ct. 1970, 1981, 128 L. Ed. 2d 811, 829 (1994) ("[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.").
96. Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976) (quoting Gregg v. Georgia, 428 U.S. 153, 173, 96 S. Ct. 2909, 2925, 49 L. Ed. 2d 859, 875 (1976)).

harm, will not satisfy the standard.[97] A complaint claiming inadequate psychiatric care because officials did not provide the treatment you would have personally chosen will not meet the deliberate indifference standard.[98] This is because prison officials have leeway to decide what treatment is adequate for a serious medical need. Courts will not find deliberate indifference when prison officials were merely negligent,[99] made a mistake, or had a difference of opinion regarding adequate medical care.[100]

Similarly, a complaint based on malpractice (improper or negligent treatment by a doctor) or misdiagnosis (a medical mistake) will not meet the high deliberate indifference standard.[101] So, "a complaint that a [doctor] has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment."[102] You may instead be able to file a medical malpractice claim for negligence. See *JLM*, Chapter 17, "The State's Duty to Protect You and Your Property: Tort Actions," for more information about negligence and how to file a tort claim.

(d) How to Bring a Deliberate Indifference Claim Under Section 1983

If you think your case meets the legal standard as described above, you may bring a claim of deliberate indifference to your personal health and wellbeing under 42 U.S.C. § 1983 ("Section 1983"). You can use Section 1983 to sue cities and local governments for constitutional violations including, for example, the government body in charge of the institution where the violation took place.[103] For detailed information on bringing a claim under Section 1983, please read Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law." If you plan to file your suit in federal court, you should also read Chapter 14 of the *JLM*, "The Prison Litigation Reform Act."

You can also use Section 1983 to challenge inadequate prison medical care under the Eighth Amendment.[104] To prove inadequate care, you must show: (1) you have a mental health need that is serious enough that denial of treatment violates the Constitution; and (2) the prison was "deliberately indifferent" to this serious mental health need.[105] You must show the policy or custom at the prison directly caused the constitutional violation.

When the complaint is for inadequate mental health care, you should keep a few things in mind. First, if you believe you suffer from a mental illness and want medical treatment, you should tell prison officials. If you are afraid you will hurt yourself or other people, you should tell prison officials that too. Prison officials can only be held responsible under the deliberate indifference standard if they

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97. Estelle v. Gamble, 429 U.S. 97, 105, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976) ("An accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain.").

98. *See* United States v. DeCologero, 821 F.2d 39, 42 (1st Cir. 1987) ("[T]hough it is plain that an inmate deserves *adequate* medical care, he cannot insist that his institutional host provide him with the most sophisticated care that money can buy.").

99. Farmer v. Brennan, 511 U.S. 825, 835, 114 S. Ct. 1970, 1978, 128 L. Ed. 2d 811, 824 (1994) ("[D]eliberate indifference entails something more than mere negligence, [but] the cases are also clear that it is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.").

100. *See* Banuelos v. McFarland, 41 F. 3d 232, 235 (5th Cir. 1995) (finding that, except in exceptional circumstances, a prisoner's disagreement with his medical treatment is not enough for a deliberate indifference claim).

101. *See*, *e.g.*, Domino v. Tex. Dept. of Crim. Justice, 239 F.3d 752, 756 (5th Cir. 2001) ("It is indisputable that an incorrect diagnosis by prison medical personnel does not suffice to state a claim for deliberate indifference."); U.S. *ex rel.* Hyde v. McGinnis, 429 F.2d 864, 867 (2d Cir. 1970) (finding that the "faulty judgment on the part of the prison doctor in choosing to administer one form of the same medication instead of another" is not deliberate indifference).

102. Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251, 261 (1976).

103. *See* Monell v. Dept. of Soc. Servs., 436 U.S. 658, 694–695, 98 S. Ct. 2018, 2037–2038, 56 L. Ed. 2d 611, 638 (1978) (holding that "when execution of a government's policy or custom…inflicts the injury…the government as an entity is responsible under § 1983").

104. Gil v. Vogilano, 131 F. Supp. 2d 486, 492–493 (S.D.N.Y. 2001) (holding that a prisoner who was denied access to treatment despite repeated requests and obvious pain had stated a valid claim under § 1983).

105. Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994); *see also* Letterman v. Does, 789 F.3d 856, 861 (8th Cir. 2015)

have actual knowledge of, or some other reason to believe, that you have a mental illness that requires treatment.[106]

C. What to Do if You Receive Unwanted Treatment

While the previous Parts of this Chapter focused on your right to receive medical treatment for your mental illness, this Part discusses treatment that you do not want. You should also look at Part C(5)(a) and (E)(1) of Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care."

1. You Have the Right to Informed Consent

You have a right to receive enough information about a potential medical treatment to make a reasonable decision whether to try the treatment.[107] After you learn about the treatment, you can choose whether or not to give permission for the doctor to treat you.[108] This right is known as informed consent. "Informed consent" means that you have the right to learn about all treatment options and the risks associated with each option *before* you allow mental health doctors or other caregivers to treat you. Informed consent is a way of making sure that you understand, before you start the treatment, what a treatment includes, and what effects it may have on you.[109] Informed consent is an important part of your right to refuse treatment.[110] If you do not give your consent, you are refusing treatment; however, informed consent does have some limits. If you pose a danger to yourself or others, the doctor may be able to treat you in a way that the doctor believes will immediately help and benefit you.[111]

Doctors have a duty to obtain informed consent from patients, including incarcerated people,[112] before treating them. A doctor must almost always tell you about the options and risks when there is penetration of the body (such as with a scalpel, needle, or pill).[113] Also, when the direct side effects of

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106. Spruill v. Gillis, 372 F.3d 218, 222 (3d Cir. 2004) (finding that prison officials who did not believe an inmate's symptoms were serious could not be deliberately indifferent).

107. Pabon v. Wright, 459 F.3d 241, 246 (2d Cir. 2006) (holding that since prisoners have a right to refuse treatment, they have a right to get enough information about the treatment "to make an informed decision" whether to accept or refuse it). To prove that officials violated this right, you must show: (1) government officials did not tell you enough about the treatment for you to make an informed decision, (2) because you couldn't make an informed decision, you were given treatment that you would have refused if you had been informed, and (3) the prison officials acted with deliberate indifference to your right to be informed.

108. *See In re* Ingram, 689 P.2d 1363, 1368, 102 Wash. 2d 827, 836 (Wash. 1984) (en banc) (finding a person has a right to choose one medical treatment over another, or to refuse treatment, even if the treatment she refuses is more likely to cure her); Schloendorff v. Soc'y of N.Y. Hospital 211 N.Y. 125, 130, 105 N.E. 92, 93 (1914) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault."), *abrogated by* Bing v. Thunig, 2 N.Y.2d 656, 665, 143 N.E.2d 3, 8, 163 N.Y.S.2d 3, 10 (finding that hospitals are not immune for the negligence of its employees for medical acts); Superintendent of Belchertown State Sch. v. Saikewicz, 373 Mass. 728, 738–739, 370 N.E.2d 417, 424 (Mass. 1977) (finding that both the Constitution and other laws protect a person from "nonconsensual invasion of his bodily integrity.").

109. Zebarth v. Swedish Hosp. Med. Ctr., 499 P.2d 1, 8, 81 Wash. 2d 12, 23 (Wash. 1972) (en banc) (defining "informed consent" as enough information to let a patient decide his treatment "by reasonably balancing the probable risks against the probable benefits"), *superseded by statute,* RCW 7.70.050(1)(a), *as recognized in* Flyte v. Summit View Clinic, 183 Wash. App. 559, 573, 333 P.3d, 566, 574 (2014) (noting that the statute expanded the duty to disclose to patient a material fact relating to the treatment); *see also* Clarkson v. Coughlin, 898 F. Supp. 1019, 1048 (S.D.N.Y. 1995) (referring to New York's statutory definition of informed consent, which requires the medical professional to tell the patient about "such alternatives [to the treatment or medication in question] and the reasonably foreseeable risks and benefits involved as a reasonable [medical or dental] … practitioner under similar circumstances would have disclosed in a manner permitting the patient to make a knowledgeable evaluation") (citing N.Y. PUB. HEALTH LAW § 2805-d(1) (McKinney 2013)).

110. Pabon v. Wright, 459 F.3d 241, 246 (2d Cir. 2006) (holding prisoners' constitutionally protected liberty interest in refusing medical care encompasses a right to receive information that would enable a reasonable person to decide).

111. *See* Washington v. Harper, 494 U.S. 210, 225–226, 110 S. Ct. 1028, 1039, 108 L. Ed. 2d 178, 201 (1990) (holding that in order to protect other prisoners, a prison can give anti-psychotic medication against a prisoner's will).

112. *See* U.S. *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1084 (2d Cir. 1969) (finding a constitutional violation of prisoner's rights where he received different procedural treatment than civilians receive).

113. *See* Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261, 269, 110 S. Ct. 2841, 2846, 111 L. Ed. 2d 224, 236 (1990) ("[T]his notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment."); *See also* N.Y. PUB. HEALTH LAW § 2805-d(1) (McKinney 2012)

treatment are painful or serious, your informed consent is usually required.[114] Some states specifically require by law that doctors consider other possible forms of care,[115] and inform you of the procedures and risks associated with each option. You should research what the law is in your state.

You should carefully consider whether or not to give your consent to be treated. State law varies as to whether informed consent must be given for each treatment. Some states will allow informed consent to cover all risks associated with a particular procedure or additional procedures that a doctor believes will help you. In New York, if you have not consented to a previous treatment, doctors cannot assume they have consent for a different or additional treatment, even in an emergency.[116] Similarly, in California, consent to a previous treatment does not mean consent to another treatment plan; there, a court held that a prisoner who consented to shock treatment did not necessarily consent to receive drugs that produced nightmares.[117]

2. Medication Over an Incarcerated Person's Objection

Medication is one form of treatment. Incarcerated people have a right to refuse antipsychotic or psychotropic drugs, with some exceptions.[118] Such medications help cure symptoms of mental illness, but these drugs also alter a person's perception, emotions, or behavior. For example, psychotropic drugs can have serious side effects, such as nightmares and muscle tics (sudden movements). The law provides protection against the unwanted use of serious drugs by giving incarcerated people the right to refuse treatments that significantly interfere with the body. However, this right is not absolute, meaning there are some circumstances when medication can be given to you, even over your objection.[119]

(a) Your Right to Refuse Medication Under the Due Process Clause

The Due Process Clause of the U.S. Constitution says that, "no State shall … deprive any person of life, liberty, or property, without due process of law."[120] Some deprivations are so important that the Constitution requires states to create processes (such as a court hearing) to ensure that you are not deprived unfairly. For example, in *Vitek v. Jones*, the Supreme Court found that classifying an

(discussing what constitutes lack of informed consent); N.Y. PUB. HEALTH LAW § 2805-d (McKinney 2012).

114. *See*, *e.g.*, Clites v. State, 322 N.W.2d 917, 922–923 (Iowa Ct. App. 1982) (en banc) (rejecting administration of "major tranquilizers" to patient with a mental illness without consent where the medical industry standard required written consent from patient or guardian).

115. N.Y. CORRECT. LAW § 402(2) (McKinney 2014) (stating that before committing a prisoner, a doctor must "consider alternative forms of care and treatment available"); *see also* Cobbs v. Grant, 502 P.2d 1, 9–10, 8 Cal. 3d 229, 242–243 (1972) (finding doctors must reasonably disclose alternatives to a proposed treatment plan and the risks of any treatment).

116. *In re* Storar, 52 N.Y.2d 363, 376, 420 N.E.2d 64, 70, 438 N.Y.S.2d 266, 272 (1981) (finding that "[t]he basic right of a patient to control the course of his medical treatment has been recognized by the Legislature."), *superseded by statute on other grounds,* Surrogate's Court Procedure Act, SCPA 1750(2), *as recognized in* In re M.B., 6 N.Y.3d 437, 441, 846 N.E.2d 794, 796 (2006).

117. Mackey v. Procunier, 477 F.2d 877, 877–879 (9th Cir. 1973).

118. Washington v. Harper, 494 U.S. 210, 221–223, 110 S. Ct. 1028, 1036–1038, 108 L. Ed. 2d 178, 197–199 (1990) (holding antipsychotic drugs can be administered only if "a mental disorder exists which is likely to cause harm if not treated" and if one psychiatrist has prescribed and another reviewed the treatment); Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261, 278, 110 S. Ct. 2841, 2851, 111 L. Ed. 2d 224, 242 (1990) (stating that "prisoners possess 'a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment.'") (quoting Washington v. Harper, 494 U.S. 210, 221–222, 110 S. Ct. 1028, 1036, 108 L. Ed. 2d 178, 198 (1990)).

119. Washington v. Harper, 494 U.S. 210, 227, 110 S. Ct. 1028, 1039–1040, 108 L. Ed. 2d 178, 201–202 (1990) (holding that "given the requirements of the prison environment, the Due Process Clause permits the State to treat a prison inmate 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."). The government may also medicate criminal defendants to make them competent to stand trial for certain serious charges, as long as the treatment is medically appropriate, unlikely to have serious side effects, and necessary "significantly to further important governmental trial-related interests." Sell v. United States, 539 U.S. 166, 179, 123 S. Ct. 2174, 2184–2185, 156 L. Ed. 2d 197, 211 (2003); *See* United States v. Baldovinos, 434 F.3d 233, 241–242 (4th Cir. 2006) (finding that involuntarily medicating a mentally ill defendant was not in his best interests but was solely done to make him competent to stand trial, but upholding the conviction after finding that a procedural mistake did not seriously affect the fairness, integrity, or public reputation of the judicial process), *cert. denied*, 546 U.S. 1203, 126 S. Ct. 1407, 164 L. Ed. 2d 107 (2006).

120. U.S. CONST. amend. XIV, § 1.

incarcerated person as mentally ill and moving him to a psychiatric hospital were such serious ("grievous") losses that the State was required to have procedural protections in place to make sure that the loss was fair.[121] These losses included the harm to the prisoner's reputation and the change in conditions of confinement.[122]

Similarly, before the State can force you to take medication, the state must have "procedural protections" in place to make sure you are not receiving the medication randomly or unfairly. You must receive these procedures, including notice and a hearing, before you can be involuntarily medicated.[123] A decision to treat you with drugs requires these procedural due process protections because drugs can produce serious and irreversible side effects.[124] These side effects are considered a significant State intrusion into your body.[125]

(b) Your Right to Refuse Medication Based on State Law

Your right to refuse medication may come not only from the Constitution, but also from state laws that specifically require procedural protections (such as notice and a hearing) before you can be forcibly medicated.[126] If your state has such a law, the state must follow the procedures set out by the law.[127] If your state wishes to avoid the process that is laid out by state law, it must have a rational reason for doing so. If the state does not have a rational reason, the avoidance will be considered a due process violation. In other words, your state must show that it has good reasons, reasonably related to its interests, before it may take away a process that was granted to you through its own law.

Unless your state can show both that you have a mental illness and are dangerous,[128] or that your state's law has so many protections that it is unlikely that you will receive medication unfairly,[129] it cannot force you to take medication without some procedural protections.

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121. Vitek v. Jones, 445 U.S. 480, 488, 100 S. Ct. 1254, 1261, 63 L. Ed. 2d 552, 561 (1980).

122. Vitek v. Jones, 445 U.S. 480, 488, 100 S. Ct. 1254, 1261, 63 L. Ed. 2d 552, 561 (1980).

123. Washington v. Harper, 494 U.S. 210, 221–222, 110 S. Ct. 1028, 1036–1037, 108 L. Ed. 2d 178, 198 (1990); *see*, *e.g.*, Mills v. Rogers, 457 U.S. 291, 299 n.16, 102 S. Ct. 2442, 2448 n.16, 73 L. Ed. 2d 16, 23 n.16 (1982) (noting that involuntary administration of psychotropic drugs bears on liberty interests), *cert. denied*, 484 U.S. 1010, 108 S. Ct. 709, 98 L. Ed. 2d 660 (1988).

124. Washington v. Harper, 494 U.S. 210, 229–231, 110 S. Ct. 1028, 1041, 108 L. Ed. 2d 178, 203–204 (1990) (describing the side effects of antipsychotic drugs, including severe spasms and neurological dysfunction); *see also Mental Health Medications*, NAMI http://www.nami.org/Learn-More/Treatment/Mental-Health-Medications (last visited Feb. 03, 2020); Nat'l Inst. of Mental Health, U.S. Dept. of Health & Human Servs., *Medications*, NIH (2016), *available at* https://www.nimh.nih.gov/health/topics/mental-health-medications/index.shtml (last visited Nov. 18, 2019). To order National Institute of Mental Health publications, call (301) 443-4513 or (866) 615-6464 (toll-free), or (301) 443-8431 (TTY), or write to the National Institute of Mental Health, Office of Communications, 6001 Executive Blvd., Room 8184, MSC 9663, Bethesda, MD 20892-9663.

125. Youngberg v. Romeo, 457 U.S. 307, 316, 102 S. Ct. 2452, 2458, 73 L. Ed. 2d 28, 37 (1982) ("[Liberty] from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.") (quoting Greenholtz v. Neb. Penal Inmates, 442 U.S. 1, 18, 99 S. Ct. 2100, 2109, 60 L. Ed. 2d 668, 682–683 (1979)); Washington v. Harper, 494 U.S. 210, 229, 110 S. Ct. 1028, 1041, 108 L. Ed. 2d 178, 203 (1990) (stating that "The forcible injection of medication into a non-consenting person's body represents a substantial interference with that person's liberty.").

126. *See*, *e.g.*, WASH. REV. CODE ANN. § 71.05.215(1) (West 2008 & Supp. 2009) ("Right to Refuse Antipsychotic Medication").

127. Washington v. Harper, 494 U.S. 210, 221, 110 S. Ct. 1028, 1036, 108 L. Ed. 2d 178, 198 (1990) (finding that a Washington state policy requiring a finding of mental illness and dangerousness before a prisoner can be forcibly medicated with antipsychotic drugs "creates a justifiable expectation on the part of the inmate that the drugs will not be administered unless those conditions exist"); Vitek v. Jones, 445 U.S. 480, 488, 100 S. Ct. 1254, 1261, 63 L. Ed. 2d 552, 561–562 (1980) ("We have repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment.").

128. Washington v. Harper, 494 U.S. 210, 232–233, 110 S. Ct. 1028, 1042–1043, 108 L. Ed. 2d 178, 204–205 (1990) (finding that a state policy was consistent with Due Process because review of medical treatment required asking (1) whether the prisoner had a mental illness, and (2) whether the mental illness made the prisoner a danger to himself or to others, and it required constant monitoring of drug dosage).

129. Washington v. Harper, 494 U.S. 210, 222, 235, 110 S. Ct. 1028, 1037, 1044, 108 L. Ed. 2d 178, 198, 207 (1990) (upholding a state policy that required psychiatric evaluation, notice, and hearing for a prisoner before forcible medication); *see also* Lappe v. Loeffelholz, 815 F.2d 1173, 1176–1178 (8th Cir. 1987) (finding that prisoner's constitutional rights were not violated by a treatment transfer where he had access to written notice, an adversarial hearing with an independent decision maker, and legal counsel).

(c) Your Right to Refuse Medication Under the Eighth Amendment

In some circumstances, you also have a right to refuse medication under the Eighth Amendment, which prohibits cruel and unusual punishment.[130] Administering drugs as a means of punishment (rather than as treatment) is unconstitutional.[131]

Forcible treatment with psychotropic medication that causes pain or fear can be considered cruel and unusual punishment, violating the Eighth Amendment.[132] The district court in *Souder v. McGuire* cited cases in the Eighth and Ninth Circuits[133] that held that treating incarcerated people with drugs without consent may raise Eighth Amendment claims. In those cases, the courts found that drugs causing pain or fright could invade the body and mental processes to an unconstitutional degree.

While some courts have emphasized that an allegation that you were given a particular kind of medicine is not enough to prove that giving you the drug was cruel and unusual (and thus a violation of the Eighth Amendment),[134] the Supreme Court has held that states may not avoid the obligations of the Eighth Amendment just by calling a medical act a "treatment."[135]

(d) Limitations on Your Right to Refuse Medication

The right to refuse medication does not mean that the State can never medicate you against your will. Instead, it means that the State must provide a process (such as a hearing) that reduces the chance that the decision to medicate you will be random or arbitrary.

One important limitation on an incarcerated person's right to refuse medication is danger or emergency. Prisons may administer psychotropic drugs over a prisoner's objection if the incarcerated person poses a danger to himself or others. Receiving medication against your will is called "medication over objection." In *Washington v. Harper*,[136] the Supreme Court upheld a policy allowing the state to medicate an incarcerated person without consent if a licensed psychiatrist found that the incarcerated person suffered from a mental disorder, and the incarcerated person was "gravely disabled"[137] or posed a "likelihood of serious harm"[138] to himself or others. Therefore, situations in which an incarcerated person presents a danger to himself or the general prison population are an exception to the right to refuse treatment. A good example is a Kansas incarcerated person who objected to psychotropic medication but was not allowed to refuse treatment because he had previously destroyed his prison cell and started fights with other prisoners.[139]

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130. U.S. CONST. AMEND. VIII.

131. Washington v. Harper, 494 U.S. 210, 241, 110 S. Ct. 1028, 1047, 108 L. Ed. 2d 178, 211 (1990) ("Forced administration of antipsychotic medication may not be used as a form of punishment.").

132. Souder v. McGuire, 423 F. Supp. 830, 831–832 (M.D. Pa. 1976) ("[I]nvoluntary administration of drugs which have a painful or frightening effect can amount to cruel and unusual punishment, in violation of the [8th] Amendment.").

133. Knecht v. Gillman, 488 F.2d 1136, 1139–1140 (8th Cir. 1973) (holding that a drug that caused prisoners to vomit for 15 minutes to an hour "can only be regarded as cruel and unusual unless the treatment is being administered to a patient who knowingly and intelligently has consented to it"); Mackey v. Procunier, 477 F.2d 877, 878 (9th Cir. 1973) (finding that "serious constitutional questions respecting cruel and unusual punishment or impermissible tinkering with the mental processes" could be raised where a prisoner who had consented to shock treatment was given extra drugs, without his consent, that caused fright and nightmares).

134. *See, e.g.*, Gittlemacker v. Prasse, 428 F.2d 1, 6 (3d Cir. 1970) ("It is only where an inmate's complaint of improper or inadequate medical treatment depicts conduct so cruel or unusual as to approach a violation of the [8th] Amendment's prohibition of such punishment that a colorable constitutional claim is presented.").

135. *See* Trop v. Dulles, 356 U.S. 86, 95, 78 S. Ct. 590, 595, 2 L. Ed. 2d 630, 639 (1958) (finding that substance—not a label—determines the meaning of a statute).

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

137. WASH. REV. CODE ANN. § 71.05.020(22) (Supp. 2009) (defining that term as a condition resulting from a mental disorder where there is a danger of serious physical harm from inability to provide for one's "essential human needs" like health or safety, or where there is a severe decrease in function evidenced by repeated and increasing loss of control over actions).

138. WASH. REV. CODE ANN. § 71.05.020(35) (Supp. 2009) (defining the term as a substantial risk that a person will physically harm himself, others, or property of others evidenced by threats or suicide attempts or actual harm to himself, others, or property).

139. Sconiers v. Jarvis, 458 F. Supp. 37, 38–39 (D. Kan. 1978) (finding that the prison physician and psychiatrist possessed the authority to provide incarcerated person with involuntary medical treatment in order to protect him and other incarcerated people from a substantial possibility of harm and that the physician and psychiatrist did not act in an arbitrary or capricious manner by administering psychotropic medication against

There are a few other limitations on an incarcerated person's right to refuse treatment. An incarcerated person may receive medication despite objections or religious beliefs if the State can prove that its interests are legitimate.[140] Also, the State may give drugs to an incarcerated person over his objections if the court feels that enough procedural protections are in place to ensure that the decision to treat with drugs was reasonable.[141] You should also note that, in some cases, if a doctor finds that medication is necessary and in the incarcerated person's medical interest, then the State does not have to grant an incarcerated person's request to stop taking the drugs so that he can prove he can do without them.[142]

A determination of whether the right to refuse is limited in any given case "must be defined in the context of the inmate's confinement."[143] This means that the court will review your current prison conditions, the threat of danger that you pose to yourself or others, and the procedures that the State has in place to protect you from an unfair decision to treat you with drugs.[144]

(e) How Do Courts Decide Whether State Interests Are Legitimate?

To determine whether or not the State may rightfully force an incarcerated person to take medication due to a situation of danger or emergency, courts apply what is called the *Turner v. Safley* rational basis test. With this test, the court tries to see if the State's decision to treat a non-consenting incarcerated person with psychotropic drugs is "reasonably related to legitimate penological interests."[145] Legitimate State interests include the health and safety of the public, the incarcerated person, and the general prison population.[146] The rational basis test presumes that State interests are legitimate. This means that a court will consider the State's choice to be reasonable unless it does not serve one or more of these legitimate State goals.

There are some common arguments that incarcerated people use to counter the presumption that the State's actions are the result of a legitimate interest. One challenge to medication over objection is that the decision to medicate is unfair or arbitrary (random or not supported by a reason).[147] In such cases, courts consider a competing risk that the determination of danger will be incorrect and may cause harm to the incarcerated person's reputation.[148] In order to avoid mistakes in determining if there is a danger, taking the drugs must be in the incarcerated person's medical interest and can only be for treatment purposes.[149]

In addition, states must provide certain procedural safeguards to ensure that the decision to medicate is not arbitrary or erroneous. Common safeguards include (1) an administrative hearing before an independent decision maker (someone not involved in the incarcerated person's treatment

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prisoner's will).

140. Smith v. Baker, 326 F. Supp. 787, 787–788 (W.D. Mo. 1970) (denying relief to an incarcerated person who objected to administration of drugs "against [his] will and religious belief"), *aff'd*, 442 F.2d 928 (8th Cir. 1971).

141. *See, e.g.*, Lappe v. Loeffelholz, 815 F.2d 1173, 1176 (8th Cir. 1987) (finding that an incarcerated person's constitutional rights were not violated by a treatment transfer where he had written notice, an adversarial hearing with an independent decision maker, and legal counsel).

142. *See, e.g.*, Sullivan v. Flannigan, 8 F.3d 591, 592 (7th Cir. 1993) (finding the Illinois Department of Corrections, which had forced incarcerated person to take mind-altering drugs against his will for five years after he was determined to be a danger to others, was not constitutionally required to give him a chance to stop taking the drugs to prove he didn't need them).

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

144. *See* Washington v. Harper, 494 U.S. 210, 222, 110 S. Ct. 1028, 1037, 108 L. Ed. 2d 178, 198 (1990) (holding that certain procedures, such as having different psychiatrists prescribe and review medication, ensure "that the treatment in question will be ordered only if it is in the prisoner's medical interests, given the legitimate needs of his institutional confinement").

145. Washington v. Harper, 494 U.S. 210, 223, 110 S. Ct. 1028, 1037, 108 L. Ed. 2d 178, 199 (1990) (citing Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987), *superseded by statute on other grounds*).

146. Washington v. Harper, 494 U.S. 210, 241, 110 S. Ct. 1028, 1047, 108 L. Ed. 2d 178, 228 (1990).

147. *See, e.g.*, Washington v. Harper, 494 U.S. 210, 217, 110 S. Ct. 1028, 1034, 108 L. Ed. 2d 178, 195 (1990) (challenging as arbitrary a decision allowing treatment with antipsychotic drugs against the will of an incarcerated person with mental illness without a judicial hearing).

148. Vitek v. Jones, 445 U.S. 480, 494, 100 S. Ct. 1254, 1264, 63 L. Ed. 2d 552, 565–566 (1980) (finding that characterization of mental illness, transfer, and treatment had "stigmatizing consequences").

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

but who may come from within the institution);[150] (2) written notice;[151] (3) the right to be present at an adversary hearing;[152] and (4) the right to present and cross-examine witnesses.[153] While the State may provide a lawyer to represent the incarcerated person in administrative hearings, providing a non-attorney adviser may satisfy due process.[154]

3. Challenging Transfers for Treatment

(a) What Is a Treatment Transfer?

Many treatments are available for incarcerated people and sometimes these treatments must be administered at a site outside of the prison. This requires that the incarcerated person be transferred from his present location in order to be treated. An incarcerated person may submit to the transfer or voluntarily agree to various forms of treatment including medication, counseling, therapy, or commitment to a psychiatric center. Or, in some cases, the incarcerated person may be treated involuntarily. This Section explains when the prison can and cannot transfer you for treatment if you do not consent to the transfer.

Incarcerated people who suffer from a mental illness may be treated at one of several possible locations. For more details on these facilities, please see Part A(2) above. Please note that if you are transferred to a facility that has a significantly different quality than the normal and typical conditions of prison confinement, this might violate your constitutional rights.

(b) Procedural Safeguards Under the Due Process Clause

Lawful imprisonment may take away some of your rights, but you still have a right to basic protections.[155] In certain circumstances, basic procedures must be in place to protect you from an unfair action of the State. For more information on procedural due process, see Chapter 18 of the *JLM*, "Your Rights at Prison Disciplinary Hearings," and Chapter 23, "Your Right to Adequate Medical Care." A hearing and written notice are two common examples of procedures that might be required, often before an incarcerated person can be involuntarily committed to a psychiatric hospital.[156]

Prison to hospital transfers might mean a significant change in living conditions and type of confinement. A determination of mental illness by a doctor and subsequent transfer does not automatically mean that an incarcerated person has a mental illness for the purposes of other laws in the state.[157] Still, there is a chance that the incarcerated person might suffer harm to his reputation. When the risk of physical and/or reputational harm is high, your constitutional right to due process might be triggered.

In addition, if the State tries to avoid the requirements imposed by its own laws, then a law giving you the right to procedures before transfer will also trigger due process protections. Where state regulations require a finding of mental illness before transfer, the State creates an "objective expectation" in the incarcerated person that there will be a procedure to determine whether or not a mental illness exists.[158] Without such procedures, the incarcerated person could suffer a due process

150. Vitek v. Jones, 445 U.S. 480, 494–496, 100 S. Ct. 1254, 1264–1265, 63 L. Ed. 2d 552, 566–567 (1980).
151. Vitek v. Jones, 445 U.S. 480, 494–496, 100 S. Ct. 1254, 1264–1265, 63 L. Ed. 2d 552, 566–567 (1980).
152. Vitek v. Jones, 445 U.S. 480, 494–496, 100 S. Ct. 1254, 1264–1265, 63 L. Ed. 2d 552, 566–567 (1980).
153. Vitek v. Jones, 445 U.S. 480, 494–496, 100 S. Ct. 1254, 1264–1265, 63 L. Ed. 2d 552, 566–567 (1980).
154. Washington v. Harper, 494 U.S. 210, 236, 110 S. Ct. 1028, 1044, 108 L. Ed. 2d 178, 207 (1990).
155. Wolff v. McDonnell, 418 U.S. 539, 555, 94 S. Ct. 2963, 2974, 41 L. Ed. 2d 935, 950 (1974) ("[T]hough his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime.").
156. Vitek v. Jones, 445 U.S. 480, 495–496, 100 S. Ct. 1254, 1265, 63 L. Ed. 2d 552, 566–567 (1980); *see, e.g.*, Washington v. Harper, 494 U.S. 210, 235, 110 S. Ct. 1028, 1044, 108 L. Ed. 2d 178, 207 (1990) (upholding a Washington state policy which required a non-judicial hearing and notice of that hearing before the involuntary treatment of an incarcerated person).
157. *See In re* Will of Stephani, 250 A.D. 253, 254–257, 294 N.Y.S. 624, 624 (3d Dept. 1937) (finding that an incarcerated person who was determined to be insane by a physician and transferred to mental hospital was still mentally competent when he later wrote his will).
158. Vitek v. Jones, 445 U.S. 480, 489–490, 100 S. Ct. 1254, 1262, 63 L. Ed. 2d 552, 562–563 (1980) (holding that an incarcerated person had a state-created liberty interest because Nebraska law created an objective expectation that an incarcerated person would not be transferred unless he suffered from a mental disease or

violation. In short, you may have a right to due process protections (such as the right to a hearing and the right to receive notice of the hearing) when the State's action creates a high level of harm to you (physical or reputational), or when a state law gives you the expectation that some particular act or process must be followed, and then the State fails to follow this act or process.

The due process protection to which you are entitled is the same, no matter how your liberty interest is implicated.[159]

In *Vitek v. Jones*, the Supreme Court found that a Nebraska statute requiring a finding of mental illness before transfer to an outside mental facility created an expectation among incarcerated people that transfer would occur *only* if they were found to have mental illness.[160]

Under *Vitek*, the State must adequately protect your liberty interests (if it has created them through state law) in the transfer process by providing:

(1) Written notice that the prison is considering your transfer;
(2) A hearing;
(3) An opportunity to present witness testimony and cross-examine state witnesses at the hearing;
(4) An independent decision maker;
(5) A written statement by the decision maker stating the reasons and evidence relied on for your transfer;
(6) Legal assistance from the State if you cannot afford your own; and
(7) Effective and timely notice of rights (1) through (6).[161]

All of these protections are triggered if your liberty interests are implicated *and* there is a chance that you will suffer a serious loss. Failure to provide them violates your rights.

(i) Are Your Liberty Interests Implicated?

Courts determine whether the State can deprive you of a liberty interest by balancing the interests of the State (for example, prison safety) with your liberty interest in freedom from random deprivations (for example, the right to agree or disagree to medication). If the interest of the incarcerated person is found to be stronger than the interest of the State, then the incarcerated person is entitled to due process protections.[162] Whether or not an incarcerated person has a state-created liberty interest depends on whether the incarcerated person faces a serious loss.

Liberty interests are limited; incarcerated people are entitled to freedom from restraint only to the extent that restraint cannot exceed the conviction sentence in an unexpected manner.[163] This is true unless there is an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[164] In other words, for due process to apply, you must have both a liberty interest *and* a

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defect that could not be adequately treated in the prison).

159. *See* Washington v. Harper, 494 U.S. 210, 221–222, 110 S. Ct. 1028, 1036–1037, 108 L. Ed. 2d 178, 198 (1990) (finding "that the Due Process Clause confers upon … [the prisoner] no greater right than that recognized under state law" where a Washington law created a liberty interest in being free from unwanted medical treatment for mental illness).

160. Vitek v. Jones, 445 U.S. 480, 489–490, 100 S. Ct. 1254, 1262, 63 L. Ed. 2d 552, 562–563 (1980).

161. Vitek v. Jones, 445 U.S. 480, 494–495, 100 S. Ct. 1254, 1264–1265, 63 L. Ed. 2d 552, 566 (1980). However, you may not be entitled to all of these procedures. In Shakur v. Selsky, 391 F.3d 106, 119 (2d Cir. 2004), the lower court held that "regardless of state procedural guarantees, the only process due an inmate is that minimal process guaranteed by the Constitution, as outlined in" Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) (emphasis in original). As explained above in note 146, the minimal process may be limited to (1) advance written notice; (2) an opportunity for you to call witnesses and present documentary evidence in your defense; and (3) a written document from the fact-finder explaining the reasons for your transfer and the evidence relied on.

162. Mathews v. Eldridge, 424 U.S. 319, 334–335, 96 S. Ct. 893, 902–903, 47 L. Ed. 2d 18, 33 (1976) (developing a three-part balancing test to determine whether state-provided procedural protections are sufficient).

163. Sandin v. Conner, 515 U.S. 472, 483–484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 429–430 (1995) (recognizing that while states may create liberty interests, these interests are generally limited to freedom from restraint that is significant and atypical rather than expected).

164. Sandin v. Conner, 515 U.S. 472, 484–485, 115 S. Ct. 2293, 2300–2301, 132 L. Ed. 2d 418, 430–431 (1995) (finding that holding an incarcerated person in a segregated housing unit for 30 days "though concededly punitive, does not present a dramatic departure from the basic conditions of [prisoner's] indeterminate sentence.").

deprivation of that liberty that imposes a significant and atypical (unusual) hardship. Only if both of these factors are present are you entitled to due process protections[165] like written notice and a hearing. Transfer from one prison to another within the State's system does not necessarily infringe upon any liberty interest.[166]

The Equal Protection Clause of the Fourteenth Amendment of the Constitution prohibits states from denying any person equal protection of the laws.[167] In other words, state laws must treat each person in the same manner as others in similar conditions and circumstances. In the context of mental health, the equal protection rights of incarcerated people who are being committed entitle them to substantially the same procedures as those available to free persons subjected to an involuntary commitment proceeding.[168] In *United States* ex rel. *Schuster v. Herold*, the Second Circuit found that a incarcerated person in custody in New York who was transferred from prison to an institution for the criminally insane was deprived of equal protection because there was an unlawful difference between procedural protections given to civilians facing involuntary commitment and those given to incarcerated people.[169] Therefore, to determine the procedural protections that apply in your state, you should review civil commitment laws in addition to laws that govern corrections facilities. We discuss procedural protections and treatment transfers later in this Chapter.

(ii) What is a Serious Loss?

Courts might consider transfers to be a serious loss because of three factors: (1) there is a high risk of stigma associated with a declaration of mental illness; (2) there is an actual change in the type of confinement; and (3) there is actual behavior modification treatment.[170] As with challenges to medication over objection, these changes require that the State provide procedural protections.

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165. Frazier v. Coughlin, 81 F.3d 313, 317 (2d Cir. 1996) ("To prevail, [the prisoner] must establish both that the confinement or restraint creates an 'atypical and significant hardship' under *Sandin*, and that the state has granted its inmates, by regulation or by statute, a protected liberty interest in remaining free from that confinement or restraint."); *see also* Palmer v. Richards, 364 F.3d 60, 64 (2d Cir. 2004) ("Factors relevant to determining whether the plaintiff endured an 'atypical and significant hardship' include 'the extent to which the conditions of the disciplinary segregation differ from other routine prison conditions' and 'the duration of the disciplinary segregation imposed compared to discretionary confinement.'" (quoting Wright v. Coughlin, 132 F.3d 133, 136 (2d Cir. 1998))).

166. *See* Montanye v. Haymes, 427 U.S. 236, 242, 96 S. Ct. 2543, 2547, 49 L. Ed. 2d 466, 471 (1976) (stating that "no Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State, whether with or without a hearing, absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events.") (citing Meachum v. Fano, 427 U.S. 215, 225, 96 S. Ct. 2532, 2538, 49 L. Ed. 2d 451, 459 (1976) (finding mere transfer of prisoner from one prison to another within the state's system does not implicate an incarcerated person's liberty interests and does not violate due process)). *But see* Wilkinson v. Austin, 545 U.S. 209, 223–224, 125 S. Ct. 2384, 2394–2395, 162 L. Ed. 2d 174, 190–191 (2005) (noting that Ohio's Supermax facility "imposes an atypical and significant hardship under any plausible baseline" and thus prisoners have a liberty interest in not being confined in the facility).

167. U.S. CONST. amend. XIV, § 1.

168. U.S. *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1073 (2d Cir. 1969) ("[W]e believe that before a prisoner may be transferred to a state institution for insane criminals, he must be afforded substantially the same procedural safeguards as are provided in civil commitment proceedings . . . ."); *see also* Souder v. McGuire, 516 F.2d 820, 821–822 (3d Cir. 1975) (finding that "serious equal protection and due process issues" were raised regarding the constitutionality of a Pennsylvania mental health statute that gave the warden a choice whether or not to adopt certain procedures for the commitment of people already in a correctional facility even though the same procedures were mandatory for the involuntary commitment of "non-confined" civilian adults); Evans v. Paderick, 443 F. Supp. 583, 585 (E.D. Va. 1977) (rejecting defendant's argument that a Virginia civil commitment procedure was not required when the person to be committed is a state incarcerated person); People v. Arendes, 86 Misc. 2d 468, 470, 382 N.Y.S.2d 684, 686 (Sup. Ct. Queens County 1976) ("[W]here the issue in the first instance is mental illness itself or dangerousness, there is no valid ground to distinguish between a civilian and a prisoner since the issues have no connection to the circumstance of incarceration and the same psychiatric criteria will apply to all people to determine mental illness."); *cf.* Baxstrom v. Herold, 383 U.S. 107, 110, 86 S. Ct. 760, 762, 15 L. Ed. 2d 620, 623 (1966) (holding that a New York state incarcerated person was denied equal protection of the laws by the statutory procedure that allowed him to be civilly committed at the expiration of his sentence without jury review available to all other civilly committed people in New York).

169. U.S. *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1073 (2d Cir. 1969).

170. Vitek v. Jones, 445 U.S. 480, 488, 100 S. Ct. 1254, 1261, 63 L. Ed. 2d 552, 561 (1980).

The test courts apply to determine if a loss is serious examines whether the loss is "atypical and significant."[171] Atypical and significant state actions are those actions *not* similar to prison conditions or those that substantially alter the environment, duration, or degree of the prison condition. For example, an incarcerated person who was placed in segregated confinement did not suffer a serious loss that implicated a liberty interest because the segregation was of the same duration and degree as that of his normal prison conditions.[172]

More specifically, under the *Vitek* standard, "significant and atypical" means that the loss suffered by the prisoner is different than the loss already suffered as a result of prison confinement.[173] The loss to the prisoner in *Vitek* was "serious" enough to require due process protections because he had reasonably developed an "objective expectation" based on the state law[174] and the risk that mistaken mental illness could damage the incarcerated person's reputation was great.[175] In another case, a loss of good-time credits was significant because such a loss of credits meant that there was a change in the length of the prison term.[176] Finally, confinement in a psychiatric prison unit might be far more restrictive than prison, and therefore might be considered a serious loss, implicating a liberty interest.[177]

4. When Due Process Procedures Are Not Required for Transfer

The protections discussed in the previous Subsection might not be afforded to the incarcerated person if the transfer is voluntary or on an emergency basis. Additionally, the Due Process Clause does not protect against every change in the conditions of your imprisonment, even if that change has a negative impact on you.[178] This is true even if the incarcerated person has a reasonable expectation that state actions will produce a particular result. In some jurisdictions, the law says that the State may not need to have due process procedures in place before transferring you so you can participate in clinical evaluations[179] (you are not considered to be under the same great hardship in this case as

171. Sandin v. Conner, 515 U.S. 472, 486, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418, 431 (1995) (holding that disciplinary segregation of an incarcerated person "did not present the type of atypical, significant deprivation" of a state-created liberty interest after comparing conditions inside and outside of disciplinary segregation in the prison and finding that the placement "did not work a major disruption in his environment."). *See also* Tellier v. Fields, 280 F.3d 69, 80 (2d Cir. 2000) (concluding as a matter of law that "a confinement of 514 days under conditions that differ markedly from those in the general population" may be atypical and significant).

172. Sandin v. Conner, 515 U.S. 472, 486, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418, 431 (1995) (finding segregated confinement that "mirrored" prison conditions was not significant and atypical); *see also* Frazier v. Coughlin, 81 F.3d 313, 317–18 (2d Cir. 1996) (finding no significant deprivation of a liberty interest to incarcerated person who failed to show that confinement conditions in a SHU were "dramatically different" from basic prison conditions). *But see* Tellier v. Fields, 280 F.3d 69, 80 (2d Cir. 2000) (holding that an extended confinement in the SHU may amount to a deprivation of a liberty interest).

173. Vitek v. Jones, 445 U.S. 480, 493, 100 S. Ct. 1254, 1264, 63 L. Ed. 2d 552, 565 (1980) (finding "transfer of a prisoner to a mental hospital is [not] within the range of confinement justified by imposition of a prison sentence").

174. Vitek v. Jones, 445 U.S. 480, 489–490, 100 S. Ct. 1254, 1261–1262, 63 L. Ed. 2d 552, 562–563 (1980).

175. Vitek v. Jones, 445 U.S. 480, 495, 100 S. Ct. 1254, 1265, 63 L. Ed. 2d 552, 566 (1980).

176. Wolff v. McDonnell, 418 U.S. 539, 557, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935, 951 (1974) (holding that a state law allowing a reduction in sentence for good time, and providing that such credit would only be forfeited for serious misbehavior, created a recognizable liberty interest); *see also* Eichwedel v. Chandler, 696 F.3d 660, 675 (7th Cir. 2012) (finding that Illinois incarcerated people have a liberty interest in their good-conduct credits that entitles them to due process procedures if revocation occurs).

177. U.S. *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1078 (2d Cir. 1969) ("Not only did the transfer effectively eliminate the possibility of [the prisoner's] parole, but it significantly increased the restraints upon him, exposed him to extraordinary hardships, and caused him to suffer indignities, frustrations and dangers, both physical and psychological, [that] he would not be required to endure in a typical prison setting.").

178. Meachum v. Fano, 427 U.S. 215, 224, 96 S. Ct. 2532, 2538, 49 L. Ed. 2d 451, 459 (1976) ("[W]e cannot agree that *any* change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause." (emphasis in original)).

179. *See* Trapnell v. Ralston, 819 F.2d 182, 184–185 (8th Cir. 1987) (finding there was no need for a pre-transfer hearing where the transfer was temporary and for evaluation purposes only); United States v. Jones, 811 F.2d 444, 448 (8th Cir. 1987) (finding "a temporary transfer for a psychological evaluation places no more of an imposition on a prisoner than does a transfer for administrative reasons," and transfers for administrative reasons do not require pre-transfer hearings).

with commitment). In a few states, procedural protections do not have to occur before transfer, but may instead occur promptly after physical transfer.[180]

As with challenges to medication over objection, there are limits to a transfer challenge. Transfer to a mental health facility without a hearing is generally not a due process violation when an incarcerated person poses an immediate threat to himself or the general population.[181] These transfers are called emergency commitments. However, a hearing must be held as soon as possible after commitment.[182] If it is determined you will be transferred to a psychiatric hospital or unit, you cannot challenge a transfer back to prison after treatment on due process grounds because no liberty interest existed.[183] For example, in Washington, D.C., prisoners may be moved, with the superintendent's certification, from psychiatric hospitals back to prisons after being restored to health.[184] You should check the laws in your state to determine the necessary steps the state must take to transfer you back to prison.

5. If You Are Transferred to a Hospital or Other Treatment Facility

If you are transferred or committed to a psychiatric facility, you maintain many of the same rights you had in prison, including the right to treatment and the right to adequate medical care. Similarly, if you are confined in a hospital or treatment facility prior to serving your criminal sentence in prison, you may be entitled to have your time spent there count toward your sentence.

(a) How Long Will I Be Held?

Generally, the time spent in commitment is left to the judgment of clinical mental health staff and prison officials, but it *cannot* be longer than your criminal sentence unless you are first granted significant due process protections.[185] Under New York State law, for example, the psychiatric hospital director may apply for a new commitment after your sentence expires.[186] If this happens in a state where there are requirements set up for a civil commitment proceeding, your criminal sentence is not relevant to any post-sentence confinement, and the State must provide the same procedural safeguards before committing or holding you for psychiatric care that it would if you were not incarcerated.[187] This means that if the State determines you need further commitment and treatment after your prison sentence has ended, you will be treated as a non-incarcerated-person. If the psychiatric hospital director successfully extends commitment past your term sentence, you have the right to another hearing before a jury to determine whether commitment to a civilian mental health facility is appropriate.[188]

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180. *See, e.g.*, Baugh v. Woodward, 808 F.2d 333, 336 (4th Cir. 1987) (finding that the North Carolina Department of Correction does not have to provide a hearing on an incarcerated person's involuntary mental health transfer prior to physical transfer and that a prompt hearing after transfer satisfies due process).

181. *See, e.g.*, Vermont Nat. Bank v. Taylor, 445 A.2d 1122, 1124–1125, 122 N.H. 442, 446 (N.H. 1982) (noting that a hearing can be delayed after transfer to a hospital if the transfer is done to prevent harm to self or others); Luna v. Van Zandt, 554 F. Supp. 68, 72 (S.D. Tx. 1982) (holding that a hearing can take place after the deprivation of a right if there is a compelling interest, such as an immediate potential harm to others); Mignone v. Vincent, 411 F. Supp. 1386, 1389 (S.D.N.Y. 1976) (noting that a hearing can be delayed after transfer to a hospital if the transfer is made to prevent harm to self or others).

182. See, e.g., Mignone v. Vincent, 411 F. Supp. 1386, 1389 (S.D.N.Y. 1976).

183. Jackson v. Fair, 846 F.2d 811, 814–815 (1st Cir. 1988) (holding that as the incarcerated person did not have a liberty interest in remaining at a psychiatric hospital, no hearing was required before returning the prisoner to prison).

184. D.C. CODE ANN. § 24-503(b) (West 2017).

185. Baxstrom v. Herold, 383 U.S. 107, 110, 86 S. Ct. 760, 762, 15 L. Ed. 2d 620, 623 (1966) (holding that a New York incarcerated person "was further denied equal protection of the laws by his civil commitment to an institution maintained by the Department of Correction beyond the expiration of his prison term without a judicial determination that he is dangerously mentally ill such as that afforded to all so committed except those, like [the prisoner], nearing the expiration of a penal sentence.").

186. N.Y. CORRECT. LAW §§ 402(10), 404(1) (McKinney 2014).

187. Baxstrom v. Herold, 383 U.S. 107, 110, 86 S. Ct. 760, 762, 15 L. Ed. 2d 620, 623 (1966).

188. N.Y. CORRECT. LAW § 402(11) (McKinney 2014).

(b) What Happens to My Good-Time Credits?

In some jurisdictions, an incarcerated person may lose the opportunity to earn good-time credits after a mental illness determination and hospitalization.[189] The reasoning that many courts give for this policy is that the goals of hospitalization differ from the goals of imprisonment. Hospitalization is meant to treat incarcerated people with mental illness,[190] while incarceration is intended to punish and also rehabilitate.[191] However, the Eighth Circuit found that there is a difference between meritorious credits (credits that are given at the State's discretion) and statutory good-time credits (credits that a state statute specifically grants for particular behavior). Unlike discretionary credits, statutory credits come from state laws. Therefore, a loss of statutory credits based on a mental health assessment could violate your constitutional right to equal protection under the Fourteenth Amendment, which prohibits states from applying the law differently to different citizens in the same condition and circumstances.[192]

Even if the law in your jurisdiction does not permit you to continue to earn credits while you are hospitalized, your existing credits may be held in abeyance (paused) during treatment, meaning that all good-time credits that would have been credited will be restored when you are transferred back to prison.[193] However, if you have existing credits, in many jurisdictions they will not apply until you are restored to health; in other words, you are not entitled to early release if you are still hospitalized on your early release date.[194] Other states, in contrast, do permit you to receive good-time credits even while in the hospital. For example, the Connecticut Supreme Court has found that the language of Connecticut's statute orders the corrections commissioner to apply earned good-time credit to *any* incarcerated person's sentence,[195] in keeping with the idea that the law should treat equally prisoners with mental illness confined in hospitals and those incarcerated in prisons.[196] Since the law varies according to the statutes of each jurisdiction, you should check the law in your state, or the United States Code if you are in federal prison, to determine what happens to your credits during transfer to a hospital.

(c) Can I Receive Credit for Pre-Sentence Confinement in a Hospital or Treatment Program?

Though the law varies significantly by state regarding whether you can receive custody or conduct credits for time spent and good behavior in institutions other than prisons, there are a few general

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189. *See*, *e.g.*, Urban v. Settle, 298 F.2d 592, 593 (8th Cir. 1962) (*per curiam*) (finding that an incarcerated person who has "been removed to a hospital for defective delinquents" under federal law to determine mental competency is not entitled to receive further good time for conditional release purposes until, in the judgment of the superintendent of the hospital, he has become "restored to sanity or health"); Bush v. Ciccone, 325 F. Supp. 699, 701 (W.D. Mo. 1971) (holding under the express provisions of 18 U.S.C. § 4241, credit for good time is suspended as to an incarcerated person who has been found by a Board of Examiners to be insane or of unsound mind). *But see* Sawyer v. Sigler, 320 F. Supp. 690, 699 (D. Neb. 1970) (distinguishing between meritorious good time, which is permissive and may be withheld, and statutory good time, which cannot be denied without violating the Equal Protection Clause of the 14th Amendment if the withholding does not result from the incarcerated person's misconduct), *aff'd*, 445 F.2d 818—819 (8th Cir. 1971). The federal law that these cases mention has changed several times, so you should proceed with care, researching the current case and statutory law. If you are in state custody, you should check your state's statutes.

190. *See*, *e.g.*, People v. Callahan, 50 Cal. Rptr. 3d 677, 683, 144 Cal. App. 4th 678, 687 (Cal. Ct. App. 2006) (finding that where an incarcerated person was confined pretrial to treat him to restore his competency to stand trial, he could not later recover credit for that time).

191. People v. Smith, 175 Cal. Rptr. 54, 56, 120 Cal. App. 3d 817, 822–823 (Cal. Ct. App. 1981) ("The purposes of the provision for 'good time' credits . . . are [to encourage prisoners] to conform to prison regulations . . . and to make an effort to participate in what may be termed 'rehabilitative activities'") (quoting People v. Saffell, 599 P.2d 92, 97, 25 Cal. 3d 223, 233, 157 Cal. Rptr. 897, 903 (1979)).

192. *See* Cochran v. Kansas, 316 U.S. 255, 257, 62 S. Ct. 1068, 1070, 86 L. Ed. 1453, 1455 (1942).

193. Dobbs v. Neverson, 393 A.2d 147, 150 n.9 (D.C. Cir. 1978).

194. *See, e.g.*, Dobbs v. Neverson, 393 A.2d 147, 154 (D.C. Cir. 1978) (holding that an incarcerated person transferred from a prison to a hospital under the D.C. transfer statute is not entitled to statutory early release unless restored to mental health).

195. Murray v. Lopes, 529 A.2d 1302, 1305–1306, 205 Conn. 27, 33–35 (Conn. 1987).

196. Murray v. Lopes, 529 A.2d 1302, 1306–1308, 205 Conn. 27, 36–38 (Conn. 1987).

rules you can use to determine if you are entitled to custody credit.[197] First, if the facility you are in before you receive your sentence is the "functional equivalent of a jail," you may be entitled to credit.[198] Second, some courts make distinctions based on whether the program you are in is voluntary or involuntary.[199] However, these are general rules, so you should make sure to find out how courts have interpreted the law in your state.

6. Credit for Time in a Mental Hospital

If you were housed in a hospital before being sentenced to prison, you might be entitled to custody credit for your time there. State statutes and courts' interpretations of those laws determine whether you can receive custody credits. Several states have found that, because time in these institutions is similar to being in jail, you should receive credit.[200] As one court stated:

> "The physical place of confinement is not important as the [incarcerated person] technically continued
> to be in jail while held in custody at the hospitals. [The incarcerated person] was not free on bail, had
> no control over his place of custody and was never free to leave the hospitals. For all
> practical intents and purposes, he was still in jail."[201]

But other courts have found incarcerated people housed in psychiatric hospitals pre-sentence underwent treatment rather than incarceration and therefore could not receive custody credits for that time.[202] These courts reason the two types of confinement are different in kind: imprisonment punishes, while hospitalization or civil commitment provides treatment.[203] So, some courts have

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197. Custody credit is statutory credit that prisoners may be awarded for their time spent in confinement prior to trial and sentencing. The reason that many states allow prisoners to count these days as part of their sentence is that it would be unfair to treat defendants who can post bail differently than those who cannot and who therefore have to stay in jail. *See*, *e.g.*, People v. Callahan, 50 Cal. Rptr. 3d 677, 680–681, 144 Cal. App. 4th 678, 684 (2006) (stating that the purpose of actual custody credit statute is to eliminate unequal treatment of indigent and non-indigent defendants). However, courts have taken differing approaches as to whether to grant that time to prisoners detained for reasons other than inability to post bail or bond, like psychiatric evaluation or drug treatment. This section will discuss some of these approaches so that you can figure out whether you are entitled to credit for any time you spent pre-sentence in an institution other than a jail.

198. Maniccia v. State, 931 So. 2d 1027, 1030, 31 Fla. L. Weekly D1622 (Fla. Dist. Ct. App. 2006).

199. Maniccia v. State, 931 So. 2d 1027, 1030, 31 Fla. L. Weekly D1622 (Fla. Dist. Ct. App. 2006) (holding that where confinement is coercive, an incarcerated person is entitled to credit for pre-sentence time in a "lockdown facility", even if the incarcerated person requested treatment there); State v. Mackley, 552 P.2d 628, 629, 220 Kan. 518, 519 (1976) (*per curiam*) (finding an incarcerated person in pretrial custody at a hospital where he was not free to leave was effectively in jail and therefore entitled to custody credit for his time there).

200. *See, e.g.*, State v. Mackley, 552 P.2d 628, 629, 220 Kan. 518, 519 (1976) (*per curiam*) (holding that the word "jail" meant a place of enforced confinement, and included a hospital that the incarcerated person was not free to leave); Maniccia v. State, 931 So. 2d 1027, 1028, 31 Fla. L. Weekly D1622 (Fla. Dist. Ct. App. 2006) (holding that pretrial confinement in a "lockdown psychiatric hospital" entitles the incarcerated person to credit for time served); Murray v. Lopes, 529 A.2d 1302, 1305, 205 Conn. 27, 33–34 (1987) (holding that statute entitles incarcerated people confined pre-sentence to credit for time served); People v. Smith, 175 Cal. Rptr. 54, 56, 120 Cal. App. 3d 817, 822 (1981) (finding incarcerated person entitled to credits for time spent in hospital when proceedings were suspended because he was incompetent to stand trial).

201. State v. Mackley, 552 P.2d 628, 629, 220 Kan. 518, 519 (1976) (*per curiam*).

202. Harkins v. Wyrick, 589 F.2d 387, 391–392 (8th Cir. 1979) (finding incarcerated person's due process and equal protection rights were not violated when he was not credited for time undergoing evaluation and treatment at a hospital prior to serving his sentence); Makal v. Arizona, 544 F.2d 1030, 1035 (9th Cir. 1976) (holding it did not violate incarcerated person's rights to deny him credit for time in a psychiatric hospital, where the purpose was treatment rather than punishment, unless state law provides otherwise, which it did not); People v. Callahan, 50 Cal. Rptr. 3d 677, 683, 144 Cal. App. 4th 678, 687 (2006) (finding that where an incarcerated person was confined pretrial for treatment to restore his competency to stand trial, he could not later recover credit for that time); Closs v. S.D. Bd. of Pardons & Paroles, 656 N.W.2d 314, 317–319, 2003 S.D. 1, (2003) (holding that because the time that incarcerated person spent in civil commitment was not related to his criminal punishment and because no South Dakota statute provided a right to credit for time served while awaiting trial, court refused to award credits); State v. Sorenson, 617 N.W.2d 146, 147, 150, 2000 S.D. 127, ¶1, ¶17 (2000) (*per curiam*) (holding that incarcerated person was not entitled to credit for pre-sentence confinement to undergo psychiatric evaluation unless he remained in state custody only because he could not afford to post bail).

203. *See* Kansas v. Hendricks, 521 U.S. 346, 361–362, 117 S. Ct. 2072, 2082, 138 L. Ed. 2d 501, 515 (1997); *see also* Harkins v. Wyrick, 589 F.2d 387, 392 (8th Cir. 1979) (holding that time in hospital was rehabilitative, not punitive); Makal v. Arizona, 544 F.2d 1030, 1035 (9th Cir. 1976) ("The state hospital was established for the confinement, treatment, and rehabilitation of the mentally ill . . . [not] for purposes of punishment . . . ."); People

determined awarding credits for time in non-penal institutions toward prison sentences does not make sense.

7. Credit for Time in Drug Treatment

The law varies as to whether you may receive credit for time you spent in narcotics or alcohol treatment prior to serving your sentence. Some states permit credit,[204] and some states do not.[205] Additionally, like in the hospitalization context, whether you may count the days in treatment toward your sentence often depends on the nature of the institution and the terms of your confinement there, such as whether or not you will be returned to prison if you fail to complete the program.[206] Typically, the court that sentences you is free to determine whether to award you credit.[207]

D. Conditions of Confinement for Prisoners with Mental Illness

This Part explains how your mental health may be a factor in determining conditions of confinement and in disciplinary proceedings. Section 1 details the rights of incarcerated people who are subjected to isolation and solitary confinement. This includes an explanation of the steps taken by many states to exclude prisoners with serious mental illness from isolated confinement and to increase mental health services for prisoners held in restrictive settings. Section 2 explains your right to have mental health considered in disciplinary proceedings. Some states require that prison administrators consider an incarcerated person's mental health when deciding whether and how to sanction incarcerated people for disciplinary misconduct.

1. Isolation and Solitary Confinement

Courts have recognized that isolating incarcerated people with mental illness in Special Housing Units (SHUs) or "keep-lock" for various reasons—among them protection or discipline—is a harmful

v. Callahan, 50 Cal. Rptr. 3d 677, 683, 144 Cal. App. 4th 678, 687 (2006) (finding that prisoner's confinement was "nonpenal and treatment oriented").

204. *See, e.g.*, State v. Sevelin, 554 N.W.2d 521, 523, 204 Wis. 2d 127, 132–133 (Wis. Ct. App. 1996) (finding that state statute's definition of "custody" for the purpose of determining whether the incarcerated person should get pre-sentence credit includes those temporarily outside of a correctional institution in order to receive medical care, which included treatment for alcoholism); Lock v. State, 609 P.2d 539, 543–546 (Alaska 1980) (interpreting statute granting credit for time "in custody" to include time in non-penal rehabilitation centers, since these institutions also involve restraints on liberty); People v. Rodgers, 144 Cal. Rptr. 602, 606, 79 Cal. App. 3d 26, 33 (1978) (holding "custody" includes participation in live-in drug treatment programs, and so defendant was entitled to credit for time spent in such a program).

205. *See, e.g.*, Pennington v. State, 398 So. 2d 815, 817 (Fla. 1981) (holding that because the purpose of "[h]alfway houses, rehabilitative centers, and state hospitals . . . is structured rehabilitation and treatment, not incarceration," incarcerated person who attended live-in drug treatment as a condition of probation was not entitled to statutory credit for time spent there prior to sentencing); Commonwealth v. Fowler, 930 A.2d 586, 597–598, 2007 Pa. Super. 219, ¶27–29 (2007) (holding that incarcerated person was not "in custody," within the meaning of the statute granting credit for time in custody prior to sentence, where he participated in drug treatment program that did not involve lock-down but did require reinstatement of court case if the defendant breached the terms of his program); State v. Vasquez, 736 P.2d 803, 804–805, 153 Ariz. 320, 321–322 (Ct. App. 1987) (holding that only time spent "in the actual or constructive control of jail or prison officials" qualifies as "in custody" for the purposes of the credit statutes, and so defendant's time in a residential treatment program under the supervision of his probation officer did not qualify for credit); People v. Scott, 548 N.W.2d 678, 680, 216 Mich. App. 196, 200—201 (1996) (holding that "the sentencing credit statute does not entitle that defendant to sentencing credit for his time in the [rehabilitative] treatment facility").

206. *See, e.g.*, Lock v. State, 609 P.2d 539, 546 (Alaska 1980) (holding that because defendant would be returned to prison if he violated the terms of the drug treatment program, he is entitled to credit for time spent in that program).

207. *See*, *e.g.*, Commonwealth v. Fowler, 930 A.2d 586, 596, 2007 Pa. Super. 219, 25 (2007) (noting that "it is within the trial court's discretion whether to credit time spent in an institutionalized rehabilitation and treatment program as time served 'in custody'").

practice.[208] Although isolation of prisoners with mental illness is not unconstitutional as a rule,[209] it is subject to Eighth Amendment limitations.[210] There are certain conditions under which isolating incarcerated people with mental illness is unconstitutional. When those conditions exist, courts will be more likely to intervene to help incarcerated people. For instance, courts will grow more suspicious if incarcerated people are segregated indefinitely without review[211] or if there is a possibility that an incarcerated person will experience psychological harm.[212] Several federal courts have found that, even though segregation does not by itself violate the Constitution, isolation can pose particular risks for those with mental illness or on the verge of developing mental illness.[213] For these groups, isolation can provide extreme stress and worsen their conditions,[214] and therefore violates their rights.[215]

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208. It has been known for many years that isolated confinement—the deprivation of human contact and other sensory and intellectual stimulation—can have disastrous consequences. *See In re* Medley, 134 U.S. 160, 168, 10 S. Ct. 384, 386, 33 L. Ed. 835, 839 (1890) (finding that "[a] considerable number of the prisoners fell, after even a short confinement, into a [state of foolishness], from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community"); *see also* Davenport v. DeRobertis, 844 F.2d 1310, 1316 (7th Cir. 1988) ("[T]here is plenty of medical and psychological literature concerning the ill effects of solitary confinement (of which segregation is a variant."). Modern courts have reiterated these consequences in addressing present-day forms of isolated confinement. *See, e.g.*, Langley v. Coughlin, 715 F. Supp. 522, 540 (S.D.N.Y. 1989) (citing expert's affidavit regarding effects of SHU placement on individuals with mental disorders); Baraldini v. Meese, 691 F. Supp. 432, 446–447 (D.D.C. 1988) (citing expert testimony on sensory disturbance, perceptual distortions, and other psychological effects of segregation), *rev'd on other grounds sub nom.* Baraldini v. Thornburgh, 884 F.2d 615, 280 U.S. App. D.C. 176 (D.C. Cir. 1989); Bono v. Saxbe, 450 F. Supp. 934, 946 (E.D. Ill. 1978) ("Plaintiffs' uncontroverted evidence showed the debilitating mental effect on those inmates confined to the control unit."), *aff'd in part and remanded in part on other grounds*, 620 F.2d 609 (7th Cir. 1980); Madrid v. Gomez, 889 F. Supp. 1146, 1235 (N.D. Cal. 1995) (concluding, after hearing testimony from experts in corrections and mental health, that "many, if not most, inmates in the SHU experience some degree of psychological trauma in reaction to their extreme social isolation and the severely restricted environmental stimulation in the SHU"), *rev'd in part on other grounds*, 190 F.3d 990 (9th Cir. 1999).

209. *See, e.g.*, Jackson v. Meachum, 699 F.2d 578, 583 (1st Cir. 1983) (finding that an incarcerated person with mental illness had no constitutional right to contact with other incarcerated people, even if it would have therapeutic value); Madrid v. Gomez, 889 F. Supp. 1146, 1261 (N.D. Cal. 1995) ("[W]e are not persuaded that the SHU, as currently operated, violates [8th] Amendment standards vis-a-vis all inmates."), *rev'd in part on other grounds*, 190 F.3d 990 (9th Cir. 1999).

210. *See, e.g.*, Helling v. McKinney, 509 U.S. 25, 34–35, 113 S. Ct. 2475, 2481, 125 L. Ed. 2d 22, 32–33 (1993) (holding that prison conditions that "pose an unreasonable risk of serious damage to [a prisoner's] future health" may violate the 8th Amendment); Casey v. Lewis, 834 F. Supp. 1477, 1548–1549 (D. Ariz. 1993) (condemning placement and retention of incarcerated people with mental illness on lockdown); Langley v. Coughlin, 715 F. Supp. 522, 540 (S.D.N.Y. 1989) (holding that psychiatric evidence that prison officials fail to screen out from SHU "those individuals who, by virtue of their mental condition, are likely to be severely and adversely affected by placement there" raises a triable 8th Amendment issue); Inmates of Occoquan v. Barry, 717 F. Supp. 854, 868 (D.D.C. 1989) (holding that inmates with mental health problems must be placed in a separate area or a hospital and not in administrative/punitive segregation area), *rev'd in part sub nom.* Brogsdale v. Barry, 926 F.2d 1184, 1191 (D.C. Cir. 1991).

211. *See* Hutto v. Finney, 437 U.S. 678, 685–687, 98 S. Ct. 2565, 2570–2571, 57 L. Ed. 2d 522, 531–532 (1978) (length of time in isolation should be considered when determining whether confinement there violates the 8th Amendment ban on cruel and unusual punishment); *see also* Jackson v. Meachum, 699 F.2d 578, 584–585 (1st Cir. 1983) (suggesting courts should be more willing to inquire where an incarcerated person has been held for a long period without a time limit).

212. Jackson v. Meachum, 699 F.2d 578, 584–585 (1st Cir. 1983) (urging that officials continue to monitor incarcerated people in segregation and that courts intervene in cases where there is evidence of psychological harm).

213. Madrid v. Gomez, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995) (finding the risk of isolating incarcerated people with mental illness or those likely to develop mental illness is unreasonable and violates the 8th Amendment), *rev'd in part on other grounds*, 190 F.3d 990 (9th Cir. 1999); Jones'El v. Berge, 164 F. Supp. 2d 1096, 1125–1126 (W.D. Wis. 2001) (granting preliminary injunction requiring removal of those with serious mental illness from "supermax" prison, which isolates incarcerated people); Gates v. Cook, 376 F.3d 323, 343 (5th Cir. 2004) ("[T]he isolation and idleness of Death Row combined with the squalor, poor hygiene, temperature, and noise of extremely psychotic prisoners create an environment 'toxic' to the prisoners' mental health."); Inmates of Occoquan v. Barry, 650 F. Supp. 619, 630 (D.D.C. 1986) (holding that housing incarcerated people with mental illness in segregation unit is inappropriate), *on remand to* Inmates of Occoquan v. Barry, 717 F. Supp. 854, 868 (D.D.C. 1989).

214. Fred Cohen, The Mentally Disordered Inmate and the Law 11–8 (1998) ("Social science and clinical literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally.").

215. Madrid v. Gomez, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995) (holding that confining those with marginal

However, to succeed on a claim that isolation violated your rights, you will need to show more than mild or generalized psychological pain.[216]

A growing number of states have taken steps to exclude incarcerated people with serious mental illness from some isolated confinement housing areas and to increase mental health services for incarcerated people with serious mental illness who are held in restrictive settings. Courts have approved remedies, many in the form of settlement agreements, for incarcerated people with mental illness in isolation. In New Jersey, incarcerated people *must* be released from administrative segregation if they have a mental illness history and it appears that ongoing confinement there would harm them.[217] The Mississippi Department of Corrections was ordered to provide annual assessments and better mental health care for incarcerated people on death row who were subject to conditions of isolation.[218] In California, *Madrid v. Gomez* resulted in incarcerated people with serious mental illness being excluded from the Pelican Bay prison's SHU.[219] In Connecticut, the settlement of *Connecticut Office of Protection & Advocacy for Persons with Disabilities v. Choinski* called for exclusion of incarcerated people with serious mental illness from the Northern Correctional Institution.[220] And, in Wisconsin, the settlement in *Jones'El v. Berge* excluded incarcerated people with serious mental illness from super-maximum security housing.[221]

In New York, advocates with the goal of improving mental health treatment in state prisons brought the case *Disability Advocates, Inc. v. New York State Office of Mental Health*.[222] The suit was brought state-wide and alleged that because of inadequate mental health treatment, incarcerated people with mental illness were trapped in the disciplinary process and ended up in isolated confinement settings, which caused them to deteriorate psychiatrically. The case resulted in a private settlement agreement that included among its provisions: a minimum of two hours per day of out-of-cell treatment or programming for incarcerated people with serious mental illness confined in SHU, universal and improved mental health screening of all incarcerated people upon admission to prison, creation and expansion of residential mental health programs, required and improved suicide prevention assessments upon admission to SHU, and improved treatment and conditions for incarcerated people in psychiatric crisis in observation cells. A stated goal of this agreement was to treat rather than isolate and punish incarcerated people with serious mental health needs. This settlement applies *only* to incarcerated people in New York State. Also, note that because this is a private settlement agreement, it does not create an individual cause of action, and a court did not order its terms. If you intend to bring a lawsuit based on the failure of New York to provide necessary mental health treatment to you in isolation, you must exhaust your administrative remedies and file a separate lawsuit. If you are an incarcerated person in New York State and are concerned you are not

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or full mental illness causes undue suffering for these groups), *rev'd in part on other grounds*, 190 F.3d 990 (9th Cir. 1999).

216. Madrid v. Gomez, 889 F. Supp. 1146, 1263–64 (N.D. Cal. 1995) (holding incarcerated people must show more than loneliness, boredom, or mild depression to state a claim of cruel and unusual punishment), *rev'd in part on other grounds*, 190 F.3d 990 (9th Cir. 1999).

217. D.M. v. Terhune, 67 F. Supp. 2d 401, 403 (D.N.J. 1999) ("The Special Administrative Segregation Review Committee shall release the prisoner from Administrative Segregation if the prisoner has a history of mental illness and the Committee decides that continued confinement in the unit would be harmful to the prisoner's mental health.").

218. Gates v. Cook, 376 F.3d 323, 342 (5th Cir. 2004) (ordering mental health examinations and care for death row incarcerated peeople).

219. Madrid v. Gomez, 889 F. Supp. 1146, 1265–1266 (N.D. Cal. 1995) (finding that placing incarcerated people with mental illness within SHU would result in an unreasonable risk of exacerbating their illnesses).

220. Connecticut Office of Protection & Advocacy for Persons with Disabilities v. Choinski, No. 3:03-cv-1352 (RNC) (D. Conn. 2004) (private settlement agreement), *available at* http://www.aclu.org/FilesPDFs/-f07s2zl.pdf (last visited Feb. 1, 2020).

221. Jones'El v. Berge, 164 F. Supp. 2d 1096, 1125–1126 (W.D. Wis. 2001) (granting preliminary injunction requiring removal of those with serious mental illness from "supermax" prison, which isolates incarcerated people).

222. Disability Advocates, Inc. v. New York State Office of Mental Health, No. 1:02-cv-04002 (S.D.N.Y. 2007) (private settlement agreement), available at https://www.clearinghouse.net/chDocs/public/PC-NY-0048-0002.pdf (last visited Feb. 1, 2020).

receiving services required by the settlement, you may write to the lawyers who are enforcing this agreement. Appendix B contains a list of organizations to contact for help.

In 2008, the New York Legislature passed and the Governor signed bill S.333/A.4870 into law. This statute amends various sections of the New York Correction Law, expanding on some of the provisions of the settlement agreement and adopting others. Notably, it defines "mental illness,"[223] provides for incarcerated people with serious mental illness to receive therapy and programming in environments that meet their clinical needs, and specifies that mentally ill incarcerated people will not be placed in segregated confinement except in exceptional circumstances.[224]

2. Your Right to Have Mental Health Considered in Disciplinary Proceedings

Mental health may be relevant in a prison disciplinary proceeding in three separate but related ways: whether the incarcerated person is mentally competent to proceed with the hearing; whether the incarcerated person was responsible for conduct at the time of the incident (or should not be held responsible because of his mental state at the time); and whether the incarcerated person's mental status should be considered to lessen the penalty or in determining what the penalty should be. When there is a connection between mental illness and disciplinary misconduct, an incarcerated person with serious mental illness might commit a disciplinary infraction that jeopardizes chances for parole, results in lost good time credits,[225] or results in isolated confinement.[226] Some states recognize the relevance of mental health and require that prison administrators consider an incarcerated person's mental health during disciplinary proceedings when deciding whether to sanction incarcerated people and, if so, how to sanction them. In New Jersey, the Department of Corrections implemented disciplinary regulations following a lawsuit stating that hearing officers must submit the names of any incarcerated people facing disciplinary hearings to mental health staff to find out whether mental illness might have played a role in the incarcerated person's behavior.[227] The hearing officer must take all information available to him into account in deciding whether to request a psychiatric evaluation and in deciding whether to impose punishment or refer the incarcerated people to a mental health unit instead of disciplining him.[228]

The New York State courts also recognize that evidence of an incarcerated person's poor mental health at the time of the incident which led to disciplinary charges should be considered at prison disciplinary hearings.[229] The seriousness of the offense or the number of incidents should not interfere

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223. N.Y. CORRECT. LAW § 400 (McKinney 2014).

224. N.Y. CORRECT. LAW § 401(1) (McKinney 2014).

225. The effect of such discipline is a longer period of incarceration for these incarcerated people because of psychiatric disabilities. Suits challenging these practices have included claims based on the Americans with Disabilities Act and Rehabilitation Act. For more information on bringing suit under these acts, see *JLM*, Chapter 28, "Rights of Incarcerated People With Disabilities."

226. Some courts clearly recognize the psychological effects of prolonged isolation as relevant to determining whether the discipline imposed constitutes an atypical and significant hardship under Sandin v. Conner, 515 U.S. 472, 483–484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 429–430 (1995). *See*, *e.g.*, Colon v. Howard, 215 F.3d 227, 232 (2d Cir. 2000) (advising district courts in the Second Circuit that, in cases challenging SHU confinement, evidence of psychological effects of prolonged confinement in isolation is relevant); Lee v. Coughlin, 26 F. Supp. 2d 615, 637 (S.D.N.Y. 1998) (finding that 376 days in SHU was atypical and significant and also observing that "[t]he effect of prolonged isolation on inmates has been repeatedly confirmed in medical and scientific studies"); McClary v. Kelly, 4 F. Supp. 2d 195, 205–208 (W.D.N.Y. 1998) (holding that evidence of psychological harm (both expert and the plaintiff's own testimony) created a triable issue under the *Sandin* "atypical and significant" standard).

227. D.M. v. Terhune, 67 F. Supp. 2d 401, 403 (D.N.J. 1999) (stating that mental health staff will be given a list of all incarcerated people with pending disciplinary charges and then will inform the disciplinary hearing officer before the hearing that the incarcerated person is undergoing mental health treatment).

228. D.M. v. Terhune, 67 F. Supp. 2d 401, 403 (D.N.J. 1999).

229. Huggins v. Coughlin, 155 A.D.2d 844, 845, 548 N.Y.S.2d 105, 106–107 (3d Dept. 1989) (determining that the hearing officer is required to consider the incarcerated person's mental condition in making the disciplinary disposition when the inmate's mental state is at issue because "that principle is in conformity with the well-established proposition that evidence in mitigation of the penalty to be imposed or that which raises a possible excuse defense to the charged violation is relevant and material in a disciplinary proceeding"), *aff'd* 76 N.Y.2d 904, 905, 563 N.E.2d 281, 282, 561 N.Y.S.2d 910, 911 (1990); People *ex rel.* Reed v. Scully, 140 Misc. 2d 379, 382, 531 N.Y.S.2d 196, 199 (Sup. Ct. Oneida County 1988) ("[T]he mental competence and mental illness of a prisoner must be considered during the prison disciplinary process where a Penal Law § 40.15 adjudication has

with a determination that alleged misconduct was caused by deteriorating mental health.[230] Litigation in New York[231] led to amendment of existing state-wide regulations that govern procedures at prison disciplinary hearings. The amendments contain criteria that establish when an incarcerated person's mental state must be considered at the hearing.[232] These amendments also establish that the hearing officer must ask the incarcerated person and other witnesses about his condition and interview an Office of Mental Health doctor concerning the incarcerated person's condition at the time of the incident and the time of the hearing.[233] The amendments also created committees with full-time mental health staff at the maximum security prisons.[234] The committees review people incarcerated in the SHU every two weeks and may recommend restoration of privileges, reduction of SHU term, housing reassignment, medication adjustment, or commitment to a psychiatric hospital.[235] Mental illness is taken into consideration in determining whether to dismiss, make a finding of guilt, or lessen any penalty imposed.[236] The settlement reached as a part of *Disability Advocates, Inc. v. New York State Office of Mental Health*[237] provides for additional changes to the disciplinary process including expansion of case management committees to additional prisons, multiple reviews of SHU sentences for incarcerated people receiving mental health services, restrictions on charging incarcerated people with serious mental illness for acts of self-harm, and restrictions on punishing incarcerated people with serious mental illness with the "loaf" (a restricted diet). These changes are contained in a private settlement agreement. They apply *only* to incarcerated people in New York State. Also, note that the private settlement agreement does not create an individual cause of action and its terms were not ordered by the court. If you intend to bring a lawsuit based on the failure of New York to follow these procedures, you must exhaust your administrative remedies and file a separate lawsuit. If you are an incarcerated person in New York State prison and are concerned that you are not receiving considerations required by the settlement, you may write to the lawyers who are enforcing this agreement. Appendix B contains a list of organizations to contact for help.

For more information on your rights at disciplinary hearings, please see Chapter 18 of the *JLM*, "Your Rights at Prison Disciplinary Proceedings." In addition, because much of the information in this section is specific to New York and New Jersey, you should research the law in your own state if you live elsewhere.

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been made or a well-documented history of serious psychiatric problems calls the prisoner's mental health into question."); *see also* Powell v. Coughlin, 953 F.2d 744, 749 (2d Cir. 1991) (upholding Office of Mental Health policy that testimony at prison disciplinary hearings provided by clinical staff concerning an incarcerated person's mental health status must be done outside the presence of the incarcerated person, as reasonably related to legitimate penological interests) (citing Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987), *superseded by statute on other grounds*). The requirement is now part of New York State regulations. *See* N.Y. COMP. CODES R. & REGS. tit. 7, § 254.6(c) (2020).

230. Gittens v. Coughlin, 143 Misc. 2d 748, 750–751, 541 N.Y.S.2d 718, 719–720 (Sup. Ct. Sullivan County 1989) (expunging incarcerated person's disciplinary record where at each hearing the incarcerated person was charged with aggressive behavior similar to behavior for which he was receiving psychiatric treatment; mental illness was not taken into account; there was no consideration of whether he was competent to participate in the hearing; his psychiatric history was well-documented; he had been committed to the forensic psychiatric hospital seventeen times; and the hearing officer did not inquire, based on his nonattendance at hearings, into whether or not he was competent); Trujillo v. LeFevre, 130 Misc. 2d 1016, 1017, 498 N.Y.S.2d 696, 698 (Sup. Ct. Clinton County 1986) ("[A]ny determination by the mental health unit that the petitioner's lack of mental health was a causal factor in his misbehavior should apply equally to all charges.").

231. *See, e.g.,* Anderson v. Goord, 87-cv-141 (N.D.N.Y. 2003) (challenging the adequacy of mental health treatment for incarcerated people in disciplinary housing units at Attica and Auburn Correctional Facilities).

232. N.Y. COMP. CODES R. & REGS. tit. 7, § 254.6(b)(1) (2020).

233. N.Y. COMP. CODES R. & REGS. tit. 7, § 254.6(c)(3) (2020).

234. N.Y. COMP. CODES R. & REGS. tit. 7, § 310.1 (2020).

235. N.Y. COMP. CODES R. & REGS. tit. 7, § 310.3 (2020).

236. N.Y. COMP. CODES R. & REGS. tit. 7, § 254.6(f) (2020).

237. Disability Advocates, Inc. v. N.Y. Office of Mental Health, No. 1:02-cv-04002 (S.D.N.Y. 2007) (providing changes under private settlement agreement to the disciplinary process for incarcerated people in New York). For a brief summary of settlement provisions, visit the case profile on The Civil Rights Litigation Clearinghouse, University of Michigan School of Law website, *available at* http://www.clearinghouse.net/detail.php?id=5560 (last visited Feb. 1, 2020).

E. Special Considerations for Pretrial Detainees

Pretrial detainees are individuals in custody who have not yet been convicted. Because they are considered "innocent until proven guilty,"[238] pretrial detainees enjoy many of the rights they would have were they not in jail. Put another way, pretrial detainees, unlike convicted incarcerated people, may not be punished, and can claim that jail practices subjecting them to punishment violate their due process rights to be found guilty before punishment is inflicted.[239] In *Bell v. Wolfish*, the Supreme Court declared that the Due Process Clause of the Fourteenth Amendment governs whether conditions of confinement violate the rights of incarcerated people.[240] The Court established in *Bell* that jail conditions should not be assessed under the Eighth Amendment, which bans cruel and unusual punishment,[241] because pretrial detainees cannot be punished *at all*.[242] Instead, claims are assessed under the Due Process Clause of the Fourteenth Amendment. For more information about filing a constitutional claim under the Due Process Clause of the Fourteenth Amendment, see Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law."

Note that the Supreme Court has also made it clear that losing your liberty by confinement before trial does *not* violate the Constitution; it is only when your loss of liberty goes beyond what necessarily comes with detention that incarcerated people may raise claims that their rights have been violated.[243] The *Bell* rule shapes most of the law surrounding your rights as a pretrial detainee to adequate mental health care and to avoid unwanted treatment.

1. Your Right as a Pretrial Detainee to Psychiatric Medical Care

In *City of Revere v. Massachusetts General Hospital*, the Supreme Court applied the *Bell v. Wolfish* rule, that pretrial detainees are entitled to be free of punishment under the Due Process Clause, to the medical care context. In that case, the Court found the Due Process Clause requires the government to provide medical care to pretrial detainees in its custody, and those detainees must receive protections "*at least as great as* the Eighth Amendment protections available to a convicted incarcerated person."[244] Pretrial detainees' claims that they have been denied adequate medical care are assessed under the Due Process Clause of the Constitution, rather than under the Eighth Amendment.[245] However, many circuit courts have imported *Estelle v. Gamble*'s[246] "deliberate indifference" test, which is based on the Eighth Amendment, to evaluate pretrial detainees' claims.[247]

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238. *See*, *e.g.*, Campbell v. McGruder, 580 F.2d 521, 527 (D.C. Cir. 1978) (pretrial detainees are presumed innocent and therefore may not be punished).

239. *See* Bell v. Wolfish, 441 U.S. 520, 535, 99 S. Ct. 1861, 1872, 60 L. Ed. 2d 447, 466 (1979) (holding that conditions of confinement should be evaluated for whether they inflict punishment on incarcerated people without due process).

240. Bell v. Wolfish, 441 U.S. 520, 535, 99 S. Ct. 1861, 1872, 60 L. Ed. 2d 447, 466 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt.").

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

242. Bell v. Wolfish, 441 U.S. 520, 535 n.16, 99 S. Ct. 1861, 1872 n.16, 60 L. Ed. 2d 447, 466 n.16 (1979) ("Due process requires that a pretrial detainee not be punished.").

243. Bell v. Wolfish, 441 U.S. 520, 538, 99 S. Ct. 1861, 1873, 60 L. Ed. 2d 447, 468 (1979) ("A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose.").

244. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244, 103 S. Ct. 2979, 2983, 77 L. Ed. 2d 605, 611 (1983) (emphasis added).

245. *See* Bell v. Wolfish, 441 U.S. 520, 535 n.16, 99 S. Ct. 1861, 1872 n.16, 60 L. Ed. 2d 447, 466 n.16 (1979) ("[The] State does not acquire the power to punish with which the [8th] Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the [14th] Amendment.") (quoting Ingraham v. Wright, 430 U.S. 651, 671–672 n.40 (1977)).

246. Estelle v. Gamble, 429 U.S. 97, 107, 97 S. Ct. 285, 293, 50 L. Ed. 2d 251, 262 (1976) (finding that "[a] medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice."). For more information on the deliberate indifference standard, which requires showing more than negligence, please see Part B(2) of this Chapter.

247. *See, e.g.*, Elliott v. Cheshire County, 940 F.2d 7, 10–12 (1st Cir. 1991) (holding that jail officials violated detainees' rights when they exhibited deliberate indifference to medical needs); Hill v. Nicodemus, 979 F.2d 987, 990–992 (4th Cir. 1992) (finding deliberate indifference is the proper standard under which to assess

Some courts have found delaying treatment for pretrial detainees violates due process because delay punishes detainees and shows deliberate indifference to the serious medical needs of the detainees.[248]

The deliberate indifference test is subjective, not objective.[249] This means for an official to be found "deliberately indifferent," the official must have been aware there was a substantial risk of serious harm but failed to respond reasonably to the risk.[250] The official's conduct must go beyond mere negligence.[251]

The bottom line is that as a pretrial detainee, you have at least the same rights that a convicted incarcerated person has to adequate and timely medical and psychiatric care. Your right comes from the Fourteenth Amendment, and may come from state statutes.[252] So, before filing your complaint, you should find out what the law is in your state.

(a) Your Right to Protection from Self-Harm and to Screening for Mental Illness

One application of the right to mental health care is the right to protection from self-harm and suicide. As a general rule, courts have found that jail staff and administrators have a duty to protect pretrial detainees[253] and/or provide them with adequate psychiatric care.[254] Jail officials are liable for

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detainees' rights to medical and mental health care); Partridge v. Two Unknown Police Officers, 791 F.2d 1182, 1186–1187 (5th Cir. 1986) (finding pretrial detainees are entitled to at least the level of medical care required under the deliberate indifference test); Heflin v. Stewart County, 958 F.2d 709, 714–717 (6th Cir. 1992) (holding that pretrial detainees must show jail acted with deliberate indifference to serious medical needs), *overruled on other grounds by* Monzon v. Parmer County, 2007 U.S. Dist. LEXIS 43798 (N.D. Tex. June 15, 2007) (*unpublished*); Hall v. Ryan, 957 F.2d 402, 404–405 (7th Cir. 1992) (finding that pretrial detainees are at least entitled to protection from jailers' deliberate indifference); Bell v. Stigers, 937 F.2d 1340, 1342–1343 (8th Cir. 1991) (holding that under either the 8th or 14th Amendments, deliberate indifference is the appropriate standard for assessing pretrial detainees' claims); Redman v. County of San Diego, 942 F.2d 1435, 1441 (9th Cir. 1991) (en banc) (finding deliberate indifference is the appropriate test for pretrial detainees' claims, but distinguishing other levels of culpability in the prison context); Howard v. Dickerson, 34 F.3d 978, 980 (10th Cir. 1994) (holding deliberate indifference test applies to pretrial detainees); Cottrell v. Caldwell, 85 F.3d 1480, 1490–1491 (11th Cir. 1996) (rejecting a pretrial detainee's mistreatment claim because of a failure to show subjective deliberate indifference).

248. Redman v. County of San Diego, 942 F.2d 1435, 1443 (9th Cir. 1991) (en banc) ("We therefore hold that deliberate indifference is the level of culpability that pretrial detainees must establish for a violation of their personal security interests under the fourteenth amendment. We also hold that conduct that is so wanton or reckless with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur . . . will also suffice to establish liability.") (internal quotation marks and citation omitted); Terry v. Hill, 232 F. Supp. 2d 934, 943–944 (E.D. Ark. 2002) (holding it violates due process and the 8th Amendment to subject pretrial detainees to an average wait of over eight months for admission to a hospital for mental health care); Swan v. Daniels, 923 F. Supp. 626, 631 (D. Del. 1995) (finding the court could apply either the 8th or 14th Amendment to assess incarcerated person's claims, since both amendments provide equivalent protection).

249. *See, e.g.*, Elliott v. Cheshire County, 940 F.2d 7, 10 (1st Cir. 1991) ("[A] finding of deliberate indifference requires . . . that defendant's knowledge of a large risk can be inferred.") (citation omitted); Hare v. City of Corinth, 74 F.3d 633, 636 (5th Cir. 1996) (*en banc*) ("We hold that the episodic act or omission of a state jail official does not violate a pretrial detainee's due process right to medical care or protection from suicide unless the official acted or failed to act with subjective deliberate indifference to the detainee's rights."); Sanderfer v. Nichols, 62 F.3d 151, 154–155 (6th Cir. 1995).

250. Sanderfer v. Nichols, 62 F.3d 151, 154–155 (6th Cir. 1995) (adopting and applying the Farmer v. Brennan subjective deliberate indifference test to a pretrial detainee's claim).

251. Sanderfer v. Nichols, 62 F.3d 151, 154–155 (6th Cir. 1995) (adopting and applying the Farmer v. Brennan subjective deliberate indifference test to a pretrial detainee's claim).

252. *See, e.g.*, N.Y. CORR. LAW § 505 (McKinney 2014) (establishing a provision of routine medical, dental and mental health services); 730 ILL. COMP. STAT. 125/17 (2019) ((requiring wardens to provide medical treatment necessary for all incarcerated people in their care).

253. Hare v. City of Corinth, 74 F.3d 633, 649 (5th Cir. 1996) (holding that the state has a duty to provide mental health care to suicidal pretrial detainees where to deny it would suggest deliberate indifference); Elliott v. Cheshire County, 940 F.2d 7, 10 (1st Cir. 1991) ("It is clearly established . . . that jail officials violate the due process rights of their detainees if they exhibit a deliberate indifference to the medical needs of the detainees that is tantamount to an intent to punish."); Hill v. Nicodemus, 979 F.2d 987, 990–991 (4th Cir. 1992) (holding that a pretrial detainee who had committed suicide was entitled to medical care, and its denial could be assessed under the deliberate indifference standard); Partridge v. Two Unknown Police Officers, 791 F.2d 1182, 1187 (5th Cir. 1986) (holding that jail officials had a duty not to be deliberately indifferent to an inmate's psychiatric needs).

254. Hare v. City of Corinth, 74 F.3d 633, 649 (5th Cir. 1996) (en banc) (holding that the state has a duty to provide mental health care to suicidal pretrial detainees where to deny it would suggest deliberate indifference); Elliott v. Cheshire County, 940 F.2d 7, 10 (1st Cir. 1991) ("It is clearly established . . . that jail officials violate the due process rights of their detainees if they exhibit a deliberate indifference to the medical needs of the detainees that is tantamount to an intent to punish."); Hill v. Nicodemus, 979 F.2d 987, 990–991 (4th Cir. 1992) (holding

failing to prevent a suicide or a suicide attempt only if they knew or should have known that an incarcerated person was suicidal.[255] The standard that courts typically apply to determine if the State failed to protect incarcerated people from themselves or failed to provide mental health care is "deliberate indifference,"[256] which is outlined in Parts E(1)(a) and B(2) of this Chapter. In a case of self-harm, "deliberate indifference" requires a strong likelihood that self-infliction of harm will occur."[257]

Similarly, courts have not established a clear rule requiring screening for mental health problems or suicidal tendencies upon arrival at a jail. Some courts have held incoming incarcerated people must be screened so that they can be provided with mental health care.[258] Other courts have found there is no duty to screen.[259]

(b) Your Right to Continuation of Drug Treatment

Although prisons are not usually required to offer specific types of treatment like methadone maintenance,[260] you do have a protected liberty interest in treatments that you are already receiving at the time you begin your incarceration. Since pretrial detainees retain many of their rights, any unnecessary deprivation of liberty—like withdrawing methadone—violates their due process rights.[261] Additionally, withdrawal pain can be considered punishment, which is not allowed prior to trial or plea.[262] The only limit on this right is if the government can claim that *its* interest in ensuring, for example, jail security or your presence at trial[263] overrides *your* interest in liberty. In addition to due process, if you are detained rather than released and are being denied methadone, you may be able to claim that you are not being treated the same as pretrial defendants who *are* out on pretrial release.[264]

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that a pretrial detainee who had committed suicide was entitled to medical care, and its denial could be assessed under the deliberate indifference standard); Partridge v. Two Unknown Police Officers, 791 F.2d 1182, 1187 (5th Cir. 1986) (holding that jail officials had a duty not to be deliberately indifferent to an inmate's psychiatric needs).

255. Elliott v. Cheshire County, 940 F.2d 7, 10–11 (1st Cir. 1991).

256. Hare v. City of Corinth, 74 F.3d 633, 643 (5th Cir. 1996) (en banc) (adopting a test of deliberate indifference for episodic acts of inadequate medical care or failure to protect).

257. Elliott v. Cheshire County, 940 F.2d 7, 10 (1st Cir. 1991) (quoting *Torraco v. Maloney*, 923 F.2d 231, 236 (1st Cir. 1991)).

258. Campbell v. McGruder, 580 F.2d 521, 548–550 (D.C. Cir. 1978) (creating an affirmative duty to screen pretrial detainees displaying unusual behavior for mental illness, and requiring treatment for their medical needs); Alberti v. Sheriff of Harris County, 406 F. Supp. 649, 677 (S.D. Tex. 1975) (ordering that jail establish an intake screening process to detect alcohol and drug abuse, and mental illness).

259. Belcher v. Oliver, 898 F.2d 32, 34–35 (4th Cir. 1990) (holding detainee's right to be free from punishment did not include right to be screened for mental illness or suicide risk); Gagne v. City of Galveston, 805 F.2d 558, 560 (5th Cir. 1986) (holding arresting officer had no duty to screen for suicidal tendencies); Danese v. Asman, 875 F.2d 1239, 1244 (6th Cir. 1989) ("It is one thing to ignore someone who has a serious injury and is asking for medical help; it is another to be required to screen prisoners correctly to find out if they need help."); Estate of Cartwright v. City of Concord, 856 F.2d 1437, 1439 (9th Cir. 1988) (upholding a finding that did not impose liability for failure to screen for mental illness).

260. *See* Norris v. Frame, 585 F.2d 1183, 1188 (3d Cir. 1978) ("There is no constitutional right to methadone."); Hines v. Anderson, 439 F. Supp. 12, 17 (D. Minn. 1977) (finding no requirement that prison administer methadone as part of a drug maintenance program).

261. Norris v. Frame, 585 F.2d 1183, 1189 (3d Cir. 1978) (finding that under the circumstances, the pretrial detainee's methadone treatment should have continued); Cudnik v. Kreiger, 392 F. Supp. 305, 311–312 (N.D. Ohio 1974) (holding that it violates due process to deny incarcerated person the right to continue methadone treatment); *see generally* Bell v. Wolfish, 441 U.S. 520, 535, 99 S. Ct. 1861, 1872, 60 L. Ed. 2d 447, 466 (1979) (applying the Due Process Clause to assess pretrial detainees' conditions of confinement claims).

262. *See* Norris v. Frame, 585 F.2d 1183, 1187 (3d Cir. 1978) ("A detainee . . . may not be 'punished' at all."); Cudnik v. Kreiger, 392 F. Supp. 305, 311 (N.D. Ohio 1974) ("[A] pretrial detainee should not be subjected to . . . punishment or loss.").

263. Norris v. Frame, 585 F.2d 1183, 1189 (3d Cir. 1978) (providing that the state can only override an incarcerated person's liberty interest in limited circumstances: those inherent to confinement, necessary to guarantee jail security, or needed to ensure defendant's presence at trial); Cudnik v. Kreiger, 392 F. Supp. 305, 311 (N.D. Ohio 1974) (finding pretrial detainees should lose only those liberties incident to confinement).

264. Cudnik v. Kreiger, 392 F. Supp. 305, 312 (N.D. Ohio 1974) (holding that those detained pretrial should not suffer greater deprivations—other than confinement—than those released pending trial).

2. Unwanted Treatment as a Pretrial Detainee

Just as you have the right to refuse medication while you are in prison,[265] you have the right to refuse treatment if you are a detainee awaiting trial.[266] However, your right to refuse medication is not absolute. Even though you have more rights as a detainee than as a convicted incarcerated person, the nature of the government interest in giving you medication is unique in this context. Specifically, the government may give you medication before trial in order to make you competent to stand trial.[267] However, the government may do this *only* if several conditions are met.[268] Similarly, there are several procedural checks in place to make sure that medicating you is absolutely necessary.[269] If you are a detainee in federal custody, for example, you are entitled to an administrative hearing for which you had prior notice and are provided representation, and at which you may appear, present evidence, cross-examine witnesses, and hear the testimony of your treating mental health professional.[270] You also may appeal a decision that you do not like.[271] The reason that there are so many checks is that you have a strong interest in defining your own treatment. You also have a strong interest in conducting your defense.[272] Thus, courts will be very careful to make sure that your interests are appropriately balanced against the government's interests.[273]

(a) The *Sell* Test: Conditions the Government Must Meet Before Medicating You

In *Sell v. United States*,[274] the Supreme Court created the test that determines when it may be appropriate for the government to forcibly medicate you prior to trial. You may be medicated for serious but non-violent crimes. This test also determines and when it violates your rights to be medicated prior to trial. There, the Court required the government to comply with *all* of the following conditions before medicating the pretrial detainee:

(i) Important Government Interests Are at Stake.[275]

The Court has held that determining a defendant's guilt or innocence for a "serious crime" is an important government interest.[276] However, there is no clear rule defining what "serious" means. Courts may measure seriousness based on the sentence to which the charged crime exposes you.[277]

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265. Washington v. Harper, 494 U.S. 210, 221–222, 110 S. Ct. 1028, 1036, 108 L. Ed. 2d 178, 198 (1990) (finding incarcerated person had a protected liberty interest under the Due Process Clause in avoiding unwanted medication).

266. Riggins v. Nevada, 504 U.S. 127, 137, 112 S. Ct. 1810, 1816, 118 L. Ed. 2d 479, 490 (1992) (holding lower court erred by not acknowledging criminal defendant's liberty interest in avoiding unwanted antipsychotic drugs); *see generally* Bell v. Wolfish, 441 U.S. 520, 545, 99 S. Ct. 1861, 1877, 60 L. Ed. 2d 447, 472 (1979) (holding that pretrial detainees enjoy at least as much protection as convicted incarcerated people).

267. Sell v. United States, 539 U.S. 166, 169, 123 S. Ct. 2174, 2178, 156 L. Ed. 2d 197, 205 (2003) (concluding that the government may administer antipsychotic drugs to pretrial detainees in limited circumstances). In prison, in contrast, the government interest is often defined in terms of avoiding harm to self or others. *See* Washington v. Harper, 494 U.S. 210, 227, 110 S. Ct. 1028, 1039–1040, 108 L. Ed. 2d 178, 202 (1990).

268. Sell v. United States, 539 U.S. 166, 180–181, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 211–213 (2003) (establishing a multi-part test for when a detainee may be medicated to restore competence to stand trial).

269. United States v. Brandon, 158 F.3d 947, 955 (6th Cir. 1998) (ordering a hearing before a judge to decide whether to medicate defendant before trial).

270. 28 C.F.R. § 549.46(a) (2020).

271. 28 C.F.R. § 549.46(a)(8) (2020).

272. *See, e.g.*, Riggins v. Nevada, 504 U.S. 127, 137, 112 S. Ct. 1810, 1816, 118 L. Ed. 2d 479, 490 (1992) (concluding that side effects from antipsychotic medication likely unfairly impaired prisoner's defense at trial); United States v. Brandon, 158 F.3d 947, 955 (6th Cir. 1998) (holding that courts should consider whether medication will affect the defendant's physical appearance at trial or as the defendant's ability to aid in the preparation of his own defense).

273. *See* United States v. Rivera-Guerrero, 377 F.3d 1064, 1069 (9th Cir. 2004) (finding that only federal district courts, not federal magistrates, may authorize the involuntary administration of medication because protection from unwanted medication is such an important right).

274. Sell v. United States, 539 U.S. 166, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003).

275. Sell v. United States, 539 U.S. 166, 180, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 211 (2003).

276. Sell v. United States, 539 U.S. 166, 180, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 211 (2003).

277. *See* United States v. Evans, 404 F.3d 227, 237 (4th Cir. 2005) (looking to the maximum statutory sentence to determine whether a crime is "serious"); United States v. Dallas, 461 F. Supp. 2d 1093, 1097 (D. Neb.

One court, for instance, declined to fix a clear line defining what crimes are serious. However, the court found that one exposing a defendant to a maximum of 10 years of imprisonment was serious.[278] Therefore, the government had an interest in trying the detainee in that case.[279]

(ii) No Special Circumstances Exist that Lessen the Government's Interest in Prosecution.[280]

If special circumstances exist, the government's interest in trying you will be less important. But the *Sell* Court noted that, if the detainee is deemed dangerous to himself or others, the State may medicate him on those grounds instead. Under these circumstances, the court would not need to reach the question of whether medication is necessary to enable the detainee to stand trial.[281] In such a case, special circumstances might not lessen the government's interest, which would involve safety rather than ensuring a detainee could stand trial. You should note that the burden on the government is lower if it desires to medicate you for dangerousness reasons rather than to stand trial.[282]

(iii) Involuntary Medication "Significantly Further[s]" Government Interests, Making Defendant's Competence to Stand Trial Substantially Likely.[283]

Several courts have tried to define what "substantially likely" means. One court found that a 50% likelihood that the pretrial detainee would regain competency was not enough to justify giving him medication over his objection.[284] Another court held that a 70% success rate among other detainees was enough.[285] Yet another court has stated that an 80% chance was enough.[286] Thus, it is not clear exactly what counts as "substantially likely." But the greater the percentage chance you will be restored to health, the smaller the chance you have of successfully claiming that the government should fail the *Sell* test. This percentage is a matter about which a psychiatrist will testify at your involuntary medication hearing. However, because the government must meet all of *Sell*'s conditions, you still might be able to claim that you should not be medicated for other reasons. Furthermore, some courts have been skeptical of the practice of using statistical evidence of how likely a defendant is to regain competence.[287] Therefore, you might be able to argue that the statistics themselves are flawed.

2006) ("The seriousness of the crime is measured by its maximum statutory penalty.").

278. United States v. Evans, 404 F.3d 227, 232 (4th Cir. 2005) (finding that a defendant facing federal charges of assaulting a U.S. agricultural employee and threatening to murder a U.S. judge had committed a "serious" crime).

279. United States v. Evans, 404 F.3d 227, 238 (4th Cir. 2005).

280. Sell v. United States, 539 U.S. 166, 180, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 212 (2003) (finding that special circumstances, like the fact that the detainee is likely to be civilly confined for a length of time, might lessen the need to prosecute criminally and therefore also lessen the need to medicate a detainee for the sake of standing trial).

281. Sell v. United States, 539 U.S. 166, 181–183, 123 S. Ct. 2174, 2185–2186, 156 L. Ed. 2d 197, 213–214 (2003) (finding that if the government can instead seek civil commitment, where the detainee may be medicated because of risk to self or others, it should do that prior to seeking to medicate to stand trial); United States v. Cruz-Martinez, 436 F. Supp. 2d 1157, 1159 n.2 (S.D. Cal. 2006) (noting that courts often conduct a *Washington v. Harper* dangerousness assessment prior to a trial competence one because of the difficulty of the *Sell* inquiry to determine whether a person can be forcibly medicated); United States v. White, 431 F.3d 431, 434–435 (5th Cir. 2005) (holding that government should have sought a dangerousness assessment before assessing whether to forcibly medicate to restore competency).

282. *See* United States v. Rodman, 446 F. Supp. 2d 487, 496 (D.S.C. 2006) ("[T]he standard for determining whether to forcibly medicate a detainee for the sole purpose of rendering him competent for trial is greater than the standard for medicating a detainee who poses a significant danger to himself or others.").

283. Sell v. United States, 539 U.S. 166, 181, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 212 (2003) (noting that the use of drugs must be "in the patient's best medical interest in light of his medical condition" and must take into account the chance of side effects).

284. United States v. Rivera-Morales, 365 F. Supp. 2d 1139, 1141 (S.D. Cal. 2005).

285. United States v. Gomes, 387 F.3d 157, 161–162 (2d Cir. 2004).

286. United States v. Bradley, 417 F.3d 1107, 1115 (10th Cir. 2005).

287. United States v. Cruz-Martinez, 436 F. Supp. 2d 1157, 1162 (S.D. Cal. 2006) (doubting the "predictive value and applicability of the government's statistic regarding the likelihood of success").

Courts are also concerned that side effects may affect the detainee. Even side effects that are not medically harmful may affect the ways that the detainee is able to assist in his defense.[288] Whether this will happen is another factor that courts should consider when deciding whether to allow you to be medicated before trial.

(iv) Involuntary Medication is Necessary to Further Government Interests, and Less Intrusive Means Are Unlikely to Achieve the Same Result.[289]

The Supreme Court requires the government to explore alternatives before deciding to use the very invasive practice of giving you medication over your objection.[290] These alternatives might include non-drug therapies. It may also include a court order to the detainee backed by the court's power to punish him for contempt if he does not comply.[291]

(v) Medication is Medically Appropriate (in the Detainee's Best Interest).[292]

If the State is trying to medicate you, the drugs must be in your best interest. If the side effects are too dangerous, for example, a court may deny the government's request to medicate you.[293] Courts have even held that the government must provide evidence that shows how the drugs are likely to affect *you* specifically. This differs from evidence that shows how the drug affects people generally.[294]

(b) Other Procedural Requirements

The *Sell* case involves what is called your "substantive due process" right to avoid unwanted intrusions into your personal liberty. The *Sell* test weighs your interests against the government's interests. You also have the right to certain *procedures* before your rights are taken away. For example, you are entitled to a hearing before you are forcibly medicated. If the government seeks to medicate you for dangerousness, it must at least give you an administrative hearing.[295] If, however, the government is trying to restore your competence to stand trial, you are entitled to a full judicial hearing in a court.[296] In both instances, you have the right to protections. These include notice (you must be told when and where your hearing will occur), representation by a lawyer, and the ability to present evidence. The precise procedural requirements vary by state.

Another protection that courts have established is the burden of proof that the government must meet when trying to forcibly administer medication to pretrial detainees. Not all federal circuits have decided this question. However, the general rule is that the government must show medication is necessary by "clear and convincing evidence."[297] This differs from the standard used in criminal cases,

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288. Sell v. United States, 539 U.S. 166, 181, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 212 (2003).
289. Sell v. United States, 539 U.S. 166, 181, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 212 (2003).
290. Sell v. United States, 539 U.S. 166, 181, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 212 (2003).
291. Sell v. United States, 539 U.S. 166, 181, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 212 (2003).
292. Sell v. United States, 539 U.S. 166, 181, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 212 (2003).
293. *See* United States v. Evans, 404 F.3d 227, 242 (4th Cir. 2005) (requiring government to state what the likely side effects will be, and whether the benefits of treatment will outweigh them); United States v. Cruz-Martinez, 436 F. Supp. 2d 1157, 1162–1163 (S.D. Cal. 2006) (finding antipsychotic drugs can have severe side effects, and the government had not met its burden of showing that the benefits of giving them to the detainee outweighed the risks).
294. *See* United States v. Evans, 404 F.3d 227, 241–242 (4th Cir. 2005) (finding fault with government's failure to provide evidence about this particular detainee).
295. *See* United States v. White, 431 F.3d 431, 435 (5th Cir. 2005) (finding the federal government regulatory scheme entitled pretrial detainee to an administrative hearing on the issue of forcible medication).
296. United State v. Brandon, 158 F.3d 947, 956 (6th Cir. 1998) (finding that judicial, rather than administrative, hearing is necessary because there is "great risk" in allowing the decision to be made by individuals without legal training).
297. United States v. Gomes, 387 F.3d 157, 160 (2d Cir. 2004) (requiring the government to make its case for involuntary medication with clear and convincing proof); United States v. Bradley, 417 F.3d 1107, 1114 (10th Cir. 2005) (finding that because important interests are involved, the government must prove its case by clear and convincing evidence); United States v. Cruz-Martinez, 436 F. Supp. 2d 1157, 1160 n.3 (S.D. Cal. 2006) (adopting the "clear and convincing" burden of proof standard).

"beyond a reasonable doubt". Although clear and convincing is not as difficult a standard to meet as "beyond a reasonable doubt," it is still very hard to meet. Furthermore, the government may not use conclusory evidence to prove its case.[298] Conclusory evidence is evidence that presumes the point it is trying to make. Though these protections do not offer you an absolute right to avoid treatment, they make it more difficult for the State to take away your rights.

F. Planning for Your Release

If you are an incarcerated person in New York and are receiving mental health care while in custody, your institution should provide you with some assistance in planning for treatment upon your release. A staff member familiar with your case should complete a written service plan. The plan should at least include a statement of your need for supervision, medication, aftercare services, or assistance in finding employment. The service plan should include a list of organizations and facilities that are available to provide treatment.

G. Planning for Parole

Although there is no constitutional right to parole,[299] the State may not use a mental illness as a reason to deny a parole hearing to an incarcerated person.[300] Even if you have been determined to have a mental illness, you have the right to a parole hearing. At the hearing, you also have the right to the same procedures that incarcerated people without mental illness have.[301] You cannot be denied parole because of your mental illness if you are eligible for psychological or psychiatric treatment[302] and the prison has failed or refused provide you those services. [303] If state regulations provide for parole and specific conditions of parole, then you may have a constitutionally protected liberty interest in the procedures provided by the state statute.[304] For more information, please see Chapter 35: "Getting Out Early: Conditional & Early Release," and Chapter 32: "Parole" of the *JLM*. You should also check the laws of your state to determine whether procedural protections apply to parole denial.

H. Where to Go for Help

In most states, there are organizations called Protection and Advocacy ("P&A") agencies that protect and advocate for the rights of people with mental illnesses. P&A agencies also investigate reports of abuse and neglect in facilities that care for or treat individuals with mental illnesses. These facilities include hospitals, nursing homes, homeless shelters, jails, and prisons. These facilities can be either public or private. P&As may advocate for incarcerated people and investigate issues that

298. *See* United States v. Evans, 404 F.3d 227, 240 (4th Cir. 2005) (criticizing the government for its failure to explain how it reached its conclusions about alleged necessity to medicate pretrial detainee).

299. *See* Greenholtz v. Inmates of the Neb. Penal & Corr. Complex, 442 U.S. 1, 7–8, 99 S. Ct. 2100, 2103–2104, 60 L. Ed. 2d 668, 675–676 (1979) (finding that while a state may establish a parole system, it has no duty to do so because there is no constitutional right of an incarcerated person to be conditionally released before the expiration of his sentence).

300. Sites v. McKenzie, 423 F. Supp. 1190, 1195 (N.D. W. Va. 1976) (finding a prisoner cannot be denied a parole hearing afforded to other prisoners solely because he is in a mental hospital). But see Lopez v. Evans, 25 N.Y.3d 199, 206–207 (2015) (holding that conducting a parole revocation hearing after a court has deemed the parolee to be mentally incompetent violates due process and, therefore, made be precluded from going forward).).

301. *See*, *e.g.*, Sites v. McKenzie, 423 F. Supp. 1190, 1195 (N.D. W. Va. 1976) (holding that liberty interest for the prisoner with mental illness included the right to a parole hearing and also the right to several procedural protections).

302. Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977) (finding there is a right to psychological treatment when an incarcerated person is eligible for it. An incarcerated person is eligible if a physician or other health care provider concludes that "(1) that the prisoner's symptoms evidence a serious disease or injury; (2) that such disease or injury is curable or may be substantially alleviated; and (3) that the potential for harm to the prisoner by reason of delay or the denial of care would be substantial").

303. Bowring v. Godwin, 551 F.2d 44, 46 (4th Cir. 1977) (reversing dismissal of incarcerated person's complaint that he had been denied parole in part because of his mental illness, for which he had not received treatment).

304. *See* Greenholtz v. Inmates of the Neb. Penal & Corr. Complex, 442 U.S. 1, 7–8, 99 S. Ct. 2100, 2103–2104, 60 L. Ed. 2d 668, 675–676 (1979) (finding Nebraska parole statute created a protected liberty interest a prisoner may enforce).

come up during transportation or admission to such treatment facilities. P&As also investigate issues that come up during residency in these facilities, or within ninety days after discharge from them.[305]

I. Conclusion

This Chapter explains your rights as an incarcerated person with a mental illness. It covers the basic information you will need to understand how the law applies to incarcerated people with mental illnesses. It also covers your right to receive treatment, and your limited right to refuse unwanted treatment and transfers. For a list of organizations that might be able to help you with legal issues related to your mental illness, see Appendix A or write to the JLM for further assistance.

305. This general definition of Protection and Advocacy Agencies was taken from various publications by the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services, such as *Transforming Housing for People with Psychiatric Disabilities Report* 17 (2006), *available at* https://www.yumpu.com/en/document/read/34895762/transforming-housing-for-people-with-psychiatric-disabilities-report- (last visited Feb. 2, 2020).

APPENDIX A

RESOURCES FOR PRISONERS WITH MENTAL ILLNESS

The following is a list of organizations, including Protection and Advocacy organizations (P&As) that you might wish to contact for help with legal issues related to your mental illness. This list is not complete, and every state should have at least one P&A that assists people with mental illness. To find out the name and contact information for the P&A in your area, contact the National Disability Rights Network, 900 Second Street NE, Suite 211, Washington, D.C. 20002; Phone: (202) 408-9514, TTY: (202) 408-9521, Fax: (202) 408-9520.

National Organization

The Bazelon Center for Mental Health Law
1101 15th Street NW, Suite 1212
Washington, DC 20005
Phone: (202) 467-5730
Fax: (202) 223-0409
TDD: (202) 467-4232
http://www.bazelon.org

California

Disability Rights California
1831 K Street
Sacramento, CA 95811
Phone: (916) 504-5800
Fax: (916) 504-5802
http://www.disabilityrightsca.org/

Florida

Advocacy Center for
Persons with Disabilities, Inc.
2728 Centerview Drive, Suite 102
Tallahassee, FL 32301
Phone: (850) 488-9071
Toll Free: (800) 342-0823 (in-state)
Fax: (850) 488-8640
TDD: (800) 346-4127
http://www.disabilityrightsflorida.org/

Massachusetts

Disability Law Center, Inc.
11 Beacon Street, Suite 925
Boston, MA 02108
Phone: (617) 723-8455
Toll Free: (800) 872-9992
TTY: (800) 381-0577
Fax: (617) 723-9125
http://www.dlc-ma.org/index.htm

New York

The Urban Justice Center
123 William Street, 16th Floor
New York, NY, 10038
Phone: (646) 602-5600
Fax: (212) 533-4598
http://www.urbanjustice.org/
Counties served: Bronx, Brooklyn, Manhattan, Queens

Disability Advocates, Inc.
5 Clinton Square, 3rd Floor
Albany, NY 12207
Phone: (518) 432-7861 (voice and TTY)
Toll Free: (800) 993-8982
Fax: (518) 427-6561 (voice and TTY)
http://www.disabilityadvocates.info/
Counties served: Albany, Columbia, Dutchess, Fulton, Greene, Montgomery, Orange, Putnam, Rensselaer, Rockland, Saratoga, Schenectady, Schoharie, Sullivan, Ulster, Westchester

New York State Commission on Quality of Care and Advocacy for Persons with Disabilities ("CQCAPD")
401 State Street
Schenectady, NY 12305
Toll Free: (800) 624-4143 (Voice/TTY/Spanish)
http://www.cqcapd.state.ny.us

Legal Aid Society of Northeastern New York, Inc.
100 Court Street, P.O. Box 989
Plattsburgh, NY 12901
Phone: (518) 563-4022
Toll Free: (800) 722-7380
Fax: (518) 563-4058
http://www.lasnny.org/
Counties served: Franklin, Clinton, Essex, Hamilton

Legal Aid Society of Northeastern New York, Inc.
17 Hodskin Street
Canton, NY 13617
Phone: (315) 386-4586
Toll Free: (800) 822-8283
Fax: (315) 386-2868
http://www.lasnny.org/
Counties served: St. Lawrence, St. Regis Indian Reservation

Legal Aid Society of Northeastern New York, Inc.
112 Spring Street
Saratoga Springs, NY 12866
Phone: (518) 587-5188
Toll free: (800) 870-8343
Fax: (518) 587-0959
http://www.lasnny.org/
Counties served: Saratoga, Warren, Washington

Legal Aid Society of Northeastern New York, Inc.
1 Kimball Street
Amsterdam, NY 12010
Phone: (518) 842-9466
Toll free: (800) 821-8347
Fax: (518) 843-1792
http://www.lasnny.org/
Counties served: Fulton, Montgomery, Schoharie

Legal Aid Society of Northeastern New York, Inc.
55 Colvin Avenue
Albany, NY 12206
Phone: (518) 462-6765
Toll free: (800) 462-2922
Fax: (518) 427-8352
http://www.lasnny.org
Counties Served: Albany, Columbia, Greene, Rensselaer, Schenectady

New York Lawyers for the Public Interest
151 West 30th Street, 11th Floor
New York, NY 10001-4017
Phone: (212) 244-4664
Fax: (212) 244-4570
http://nylpi.org
Counties served: Bronx, Brooklyn, Manhattan, Queens, Richmond

Neighborhood Legal Services, Inc.
237 Main Street, 4th Floor
Buffalo, NY 14203
Phone: (716) 847-0650
TTY: (716) 847-1322
Fax: (716) 847-0227
http://www.nls.org/
Counties served: Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Seneca, Steuben, Wayne, Wyoming, Yates

Legal Services of Central New York, Inc.
472 South Salina Street, Suite 300
Syracuse, NY 13202
Phone: (315) 703-6500
Toll Free: (866) 475-9967 (in-state)
TTY: (866) 475-3120
Fax: (315) 475-2706
http://www.lscny.org/
Counties served: Broome, Cayuga, Chemung, Chenango, Cortland, Delaware, Herkimer, Jefferson, Lewis, Madison, Oneida, Onondaga, Otsego, Oswego, Schuyler, Tompkins, Tioga

Touro College Clinic Program
Jacob D. Fuchsberg Law Center
225 Eastview Drive
Central Islip, NY 11722
Phone: (631) 761-7080
Fax: (631) 421-2675
Counties served: Nassau, Suffolk

Texas
Advocacy, Inc.
7800 Shoal Creek Blvd., Suite 171-E
Austin, TX 78757-1024
Phone: (512) 454-4816
Toll Free: (866) 362-2851 (Voice/TDD)
Fax: (512) 323-0902
(only in county and city jails)
http://www.disabilityrightstx.org

APPENDIX B

CONTACT INFORMATION FOR DISABILITY ADVOCATES, INC. V. NEW YORK STATE OFFICE OF MENTAL HEALTH

Disability Advocates, Inc.
5 Clinton Square, 3rd Floor
Albany, NY 12207
Phone: (518) 432-7861
Toll Free: (800) 993-8982
Fax: (518) 427-6561
www.disability-advocates.org

Prisoners' Legal Services of New York
102 Prospect Street
Ithaca, NY 14850
http://www.plsny.org
Prisons Served: Auburn, Butler, Camp Georgetown, Monterey Shock, Camp Pharsalia, Cape Vincent, Cayuga, Elmira, Five Points, Southport, Watertown, Willard

Prisoners' Legal Services of New York
41 State Street, Suite M112
Albany, NY 12207
http://www.plsny.org
Prisons Served: Arthurkill, Bayview, Beacon, Bedford Hills, Mt. McGregor, Summit Shock, CNYPC, Coxsackie, Downstate, Eastern, Edgecombe, Fishkill, Fulton, Great Meadow, Greene, Greenhaven, Hale Creek, Hudson, Lincoln, Marcy, Midstate, Mid-Orange, Mohawk, Oneida, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Wallkill, Walsh, Washington, Woodbourne

Prisoners' Legal Services of New York
237 Maine Street, Suite 1535
Buffalo, NY 14203
http://www.plsny.org
Prisons Served: Albion, Attica, Buffalo, Collins, Gowanda, Groveland, Lakeview, Livingston, Orleans, Rochester, Wende, Wyoming