

# CHAPTER 23

## INFECTIOUS DISEASES: HIV/AIDS, TUBERCULOSIS, HEPATITIS, AND MRSA IN PRISON

### A. INTRODUCTION

This Chapter explains your legal rights concerning infectious diseases in Louisiana prisons and jails. You should also refer to Chapter 26 of the main *JLM* for more information on your rights under the U.S. Constitution, as well as for general information on HIV, AIDS, tuberculosis (TB), hepatitis B, hepatitis C, and methicillin-resistant staphylococcus aureus (MRSA, or “staph”). Chapter 26 of the main *JLM* also explains related federal laws, which govern federal prisons.

Part B of this chapter provides background information on infectious diseases. Part C briefly explains your constitutional rights concerning medical treatment. Part D explains your legal rights concerning involuntary and voluntary testing for infectious diseases. Part E discusses your rights and the prevention of infectious diseases, including segregation. Part F explains your rights to confidentiality and Part G outlines your rights to medical treatment. Part H outlines the laws about discrimination and infectious diseases. Finally, Part I contains information on sentencing and infectious diseases.

You should also read other Chapters of the main *JLM* to understand your legal rights, especially Chapter 16, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law,” Chapter 36, “Special Considerations for Sex Offenders,” Chapter 28, “Rights of Prisoners with Disabilities,” Chapter 23, “Your Right to Adequate Medical Care,” and Chapter 35, “Getting Out Early: Conditional & Early Release.”

There are more court cases about HIV/AIDS than about tuberculosis, hepatitis B, hepatitis C, and MRSA. Judges always look at the specific facts of each case, so you should try to find cases about your disease. If you cannot find cases about your disease, you can also try to show how your disease is similar to HIV/AIDS or another disease that a case talks about. Infectious diseases are very similar, including how they are spread and their effects on prisoners. For example, if you want to use a case about AIDS and argue the law should also apply to hepatitis C, you should try to explain clearly why hepatitis C is similar to AIDS.

This Chapter is only a summary of the many issues about infectious diseases in the prison system. You will probably have to do more research elsewhere. This Chapter only includes HIV/AIDS, tuberculosis, hepatitis (the most common infectious diseases in prison), and MRSA, but there are many other diseases. Scientists are always discovering new information about infectious diseases, so some of this information may not be correct in the future.

### B. BACKGROUND INFORMATION ON INFECTIOUS DISEASES

#### 1. HIV and AIDS

HIV, the Human Immunodeficiency Virus, is the virus that causes AIDS.<sup>1</sup> AIDS stands for Acquired Immunodeficiency Syndrome. Over time, the HIV virus weakens your immune system so your body cannot fight off infection properly. You may develop various infections—known as “opportunistic” infections—that take advantage of your body because HIV has weakened it.<sup>2</sup>

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<sup>1</sup> See Centers for Disease Control & Prevention, HIV Basics, *available at* <http://www.cdc.gov/hiv/basics/index.html> (last visited Oct. 1, 2017). The *JLM* knows that many prisoners do not have access to the Internet, but because we want this information to be up-to-date, we cite frequently to different agencies’ and organizations’ Internet websites.

<sup>2</sup> See Centers for Disease Control and Prevention: Living with HIV, *available at* <http://www.cdc.gov/hiv/living/index.html> (last visited Oct. 1, 2017).

Left untreated, on average, HIV develops into AIDS within ten years.<sup>3</sup> How long it takes for HIV to develop into AIDS is different for each person. Medical treatments can slow down how fast HIV weakens your body.<sup>4</sup> As HIV gets worse and becomes AIDS, people become sick with other serious illnesses and infections.

Being HIV-positive *does not* mean that you have AIDS. It is very important that you consult a doctor to find out if you are infected with HIV or if you have developed AIDS so that you can get the proper medical treatment. Getting tested is the only way you can know for certain if you are infected.

HIV is most commonly spread in these ways: 1) by having unprotected anal, vaginal, or oral sex with a person with HIV; 2) by sharing needles or injection equipment with a drug user who has HIV; 3) from an HIV-infected mother to her baby, before or during birth or through breast-feeding;<sup>5</sup> and 4) through unsanitary tattooing or body piercing procedures.<sup>6</sup>

*You cannot get HIV by working with or being around someone who has HIV, or by sharing a cell with another prisoner who is HIV-positive.* You also cannot get HIV from sweat, spit, tears, clothes, drinking fountains, telephones, toilet seats, or through everyday activities like sharing a meal. HIV is also not transmitted through insect bites or stings, donating blood, or through kissing.

If you do not have HIV (are “HIV-negative”), you can help avoid getting HIV by taking the following steps:

- 1) Never share needles or syringes if you inject drugs or get a tattoo or body piercing.
- 2) Do not share equipment used to prepare and inject drugs (“works”).
- 3) Use a latex condom—not a lambskin condom—every time you have sex, including anal and oral sex.
- 4) Never share razors or toothbrushes because of the risk of contact with someone else’s blood.

Following these rules can help protect you from getting HIV.

a. Women and HIV/AIDS

Symptoms of HIV are often different for women than for men. Early signs for a woman with HIV include gynecological disorders, especially pelvic inflammatory disease (“PID”), infections causing unusual pap smears (cervical dysplasia), and chronic yeast infections.<sup>7</sup> Women with HIV also have a higher risk of getting cervical cancer.<sup>8</sup> If you have HIV, you should get a complete gynecological exam, including an inspection of the cervix (colposcopy), and a pap smear every six months to find any problems early. If you believe you may have HIV or AIDS, try to get tested.

Appendix A includes several organizations and sources of information about HIV and AIDS. *If you have HIV, it is important that you be tested for tuberculosis*, which is a very contagious and serious disease, because people with HIV have a much higher risk of getting tuberculosis.<sup>9</sup>

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<sup>3</sup> West Virginia Department of Health and Human Services, HIV/AIDS Information, *available at* [https://dhhr.wv.gov/oeeps/std-hiv-hep/HIV\\_AIDS/Pages/HIVAIDSInformation.aspx](https://dhhr.wv.gov/oeeps/std-hiv-hep/HIV_AIDS/Pages/HIVAIDSInformation.aspx) (last visited Feb. 9, 2018).

<sup>4</sup> See HIV Treatment Overview, *available at* <http://aids.gov/hiv-aids-basics/just-diagnosed-with-hiv-aids/treatment-options/overview-of-hiv-treatments/index.html> (last visited Oct. 1, 2017).

<sup>5</sup> See Centers for Disease Control & Prevention, HIV Transmission, *available at* <https://www.cdc.gov/hiv/basics/transmission.html> (last visited Oct. 1, 2017).

<sup>6</sup> See Centers for Disease Control & Prevention, HIV Transmission: Can I get HIV from a Tattoo or a Body Piercing?, *available at* <https://www.cdc.gov/hiv/basics/transmission.html> (last visited Oct. 1, 2017).

<sup>7</sup> See U.S. Dep’t. of Health & Human Services, HIV and Women’s Health, *available at* <https://www.hiv.gov/hiv-basics/staying-in-hiv-care/other-related-health-issues/womens-health-issues> (last visited Oct. 1, 2017).

<sup>8</sup> See U.S. Dep’t. of Health & Human Services, HIV and Women’s Health, *available at* <https://www.hiv.gov/hiv-basics/staying-in-hiv-care/other-related-health-issues/womens-health-issues> (last visited Oct. 1, 2017).

<sup>9</sup> See Division of Tuberculosis Elimination, Centers for Disease Control & Prevention, TB and HIV Coinfection, *available at* <https://www.cdc.gov/healthcommunication/toolstemplates/entertainment/tips/hivtb.html> (last visited Oct. 1, 2017).

## 2. Tuberculosis

Tuberculosis (“TB”) is a disease caused by bacteria (small, microscopic organisms) that are spread through the air. When you breathe in the bacteria, they usually settle in and attack your lungs,<sup>10</sup> but the bacteria can also move to and attack other parts of your body.<sup>11</sup> Outside of prison, TB does not spread easily. In prison, TB spreads much more easily because of overcrowding and poor air flow. People who have spent time in places where TB is common, like homeless shelters, drug treatment centers, health care clinics, jails, and prisons, are also more likely to have TB infections.<sup>12</sup>

It is important to know that being infected with the TB bacteria is *not* the same as having TB disease. If you have TB infection (“latent TB”), you will have no symptoms and you cannot spread TB to others. But if you do not get medical treatment, your TB infection can develop into TB disease (“active TB”).<sup>13</sup> If you have active TB, you can have symptoms like a bad cough lasting more than three weeks, pain in your chest, coughing up blood or phlegm, weakness or tiredness, weight loss, no appetite, chills, fever, or night sweating.<sup>14</sup>

TB is especially dangerous for people with HIV because they are less able to fight off diseases. In fact, TB is one of the leading causes of death for people with HIV.<sup>15</sup> People with both HIV and TB bacteria are much more likely to develop active TB than people who do not have HIV.<sup>16</sup>

Be sure to consult other sources and prison medical professionals if you think you have TB. Active TB disease can be treated and cured if you get medical care, take prescription medication, and follow doctor’s orders.<sup>17</sup>

## 3. Hepatitis B and Hepatitis C

Hepatitis is a disease that attacks the liver. There are different types of hepatitis, but the most common types among prisoners are hepatitis B and hepatitis C.

### a. Hepatitis B

The hepatitis B virus is spread in the same ways as HIV is spread. It can be spread by sex with infected persons without a condom, by sharing needles (“works”) when shooting drugs, through needle sticks or sharp exposures, or from an infected mother to her baby during birth.<sup>18</sup> You can avoid getting hepatitis B in the same ways you avoid getting HIV.

People who have hepatitis B often do not have any symptoms, but can still spread the virus to

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<sup>10</sup> See Division of Tuberculosis Elimination, Centers for Disease Control & Prevention, Basic TB Facts, *available at* <https://www.cdc.gov/tb/topic/basics/howtbspreads.htm> (last visited Oct. 1, 2017).

<sup>11</sup> See Division of Tuberculosis Elimination, Centers for Disease Control & Prevention, Basic TB Facts, *available at* <https://www.cdc.gov/tb/topic/basics/howtbspreads.htm> (last visited Oct. 1, 2017).

<sup>12</sup> See Centers for Disease Control & Prevention, TB in Specific Populations *available at* <https://www.cdc.gov/tb/topic/populations/default.htm> (last visited Oct. 1, 2017).

<sup>13</sup> Division of Tuberculosis Elimination, Centers for Disease Control & Prevention, Basic TB Facts, *available at* <http://www.cdc.gov/tb/topic/basics/default.htm> (last visited Oct. 1, 2017).

<sup>14</sup> See Division of Tuberculosis Elimination, Centers for Disease Control & Prevention, Signs & Symptoms, *available at* <https://www.cdc.gov/tb/topic/basics/signsandsymptoms.htm> (last visited Oct. 1, 2017).

<sup>15</sup> See Division of Tuberculosis Elimination, Centers for Disease Control & Prevention, TB and HIV Coinfection, *available at* <https://www.cdc.gov/tb/topic/basics/tbhivcoinfection.htm> (last visited Oct. 1, 2017).

<sup>16</sup> See Division of Tuberculosis Elimination, Centers for Disease Control & Prevention, TB and HIV Coinfection, *available at* <https://www.cdc.gov/tb/topic/basics/tbhivcoinfection.htm> (last visited Oct. 1, 2017).

<sup>17</sup> See Division of Tuberculosis Elimination, Centers for Disease Control & Prevention, Tuberculosis (TB): Treatment, *available at* <http://www.cdc.gov/tb/topic/treatment/default.htm> (last visited Oct. 1, 2017).

<sup>18</sup> See Centers for Disease Control & Prevention, Hepatitis B FAQs for the Public, *available at* <https://www.cdc.gov/hepatitis/hbv/bfaq.htm> (last visited Oct. 1, 2017).

other people.<sup>19</sup> If you do have symptoms, you may get yellow eyes and skin, tiredness, loss of appetite, dark pee, chest pains, and nausea. There are vaccines to protect you from hepatitis B, but once you get hepatitis B, there is no cure. You should still get medical attention, however, because there are medical treatments to help your symptoms.<sup>20</sup> If you have hepatitis B, you should get tested for HIV and hepatitis C.

#### b. Hepatitis C

The hepatitis C virus (“HCV”) causes hepatitis C. Almost 80% of people who have HCV do not show any signs or symptoms of hepatitis C. Many people infected with hepatitis C may not show any symptoms for twenty or thirty years. Hepatitis C symptoms include yellow skin, dark pee, fatigue, chest pain, and loss of appetite.<sup>21</sup> Most people (around 70%) with chronic HCV infection have some liver damage. If you have hepatitis C, you should not drink alcohol, because alcohol can make your liver damage worse.<sup>22</sup>

While few people outside of prison have HCV, a very high number of prisoners are infected with HCV.<sup>23</sup> To avoid getting hepatitis C, you should:

- 1) Never shoot drugs (if you cannot stop, never reuse or share syringes, water, or “works”);
- 2) Never share toothbrushes, razors, or other personal care items;
- 3) Avoid getting a tattoo or body piercing if there is a chance that someone else’s blood is on the tools or the artist or piercer does not follow good health practices;<sup>24</sup> and
- 4) Avoid having unprotected sex.

The risk of spreading hepatitis C through sexual intercourse is low. Hepatitis C is spread through contact with infected blood.<sup>25</sup> If you have hepatitis C, you should be tested for HIV and hepatitis B.

#### 4. Methicillin-resistant *Staphylococcus Aureus* (“MRSA”)

Staph is a kind of bacteria. Bacteria can cause infections. Staph can cause minor skin problems or even death.<sup>26</sup> Methicillin-resistant *Staphylococcus aureus*, or “MRSA,” is a kind of staph. MRSA is hard to treat with antibiotics.<sup>27</sup> Many people carry staph bacteria in their nose without getting sick.<sup>28</sup> People can get sick if the bacteria gets under their skin. This can happen through a scratch, scrape, or another injury. Most MRSA infections happen in places like hospitals. Infections in prisons are becoming more common though.<sup>29</sup>

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<sup>19</sup> See Centers for Disease Control & Prevention, Hepatitis B FAQs for the Public, *available at* <https://www.cdc.gov/hepatitis/hbv/bfaq.htm> (last visited Oct. 1, 2017).

<sup>20</sup> See Centers for Disease Control & Prevention, Hepatitis B FAQs for the Public, *available at* <https://www.cdc.gov/hepatitis/hbv/bfaq.htm> (last visited Oct. 1, 2017).

<sup>21</sup> See Centers for Disease Control & Prevention, Hepatitis C FAQs for the Public, *available at* <https://www.cdc.gov/hepatitis/hcv/cfaq.htm> (last visited Oct. 1, 2017).

<sup>22</sup> See Centers for Disease Control & Prevention, Hepatitis C FAQs for the Public, *available at* <https://www.cdc.gov/hepatitis/hcv/cfaq.htm> (last visited Oct. 1, 2017).

<sup>23</sup> See Centers for Disease Control & Prevention, Hepatitis C & Incarceration, *available at* <https://www.cdc.gov/hepatitis/hcv/pdfs/hepcincarcerationfactsheet-bw.pdf> (last visited Oct. 1, 2017).

<sup>24</sup> See Centers for Disease Control & Prevention, Hepatitis C & Incarceration, *available at* <https://www.cdc.gov/hepatitis/hcv/pdfs/hepcincarcerationfactsheet-bw.pdf> (last visited Oct. 1, 2017).

<sup>25</sup> Centers for Disease Control & Prevention, Hepatitis C General Information, <http://www.cdc.gov/hepatitis/HCV/PDFs/HepCGeneralFactSheet.pdf> (last visited Sept. 29, 2017).

<sup>26</sup> Centers for Disease Control & Prevention, Methicillin-Resistant *Staphylococcus Aureus* (MRSA) Infections, <http://www.cdc.gov/mrsa/index.html> (last visited Sept. 29, 2017).

<sup>27</sup> Centers for Disease Control & Prevention, Methicillin-Resistant *Staphylococcus Aureus* (MRSA) Infections, <http://www.cdc.gov/mrsa/index.html> (last visited Sept. 29, 2017).

<sup>28</sup> Centers for Disease Control & Prevention, General Information about MRSA in the Community, <http://www.cdc.gov/mrsa/community/index.html> (last visited Sept. 29, 2017).

<sup>29</sup> Divya Ahuja, MD, and Helmut Albrecht, MD, HIV and Community-Acquired MRSA, *NEJM Journal Watch* (2009), <http://aids-clinical-care.jwatch.org/cgi/content/full/2009/209/1> (last visited Sept. 29, 2017).

The first sign of MRSA is commonly a skin infection. The skin infection can be mistaken for a pimple, boil, or insect bite.<sup>30</sup> The infection may be painful or swollen. The infection may be red or produce pus.<sup>31</sup> The infection can become a large blister.<sup>32</sup> MRSA is usually treatable. MRSA is treated by draining the wound or taking antibiotics.<sup>33</sup> You should not drain the wound yourself because this can spread the infection.<sup>34</sup> The infection may return even after treatment.<sup>35</sup>

Staph infections can spread through direct physical contact. Staph infections can be spread through contact with an infected surface or object.<sup>36</sup> The risk of infection can be lessened by keeping wounds clean, dry, and covered.<sup>37</sup> You should keep shared surfaces clean. You should wash your hands often. You should wash your hands after touching a wound. You should avoid sharing personal items like razors and clothing.<sup>38</sup> If you think you have MRSA, it is important to seek treatment. It is very important to seek treatment if you have HIV or another issue with your immune-system. This is because a MRSA infection may lead to more serious problems.<sup>39</sup>

### C. CONSTITUTIONAL RIGHTS IN A PRISON SETTING

The rest of this Chapter talks about your rights regarding infectious diseases in prison. It explains when a correctional facility can limit your rights to treatment and protection. This Part explains the rule that courts use to figure out if a prison policy violates the Constitution. Knowing the rule will help you understand the court decisions in this Chapter.

In general, correctional facilities can limit your constitutional rights if the prison's actions are "reasonably related to [a] legitimate penal interest" ("penal" means related to the management of the prison).<sup>40</sup> To decide if a prison policy has a legitimate penal interest, courts look at four factors:

- 1) The existence of a valid, rational connection between the prison policy and a legitimate state

<sup>30</sup> Tara Parker-Pope, MRSA Warning Signs and Preventive Measures, N.Y. TIMES, Oct. 27, 2007, at B4, *available at* <http://www.nytimes.com/2007/10/27/nyregion/27mrsa.html?scp=3&sq=%22tara+parker-pope%22+MRSA&st=nyt> (last visited Sept. 29, 2017).

<sup>31</sup> Centers for Disease Control & Prevention, General Information About MRSA in the Community: What are MRSA Symptoms?, <http://www.cdc.gov/mrsa/community/index.html#how4> (last visited Sept. 29, 2017).

<sup>32</sup> Tara Parker-Pope, MRSA Warning Signs and Preventive Measures, N.Y. TIMES, Oct. 27, 2007, at B4, *available at* <http://www.nytimes.com/2007/10/27/nyregion/27mrsa.html?scp=3&sq=%22tara+parker-pope%22+MRSA&st=nyt> (last visited Sept. 29, 2017).

<sup>33</sup> Centers for Disease Control & Prevention, General Information About MRSA in the Community: Information for Clinicians, *available at* <https://www.cdc.gov/mrsa/community/clinicians/index.html> (last visited October 22, 2017).

<sup>34</sup> Tara Parker-Pope, MRSA Warning Signs and Preventive Measures, N.Y. TIMES, Oct. 27, 2007, at B4, *available at* <http://www.nytimes.com/2007/10/27/nyregion/27mrsa.html?scp=3&sq=%22tara+parker-pope%22+MRSA&st=nyt> (last visited Sept. 29, 2017).

<sup>35</sup> The University of Chicago Medicine: MRSA Research Center, Frequently Asked Questions about MRSA, *available at* [http://mrsa-research-center.bsd.uchicago.edu/patients\\_families/faq.html](http://mrsa-research-center.bsd.uchicago.edu/patients_families/faq.html) (last visited Oct. 22, 2017); Minnesota Department of Health, Learning About MRSA: A Guide for Patients, *available at* <http://www.health.state.mn.us/divs/idepc/diseases/mrsa/bookfs.pdf> (last visited Oct. 22, 2017).

<sup>36</sup> Tara Parker-Pope, MRSA Warning Signs and Preventive Measures, N.Y. TIMES, Oct. 27, 2007, at B4, *available at* <http://www.nytimes.com/2007/10/27/nyregion/27mrsa.html?scp=3&sq=%22tara+parker-pope%22+MRSA&st=nyt> (last visited Sept. 29, 2017).

<sup>37</sup> Tara Parker-Pope, MRSA Warning Signs and Preventive Measures, N.Y. TIMES, Oct. 27, 2007, at B4, *available at* <http://www.nytimes.com/2007/10/27/nyregion/27mrsa.html?scp=3&sq=%22tara+parker-pope%22+MRSA&st=nyt> (last visited Sept. 29, 2017).

<sup>38</sup> Centers for Disease Control & Prevention, General Information About MRSA in the Community: Can I Prevent MRSA? How?, <http://www.cdc.gov/mrsa/community/index.html#how3> (last visited Sept. 29, 2017); National Institutes for Occupational Safety and Health, MRSA and the Workplace, <http://www.cdc.gov/niosh/topics/mrsa/> (last visited Sept. 29, 2017); National Institutes for Occupational Safety and Health, MRSA Can Live on High-Touch Surfaces (Correctional Facilities), *available at* <http://www.cdc.gov/niosh/docs/2013-124/> (last visited Sept. 29, 2017).

<sup>39</sup> Divya Ahuja, MD, and Helmut Albrecht, MD, HIV and Community-Acquired MRSA, NEJM Journal Watch (2009), *available at* <http://aids-clinical-care.jwatch.org/cgi/content/full/2009/209/1> (last visited Sept. 29, 2017).

<sup>40</sup> Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 77-78 (1987) (holding that prison systems' regulations of inmate marriages and inmate-to-inmate correspondence must meet a "reasonable relationship" standard.)

- interest;
- 2) The existence of alternative means of exercising the right being limited;
  - 3) The impact granting the right will have on correction officers, other prisoners, or the allocation of prison resources; and
  - 4) Whether the prison policy or regulation is an exaggerated response to prison concerns.<sup>41</sup>

These four factors are often referred to as the *Turner* standard, since the Supreme Court first stated this standard in *Turner v. Safley*.<sup>42</sup>

So, if you think a prison policy illegally violates your constitutional rights, there are several arguments you can make. You may want to argue that there is no legitimate penal interest which justifies the violation. You could also argue that the penal interest is not “reasonably related” to the actions or policy of the prison officials. Courts have already ruled on many issues related to infectious diseases and constitutional rights. For example, courts have said that involuntary TB testing serves a legitimate state interest in preventing the spread of TB.<sup>43</sup> You can also try to argue that there are other ways of accomplishing the same governmental goal without violating your constitutional rights.

## D. LEGAL RIGHTS CONCERNING TESTING FOR INFECTIOUS DISEASES

### 1. Involuntary Testing

This Section explains when you can be tested for infectious diseases in Louisiana without your consent. Being tested without your consent or, in other words, being involuntarily tested, means being tested for an infectious disease even though you may not want to be tested and do not give permission to be tested. The specific reasons you may be involuntarily tested for an infectious disease vary by the disease being tested for, the type of facility you are in, and the type of offense with which you have been indicted or charged. As this Chapter and Chapter 26 of the main *JLM* explain, courts tend to allow involuntary testing for infectious diseases because prevention of disease is deemed a legitimate state interest.

Generally, in Louisiana, you can be tested for an infectious disease without your consent if you bite another person, throw feces at another person, or come in contact with a person that may spread an infectious disease, such as HIV/AIDS or viral hepatitis.<sup>44</sup> You may also be tested without your consent if you are involved in a dispute (or a fight) in which bodily fluids, like blood, might have been exchanged between you and another person.<sup>45</sup> In either situation, you may be tested without your consent even if you did not start the dispute.<sup>46</sup>

#### a. HIV/AIDS Testing

You may be tested for HIV or AIDS without your consent in a variety of situations. First, you may be involuntarily tested if you are indicted or charged for a sexual offense or you are arrested for battery of a police officer or correctional officer.<sup>47</sup> Second, you may be tested because you are involved in an altercation while confined in a prison or jail in which bodily fluids are exchanged.<sup>48</sup> Louisiana does not require that you be tested for HIV/AIDS before beginning your sentence.<sup>49</sup>

<sup>41</sup> *Turner v. Safley*, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79–80 (1987).

<sup>42</sup> *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).

<sup>43</sup> See *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997); *Herbet v. Neustrom*, 2009 WL 2356450, at \*3 (W.D. La. July 29, 2009).

<sup>44</sup> LA. REV. STAT. ANN. § 15:739 (2017).

<sup>45</sup> LA. REV. STAT. ANN. § 15:831(c) (2017).

<sup>46</sup> LA. REV. STAT. ANN. § 15:739 (2017).

<sup>47</sup> LA. REV. STAT. ANN. § 15:535(C) (2017); LA. CODE CRIM. PROC. ANN. art. 499 (2017); LA. CODE CRIM. PROC. ANN. art. 221 (2017).

<sup>48</sup> LA. REV. STAT. ANN. § 15:739 (2017).

<sup>49</sup> James Lee Pope, HIV Testing in State Correctional Systems, 22 J.L. & HEALTH 17, 32 (2009).

i. *Testing following Indictment or Charging with Certain Sexual Offenses*

You can be tested for HIV/AIDS without your consent if you are indicted or charged with certain sex crimes.

If charges for a sexual offense are filed against you, the court will order that you be tested for HIV/AIDS.<sup>50</sup> Sexual offenses include rape, sexual battery, intentional exposure to the AIDS virus, molestation of a juvenile, and various other offenses.<sup>51</sup> The results of that test will be disclosed to the court.<sup>52</sup> The court order that requires you to take the test will include the location where the test can be given to you.<sup>53</sup> The court can choose to notify any victims and the law requires that a court must notify certain healthcare authorities.<sup>54</sup>

If you are indicted for certain sex crimes like rape, aggravated rape, or sexual battery, then the victim may request that you be tested for HIV/AIDS.<sup>55</sup> The request must come within 48 hours of your indictment. If the victim makes this request, the court will order you to be tested for HIV/AIDS.<sup>56</sup> After 48 hours from the time you are indicted, a victim may still request that you be tested for HIV/AIDS.<sup>57</sup> However, the court will decide whether the test is medically appropriate.<sup>58</sup> If the test is medically appropriate, then the court will order you to be tested for HIV/AIDS.<sup>59</sup> The results of a test will be disclosed to the victim, but not to the court.<sup>60</sup>

If you are convicted of rape, aggravated rape, or sexual battery, then you will be tested for HIV/AIDS.<sup>61</sup> The results of the test will be reported to any victim and the Department of Public Safety and Corrections.<sup>62</sup>

ii. *Testing Following Altercation with Police or Corrections Officer*

You can be involuntarily tested if you are arrested for committing battery of a police or corrections officer and that officer then tests positive for HIV/AIDS or other infectious diseases.<sup>63</sup> Battery of a police or corrections officer includes throwing feces, urine, blood, or other bodily fluids at the officer while confined in a jail, prison, or other corrections facility.<sup>64</sup> You can also be tested involuntarily if you are arrested for intentionally exposing an officer to AIDS and the officer tests positive for HIV/AIDS.<sup>65</sup> If you are tested involuntarily for this reason, you will be responsible for paying for the test.<sup>66</sup>

If you do anything during an arrest that might expose an officer to a disease like HIV/AIDS, then you can be involuntarily tested.<sup>67</sup> The officer must request this test from the criminal district court.<sup>68</sup> The

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<sup>50</sup> LA. CODE CRIM. PROC. ANN. art. 499(A) (2017).

<sup>51</sup> LA. REV. STAT. ANN. § 15:541(24) (2017); *see also* LA. ADMIN CODE. tit. 48 § 13503(E)(7) (2017).

<sup>52</sup> LA. CODE CRIM. PROC. ANN. art. 499(B) (2017).

<sup>53</sup> LA. CODE CRIM. PROC. ANN. art. 499(B) (2017).

<sup>54</sup> LA. CODE CRIM. PROC. ANN. art. 499(B) (2017).

<sup>55</sup> LA. REV. STAT. ANN. § 15:535(C)(2) (2017); LA. REV. STAT. ANN. §§ 14:42–14:43 (2017).

<sup>56</sup> LA. REV. STAT. ANN. § 15:535(C)(2) (2017).

<sup>57</sup> LA. REV. STAT. ANN. § 15:535(C)(2)(a) (2017).

<sup>58</sup> LA. REV. STAT. ANN. § 15:535(C)(2)(b) (2017).

<sup>59</sup> LA. REV. STAT. ANN. § 15:535(C)(2)(b) (2017).

<sup>60</sup> LA. REV. STAT. ANN. § 15:535(C)(2)(c) (2017).

<sup>61</sup> LA. REV. STAT. ANN. § 15:535(C)(1) (2017); LA. REV. STAT. ANN. §§ 14:42–14:43 (2017).

<sup>62</sup> LA. REV. STAT. ANN. § 15:535(C)(1) (2017).

<sup>63</sup> LA. CODE CRIM. PROC. ANN. arts. 221(A), (C) (2017).

<sup>64</sup> LA. REV. STAT. ANN. § 14:34.2(A)(3) (2017).

<sup>65</sup> LA. CODE CRIM. PROC. ANN. arts. 221(A), (C) (2017).

<sup>66</sup> LA. CODE CRIM. PROC. ANN. art. 221(C)(4) (2017).

<sup>67</sup> LA. CODE CRIM. PROC. ANN. art. 222(A) (2017).

<sup>68</sup> LA. CODE CRIM. PROC. ANN. art. 222(B) (2017).

results of your test will be shared with you and with the requesting officer.<sup>69</sup> However, the test will not be used against you in any proceeding related to the arrest.<sup>70</sup> You will have to pay for the cost of this test.<sup>71</sup>

#### b. TB Testing

You will be tested for TB if you are going to be in a Louisiana prison for longer than 48 hours.<sup>72</sup> You will also be tested if you are going to be confined in a parish jail for longer than 14 days.<sup>73</sup> From then on, you may be involuntarily tested for TB each year.<sup>74</sup>

Normally, prisons will give you a skin test for TB, but if you are HIV-positive or have AIDS, then they will give you both a skin test and a chest x-ray.<sup>75</sup> If you are HIV-positive or have AIDS, you may be tested for TB while you are being treated for HIV or AIDS.<sup>76</sup>

#### c. Hepatitis Testing

Like HIV/AIDS and other infectious diseases, if you bite someone or throw blood, urine, feces, or other bodily fluids at them, you may be involuntarily tested for hepatitis.<sup>77</sup> You will have to pay for the costs of this test.<sup>78</sup> You may also be tested for hepatitis if you are arrested or charged with battery of a police or corrections officer. You might also be tested if you are charged with intentionally exposing an officer to AIDS and that officer tests positive for hepatitis.<sup>79</sup>

If you do anything during an arrest that might expose an officer to an infectious disease like hepatitis, then you can be involuntarily tested.<sup>80</sup> The officer must request this test from the criminal district court.<sup>81</sup> The results of your test will be shared with you and with the requesting officer.<sup>82</sup> However, the test will not be used against you in any proceeding related to the arrest.<sup>83</sup> You will have to pay for the cost of this test.<sup>84</sup>

If you test positive for hepatitis, you should ask for special medical treatment.<sup>85</sup> If you don't ask for special medical care for your hepatitis, you might not get it.<sup>86</sup>

## 2. Right to Testing Upon Request

In Louisiana, you may sometimes request to be tested for HIV/AIDS, hepatitis, or other sexually transmitted diseases. You can ask for testing if you have bodily fluids thrown at or around you.<sup>87</sup> You can also ask for testing if another person exposes you to an infectious disease.<sup>88</sup> To be tested, you need to tell

<sup>69</sup> LA. CODE CRIM. PROC. ANN. art. 222(C) (2017).

<sup>70</sup> LA. CODE CRIM. PROC. ANN. art. 222(D) (2017).

<sup>71</sup> LA. CODE CRIM. PROC. ANN. art. 222(F) (2017).

<sup>72</sup> LA. ADMIN. CODE tit. 51 § 301(A) (2017); LA. REV. STAT. ANN. § 40:4(A)(2)(c)(iv) (2017).

<sup>73</sup> LA. ADMIN. CODE tit. 51 § 301(B) (2017); LA. REV. STAT. ANN. § 40:4(A)(2)(c)(v) (2017).

<sup>74</sup> Dep't. of Pub. Safety and Corr., Master Plan: Where We Are-Where We're Going: A Report to the State, 25 (Aug. 2003), *available at* [http://doc.louisiana.gov/media/1/dps\\_20master\\_20plan\\_208-2003.pdf](http://doc.louisiana.gov/media/1/dps_20master_20plan_208-2003.pdf) (last visited Jan. 25, 2018).

<sup>75</sup> LA. ADMIN. CODE tit. 51 § 301(A) (2017).

<sup>76</sup> LA. REV. STAT. ANN. § 40:4(A)(2)(c)(vi) (2017).

<sup>77</sup> LA. REV. STAT. ANN. § 15:739(A)(1) (2017).

<sup>78</sup> LA. REV. STAT. ANN. § 15:739(B)(3) (2017).

<sup>79</sup> LA. CODE CRIM. PROC. ANN. art. 221(A), (C) (2017).

<sup>80</sup> LA. CODE CRIM. PROC. ANN. art. 222(A) (2017).

<sup>81</sup> LA. CODE CRIM. PROC. ANN. art. 222(B) (2017).

<sup>82</sup> LA. CODE CRIM. PROC. ANN. art. 222(C) (2017).

<sup>83</sup> LA. CODE CRIM. PROC. ANN. art. 222(D) (2017).

<sup>84</sup> LA. CODE CRIM. PROC. ANN. art. 222(F) (2017).

<sup>85</sup> LA. CODE CRIM. PROC. ANN. art. 221(C)(3) (2017).

<sup>86</sup> LA. CODE CRIM. PROC. ANN. art. 221(C)(3) (2017).

<sup>87</sup> LA. REV. STAT. ANN. § 15:739(C) (2017).

<sup>88</sup> LA. REV. STAT. ANN. § 15:739(A), (C) (2017).



the chief administrator of the facility about the incident and ask to be tested.<sup>89</sup> The chief administrator might also order other prisoners to be tested if they were involved in the incident.<sup>90</sup>

If they refuse to test you, it might be a violation of the correctional facility's policy. It might also be a violation of your constitutional rights. At least one federal court has said that there is no constitutional right to HIV testing, especially when the prisoner doesn't have a good reason to think that they might have HIV.<sup>91</sup> Still, you may have an Eighth Amendment claim if you meet the requirements in this section or if you have a high risk of HIV because of drug use, sex, or medical symptoms and are still denied an HIV test.<sup>92</sup> You should check Chapter 26 of the main *JLM* and Part C of this chapter for more information on Eighth Amendment claims.

### 3. Consequences of Testing Positive for Infectious Diseases in Louisiana

If you test positive for an infectious disease, certain things can happen to you. If you test positive for HIV/AIDS, tuberculosis, hepatitis, MRSA, or another infectious disease then it will be reported to the Louisiana Office of Public Health.<sup>93</sup> If you were tested because of a sex offense, as explained in Part D(1)(a)(i) of this chapter, then any victim may be told about your test results.<sup>94</sup>

If you test positive, you can ask for counseling and a referral to receive medical care. A referral means you will be given the name of a special doctor to treat you. If you test positive because you were part of an incident where bodily fluids were thrown or you came into contact with someone in a way that might have exposed you to an infectious disease, then the facility must give you counseling and referral to medical and support services.<sup>95</sup> Jails and prisons must give you access to reasonable medical care. Also, there may be support groups or other programs at your facility for people with certain infectious diseases. For example, some facilities may offer special programs and support groups for prisoners who have tested positive for HIV/AIDS, like peer-counseling programs.<sup>96</sup>

## E. LEGAL RIGHTS AND PREVENTION OF INFECTIOUS DISEASES

### 1. Prevention and Prison Policy

The government must provide medical care to people in jail or prison.<sup>97</sup> They might also have to protect prisoners from infectious diseases.<sup>98</sup> But, it is also very important to take the needed steps to protect yourself and others from disease.

<sup>89</sup> LA. REV. STAT. ANN. § 15:739(C) (2017).

<sup>90</sup> LA. REV. STAT. ANN. § 15:739(C) (2017).

<sup>91</sup> See *St. Hilaire v. Lewis*, No. 93-15129, 1994 U.S. App. LEXIS 14867, at \*10 (9th Cir. June 7, 1994) (unpublished) (finding no constitutional violation for failure to provide an HIV test because prisoner was not a member of a high-risk group and had not alleged exposure to HIV); *Doe v. Wigginton*, 21 F.3d 733, 738–739 (6th Cir. 1994) (finding no 8th Amendment violation where a prisoner was refused an HIV test because the state policy required an HIV test if a prisoner “provides a presumptive history of exposure” and the prisoner did not provide such information).

<sup>92</sup> See *Doe v. Wigginton*, 21 F.3d 733, 738–740 (6th Cir. 1994) (holding the prison did not violate the 8th or 14th Amendments for refusing to test for HIV on request because it could reasonably limit the testing based on a prisoner's history, medical symptoms, prior drug use, or sexual activity). It is possible the court would have allowed Doe's claim to prevail if he had given officials information indicating that he met the criteria for testing and was still refused a test.

<sup>93</sup> LA. ADMIN. CODE tit. 51 §§ 105, 109 (2017).

<sup>94</sup> LA. REV. STAT. ANN. § 15:535(C)(2)(c) (2017).

<sup>95</sup> LA. REV. STAT. ANN. § 15:739(B)(1) (2017).

<sup>96</sup> For example, the Elayn Hunt Correctional Center has an HIV support group where prisoners can “express their feelings about the experiences they have being HIV positive and show support for one another.” The Louisiana Correctional Institute for Women hosts a support group sponsored by outside volunteers for women prisoners with HIV/AIDS. The David Wade Correctional Center is home to H.E.L.P.E.R., a prisoner-run organization that educates fellow prisoners about HIV/AIDS. Louisiana Department of Public Safety and Corrections, Catalog of Rehabilitative Programs (July 2012), available at <https://lajudicialcollege.org/wp-content/uploads/2012/10/C-6.-Catalog-of-DOC-Rehabilitative-Services.pdf> (last visited Oct. 22, 2017).

<sup>97</sup> See *Estelle v. Gamble*, 429 U.S. 97, 103, 97 S. Ct. 285, 290, 50 L. Ed. 2d 251, 259 (1976) (confirming “the government's obligation to provide medical care for those whom it is punishing by incarceration”). See Chapter 23 of

## 2. Segregation

### a. Mandatory Segregation

If you test positive for HIV/AIDS, hepatitis, tuberculosis, or other contagious diseases (this means diseases that can easily spread between people), you may be segregated (which means separated) from the general population.<sup>99</sup> While you can be segregated because you tested positive for HIV/AIDS or hepatitis, many facilities will let you stay in the general population.<sup>100</sup> If you test positive for tuberculosis, you will likely be separated from the general population while you get further testing and treatment. This is because tuberculosis can spread quickly through the air.

It may be hard to challenge your segregation if you disagree with it. You may be able to challenge it through administrative procedures, which are ways to bring a complaint created by the prison. You may also bring a constitutional claim to fight your segregation. However, you are unlikely to win this way. In the past, courts have said that there is a legitimate state interest in segregating prisoners with HIV/AIDS and tuberculosis, which means it is okay for the prison to separate people who test positive.<sup>101</sup> This is because segregation may help protect other prisoners from getting infectious diseases.<sup>102</sup> For more information on challenging your classification, see Chapter 12 of the *Louisiana State Supplement* and Chapter 31 of the main *JLM*.

### b. Segregation Requested by Prisoners

If you are afraid of getting an infectious disease, read Part B of this Chapter to get an idea of the steps that you can take to protect yourself. In general, prisoners who are afraid of getting infectious diseases from other prisoners have not been able to win when they sue prison officials. Some prisoners have tried to get prisons to segregate other prisoners who are infected with a contagious disease, but this usually does not work. Prisoners who are infected have also been unsuccessful when they request that the prison give them a single cell (or vaccinate other prisoners) so that they do not spread their diseases.<sup>103</sup> Courts seem to support a prison's decision not to separate prisoners with HIV-related illnesses.<sup>104</sup>

Prisons may have a legal duty to protect prisoners from exposure to infectious diseases.<sup>105</sup> But, to win a lawsuit against prison officials for exposing you to infectious diseases, you must prove that (1) there

the main *JLM* for more information on a prison's duty to provide medical care and what you can do if you are not receiving proper care.

<sup>98</sup> See *Smith v. Sullivan*, 553 F.2d 373, 380 (5th Cir. 1977) (holding that though a prison is not required to conduct medical exams on prisoners within 36 hours of entering the facility, leaving persons with communicable or contagious diseases, like scabies or gonorrhea, among other prisoners for a month or more, without medical care, violated the standard of adequate medical services); *Lareau v. Manson*, 651 F.2d 96, 109 (2d Cir. 1981) (finding that a prison's failure to adequately screen incoming prisoners "created an indiscriminate threat to all inmates" in violation of the Fourteenth Amendment, and constituted a failure "sufficiently harmful to evidence deliberate indifference to serious medical needs" in violation of the Eighth Amendment).

<sup>99</sup> LA. ADMIN. CODE tit. 51 § 103(D) (2017); LA. ADMIN. CODE tit. 22 § 3303 (2017).

<sup>100</sup> Lafayette Parish Sheriff's Office, H-2603(C), Bloodborne Diseases—Health Care (2010) available at [http://www.lafayettesheriff.com/uploads/H\\_2600\\_BloodborneDiseasesHealthCare.pdf](http://www.lafayettesheriff.com/uploads/H_2600_BloodborneDiseasesHealthCare.pdf) (last visited Sept. 30, 2017); LA. ADMIN. CODE tit. 51 § 103(D) (2017).

<sup>101</sup> See *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997); *Moore v. Mabus*, 976 F.2d 268, 271 (5th Cir. 1992).

<sup>102</sup> See *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997).

<sup>103</sup> *Johnson v. Horn*, 782 A. 2d 1073, 1076–1077 (Pa. Commw. Ct. 2001) (refusing to give court order forcing prison officials to assign prisoner to a single cell so he would not spread hepatitis C to other prisoners).

<sup>104</sup> See *Deutsch v. Fed. Bureau of Prisons*, 737 F. Supp. 261, 267–268 (S.D.N.Y. 1990), *aff'd*, 930 F.2d 909 (2d Cir. 1991) (holding that prisoner did not have the right to have another HIV-positive prisoner segregated unless the inmate poses a known health risk); *Glick v. Henderson*, 855 F.2d 536, 539–540 (8th Cir. 1988) (holding that prisoner's fear of contracting HIV either through sharing work assignments with an HIV-infected prisoner or through eating food that might have been prepared by an HIV-infected prisoner, was not sufficient to justify an order to segregate HIV-infected prisoners).

<sup>105</sup> See *Smith v. Sullivan*, 553 F.2d 373, 380 (5th Cir. 1977) (stating that leaving persons with communicable or contagious diseases, such as scabies or gonorrhea, without medical attention for over a month, and in the midst of other prisoners violated the required standard of adequate medical services); *Hutto v. Finney*, 437 U.S. 678, 682–687,

was a specific and significant (or high) risk of infection, and (2) prison officials knew about that risk but ignored it.<sup>106</sup> In order to win such a lawsuit, you must show that there is a significant possibility that you will contract the virus or disease. For example, some courts have held that this standard is met when prisoners are housed with people who have known MRSA infections. In order to meet the standard, however, the infected prisoner must have open wounds that are not being adequately covered or cleaned and that are likely to infect other prisoners.<sup>107</sup> You will not win if you only have a general fear of getting the virus.

## F. LEGAL RIGHTS AND CONFIDENTIALITY

Your medical records are usually confidential.<sup>108</sup> Under the U.S. Constitution, you have a right to privacy (a “privacy interest”) regarding the disclosure of personal information.<sup>109</sup> However, doctors, nurses, certain state health officers, certain prison officials, and others are authorized by Louisiana law to view your medical records in certain situations. Also, if you test positive for HIV/AIDS, hepatitis, tuberculosis, MRSA, or a variety of other infectious diseases, then that result will be reported to the Office of Public Health.<sup>110</sup> For information about your general medical privacy, see Chapter 23 of the main *JLM*, “Your Right to Adequate Medical Care” and Chapter 14 of the *Louisiana State Supplement*.

### 1. HIV/AIDS Testing and Confidentiality

As noted above, if you test positive for HIV/AIDS, then this result will be reported to the Office of Public Health. There are other situations in which your positive test result will be disclosed. For example, your HIV or AIDS status may be disclosed to:

- 1) Doctors and nurses who are treating you,<sup>111</sup>
- 2) Members of the parole committee of the DPSC,<sup>112</sup>
- 3) People to whom a court order authorizes the release of your test results,<sup>113</sup> and

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98 S. Ct 2565, 2569–2572 (1978) (finding that prison conditions unconstitutional under the 8th Amendment where (among other concerns) inmates in “punitive isolation” were crowded into cells, and some had infectious conditions such as hepatitis and venereal diseases); *Lareau v. Manson*, 651 F.2d 96, 109 (2d Cir. 1981) (finding that prison’s failure to adequately screen incoming prisoners violated the due process and 8th Amendment rights of other prisoners).

<sup>106</sup> See *Massick v. N. Cent. Corr. Facility*, 136 F.3d 580, 581 (8th Cir. 1998) (holding that there was no 8th Amendment violation when prison officials placed the plaintiff in a cell with an HIV-positive prisoner, who had open bleeding wounds, without warning the plaintiff of his cellmate’s HIV status; the court found no constitutional violation, because the risk of plaintiff contracting HIV was small and because prison officials acted reasonably by granting plaintiff’s request to change cellmates); *Billman v. Ind. Dep’t. of Corrs.*, 56 F.3d 785, 788–789 (7th Cir. 1995) (holding that prison officials who knowingly and without warning assign a prisoner to share a cell with an HIV-positive prisoner who has a known propensity to rape, constitutes an 8th Amendment violation due to the official’s “deliberate indifference” to the “fear and humiliation inflicted by the rape and the fear of contracting the AIDS virus”); *DeGidio v. Pung*, 920 F.2d 525, 533 (8th Cir. 1990) (holding that prison officials’ pattern of reckless or negligent responses to TB outbreaks was sufficient to constitute deliberate indifference, violating the 8th Amendment).

<sup>107</sup> See *Lopez v. McGrath*, No. C 04-4782 MHP, 2007 U.S. Dist. LEXIS 39409, at \*3–6, \*31 (N.D. Cal. May 31, 2007) (finding a triable issue of fact where plaintiff claimed that administrators knew medical staff were putting prisoners with MRSA infections back into the general population, possibly creating “substantial risk” to other prisoners); *Kimble v. Tennis*, No. 4:CV-05-1871, 2006 U.S. Dist. LEXIS 36285, at \*11 (M.D. Pa. June 5, 2006) (holding that evidence that prison doctor authorized release of a MRSA-infected prisoner with open sores to the general population may be sufficient to support a claim of deliberate indifference).

<sup>108</sup> LA. ADMIN. CODE tit. 48 § 505 (2017).

<sup>109</sup> See *Whalen v. Roe*, 429 U.S. 589, 598–600, 97 S. Ct. 869, 876, 51 L. Ed. 2d 64, 73 (1977) (finding that the U.S. Constitution protects your right to make personal decisions and against disclosure of your personal information) (non-prison case); *O’Connor v. Pierson*, 426 F.3d 187, 201 (2d Cir. 2005) (“Medical information in general, and information about a person’s psychiatric health and substance-abuse history in particular, is information of the most intimate kind.”) (non-prison case).

<sup>110</sup> LA. ADMIN. CODE tit. 51 §§ 105, 109 (2017).

<sup>111</sup> LA. REV. STAT. ANN. § 40:1171.4(B)(3) (2017).

<sup>112</sup> LA. REV. STAT. ANN. § 40:1171.4(B)(9) (2017).

<sup>113</sup> LA. REV. STAT. ANN. § 40:1171.4(C)(4) (2017).

- 4) Federal, state, and local health officers as authorized by law.<sup>114</sup>

If you are tested because were charged or convicted of a sexual offense, then the results of your test will be disclosed to any victim.<sup>115</sup> If you test positive, then your result will also be reported to the Department of Public Safety and Corrections.<sup>116</sup> Also, if you are tested because of being charged with battery upon a police officer or intentionally exposing an officer to AIDS *and* you test positive, then this result will be given to the chief administrator of the prison or jail.<sup>117</sup>

A court may order the disclosure of your HIV test result.<sup>118</sup> Some of the reasons a court may order the disclosure besides those stated above include:

- 1) There is a compelling need for disclosure because of a civil or criminal proceeding;<sup>119</sup>
- 2) There is a clear and imminent (imminent means “about to happen”) danger to a person who may unknowingly be at risk for exposure because of contact with you;<sup>120</sup> or
- 3) A parish, state, or local health officer applies for the disclosure because of a clear and imminent danger to public health.<sup>121</sup>

If the court receives an application requesting the disclosure of your test results, you should be notified.<sup>122</sup> Also, the court will seal court documents to protect the confidentiality of your results.<sup>123</sup>

If you test positive for HIV/AIDS, then that can only be disclosed to individuals authorized by law.<sup>124</sup> This means that a person authorized to know your positive test results cannot tell another person who is not authorized.

## G. LEGAL RIGHTS AND MEDICAL TREATMENT

### 1. Right to Medical Treatment

Prisons and jails in Louisiana must provide you with healthcare.<sup>125</sup> This includes an initial screening, a yearly medical examination, and access to emergency healthcare.<sup>126</sup> Under Louisiana law, this medical care must be “reasonable.”<sup>127</sup> What medical care is reasonable will vary from situation to situation.<sup>128</sup> Louisiana courts have not provided a complete list of factors that may determine whether

<sup>114</sup> LA. REV. STAT. ANN. § 40:1171.4(B)(6) (2017).

<sup>115</sup> LA. CODE CRIM. PROC. ANN. art. 499(B) (2017); LA. REV. STAT. ANN. § 15:535(C) (2017). *See also* LA. REV. STAT. ANN. § 40:1171.4(E)(1)(a) (2017).

<sup>116</sup> LA. REV. STAT. ANN. § 15:535(C) (2017).

<sup>117</sup> LA. CODE CRIM. PROC. ANN. art. 221 (C)(2) (2017).

<sup>118</sup> LA. REV. STAT. ANN. § 40:1171.5(B) (2017).

<sup>119</sup> LA. REV. STAT. ANN. § 40:1171.5(B)(1) (2017).

<sup>120</sup> LA. REV. STAT. ANN. § 40:1171.5(B)(2) (2017).

<sup>121</sup> LA. REV. STAT. ANN. § 40:1171.5(B)(3) (2017).

<sup>122</sup> LA. REV. STAT. ANN. § 40:1171.5(D)(1) (2017).

<sup>123</sup> LA. REV. STAT. ANN. § 40:1171.5(C) (2017).

<sup>124</sup> LA. ADMIN. CODE tit. 48 § 13505 (2017).

<sup>125</sup> LA. ADMIN. CODE tit. 22 § 2909 (2017); *see also* LA. REV. STAT. ANN. §§ 15:760, 15:831 (2017).

<sup>126</sup> LA. ADMIN. CODE tit. 22 §§ 2909(E), (I), (J) (2017).

<sup>127</sup> *See e.g.*, *Jacoby v. State*, 434 So. 2d 570, 573 (La. App. 1 Cir. 1983); *see also* *Cole v. Arcadia Parish Sherriff's Dep't.*, 2007-1386, pp. 5–6 (La. App. 3 Cir. 11/05/08); 998 So. 2d 212, 216; *Wells v. Dep't. of Public Safety and Corr.*, 41,836, p. 4 n.5 (La. App. 2 Cir. 3/7/07); 954 So. 2d 234, 237 n.5; *Elsev v. Sherriff of the Parish of East Baton Rouge*, 435 So. 2d 1104, 1106 (La. App. 1 Cir. 1983).

<sup>128</sup> *See e.g.*, *Neidlinger v. Warden, Medical Dep't.*, 45,235, pp. 6–7 (La. App. 2 Cir. 5/19/10); 38 So. 3d 1171, 1174 (holding that prisoner received reasonable medical care when he was treated for a spider bite and subsequently sent to a hospital after the bite became worse); *Harper v. Goodwin*, 41,035, p. 7 (La. App. 2 Cir. 5/17/06); 930 So. 2d 1160, 1163 (holding that prisoner received reasonable medical care because he received prompt treatment after bee stings); *Robinson v. Stalder*, 98-0558 (La. App. 1 Cir. 1999); 734 So. 2d 810, 812–813 (holding that reasonable medical care was provided when corrections officials refused to repair a prosthetic leg that was no longer repairable, but did provide a wheelchair and crutches); *Dancer v. Dep't. of Corr.*, 282 So. 2d 730, 731–733 (La. App. 1 Cir. 1973) (noting that having

medical care is reasonable. However, a court may look at factors that include the nature of the medical need, the urgency of treatment, possible alternatives in treatment, and what symptoms of an illness are visible.<sup>129</sup>

If you are denied medical treatment for an infectious disease, you may also have a claim that the prison violated your rights under the Eighth Amendment. The Eighth Amendment protects you from cruel and unusual punishment. To win an Eighth Amendment claim, you must prove that prison officials showed “deliberate indifference” to your “serious medical needs.”<sup>130</sup> It is important to remember that courts do not think that every claim of inadequate medical care is bad enough to be a constitutional violation.<sup>131</sup> But a few courts have held that a denial of prescribed AIDS or hepatitis C medical treatment does violate a prisoner’s constitutional rights.<sup>132</sup> See Chapter 23 of the main *JLM*, “Your Right to Adequate Medical Care,” for more information on how to bring an Eighth Amendment claim for failure to provide adequate medical treatment.

If you believe that your health is suffering because you are being wrongfully denied medicine, you will probably have to show that the medical community agrees that this medicine will help your condition. Otherwise, the court may see your claim as a simple disagreement between you and your doctor.<sup>133</sup> If you want to bring a claim about medical treatment or medicine denied to you sometime in the past, a court may look back to see what the accepted medical practices were at that time.<sup>134</sup> Even if past treatment or

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another prisoner, who did not have formal medical training, set the broken leg of another prisoner was not reasonable medical care).

<sup>129</sup> See e.g., *Neidlinger v. Warden, Medical Dep’t.*, 45,235, pp. 6–7 (La. App. 2 Cir. 5/19/10); 38 So. 3d 1171, 1174 (holding that prisoner received reasonable medical care when he was treated for a spider bite and subsequently sent to a hospital after the bite became worse); *Harper v. Goodwin*, 41,035, p. 7 (La. App. 2 Cir. 5/17/06); 930 So. 2d 1160, 1163 (holding that prisoner received reasonable medical care because he received prompt treatment after bee stings); *Robinson v. Stalder*, 98-0558 (La. App. 1 Cir. 1999); 734 So. 2d 810, 812–813 (holding that reasonable medical care was provided when corrections officials refused to repair a prosthetic leg that was no longer repairable, but did provide a wheelchair and crutches); *Dancer v. Dep’t. of Corr.*, 282 So. 2d 730, 733 (La. App. 1 Cir. 1973) (noting that having another prisoner without formal medical training set the broken leg of another prisoner was not reasonable medical care).

<sup>130</sup> *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998) (describing the standard for bringing an 8th Amendment claim for failure to receive proper medical care) (citing *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291 (1976)). HIV and hepatitis are generally considered “serious medical needs.” *Brown v. Johnson*, 387 F.3d 1344, 1351 (11th Cir. 2004).

<sup>131</sup> *Smith v. Carpenter*, 316 F.3d 178, 184, 186–187 (2d Cir. 2003) (citing *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976)) (holding that brief interruptions of HIV medications, with no discernible adverse effects, did not constitute a denial of serious medical needs. However, the court also noted that a showing of increased risk, even absent presently detectable symptoms, might be serious enough to constitute denial of medical care).

<sup>132</sup> *Montgomery v. Pinchak*, 294 F.3d 492, 500 (3d Cir. 2002) (finding HIV-positive prisoner’s claim regarding violation of his right to adequate medical treatment had merit and holding that because HIV is a life-threatening disease if left untreated, the prisoner had met the serious medical need prong of *Estelle v. Gamble*). But see *Johnson v. Wright*, 412 F.3d 398, 404–406 (2d Cir. 2005) (finding that although a facility’s refusal to give a prisoner the medication most prisoners received for hepatitis C because he had used illegal drugs constituted deliberate indifference, there was a medical reason for denying the prison therapy); *Niemic v. Maloney*, 448 F. Supp. 2d 270, 280 (D. Mass. 2005) (finding that the denial of a medicine subsequent to a failed drug test does not violate Due Process under the 14th Amendment, especially given that a decision to deny the medicine to active drug users is in accord with medical custom).

<sup>133</sup> *Perkins v. Kansas Dep’t. of Corr.*, 165 F.3d 803, 811 (10th Cir. 1999) (upholding the denial of protease inhibitor to prisoner with HIV because other treatment was provided); *Loch v. County of Bucks*, No. 03-CV-4833, 2006 WL 2559296, at \*3, 2006 U.S. Dist. LEXIS 62620, at \*10–11 (E.D. Pa. Sept. 1, 2006), available at <http://www.paed.uscourts.gov/documents/opinions/06D1114P.pdf>, at 5 (holding that a prisoner who had been treated for conditions including MRSA did not assert a constitutional violation simply because they claim the treatment they received was inadequate).

<sup>134</sup> *Parker v. Proffit*, Civ. A. No. 94-00815-R, 1995 U.S. Dist. LEXIS 15941, at \*19 (W.D. Va. Oct. 27, 1995) (unpublished) (evaluating denial of medication by standards of medical treatment at time of denial); *Adams v. Poag*, 61 F.3d 1537, 1543 (11th Cir. 1995) (to show a prison official’s actions were deliberately indifferent, a plaintiff could produce opinions of medical experts asserting the official’s actions were contrary to contemporary accepted medical practices).

denial of medication is not an accepted practice, it may not be enough to show deliberate indifference.<sup>135</sup>

If you received medical treatment but think that a prison doctor incorrectly diagnosed your condition, it will be difficult to bring a successful case against the prison officials. In the past, courts have dismissed cases for a variety of reasons. Some of those reasons are that the prisoner could not prove that the prison officials had personal involvement,<sup>136</sup> the prisoner could not show any physical harm, or that his needs were ignored.<sup>137</sup>

If you have hepatitis C and prison officials decide that you should receive a certain treatment for a certain length of time, and you are then denied that treatment, you may have a claim under the Eighth Amendment. To bring a claim, you must be able to say that the removal from the prescribed treatment is endangering your life by failing to treat your disease.<sup>138</sup> Meeting these requirements allows you to begin your case, but does not mean that you will win. You will still need to show that there was “deliberate indifference” to your medical needs.<sup>139</sup>

This does not change the rule that courts do not like to question doctors' medical decisions. If you have received treatment for hepatitis C but think you should have been given different treatment,<sup>140</sup> or if your doctors said you do not have a condition requiring any treatment, this rule will not allow you to sue.<sup>141</sup>

## 2. Right to Refuse Medical Treatment

Generally, you have the ability to decline medical treatment.<sup>142</sup> One exception is if the law requires you to be treated.<sup>143</sup> For example, if you test positive for TB, then you may be treated for it even if you do not wish to be treated.<sup>144</sup> This is because there is a legitimate state interest in preventing the spread of TB, which spreads easily through the air.<sup>145</sup> For diseases like HIV/AIDS that are less easily transmitted, it will be more difficult for prison officials to treat you without your consent. For more information about your right to refuse treatment, see Chapter 29, Part C, of the main *JLM*, “Special Issues for Prisoners with Mental Illness,” Chapter 23 of the main *JLM*, “Your Right to Adequate Medical Care,” and Chapter 14 of the *Louisiana State Supplement*, “Your Right to Adequate Medical Care.”

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<sup>135</sup> *Farmer v. Brennan*, 511 U.S. 825, 835, 114 S. Ct. 1970, 1978 (1994) (“While . . . deliberate indifference entails something more than mere negligence, 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.”).

<sup>136</sup> *Timmons v. N.Y. State Dep't. of Corr. Servs.*, 887 F. Supp. 576, 580 (S.D.N.Y. 1995) (holding a prisoner bringing a claim against prison officials for misdiagnosing him in 1986 as having HIV had not shown the officials had any personal involvement in the alleged violations and was thus not entitled to relief under 42 U.S.C. § 1983). Section 1983 governs suits against prison officials for federal statutory and constitutional violations and is described in detail in the main *JLM*, Chapter 16, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law.”

<sup>137</sup> *Smith v. Carpenter*, 316 F.3d 178, 184 (2d Cir. 2003) (dismissing 8th Amendment claim because prisoner failed to show that he suffered any adverse medical effects from the sporadic lack of treatment).

<sup>138</sup> *Erickson v. Pardus*, 551 U.S. 89, 93, 127 S. Ct. 2197 (2007) (holding that the pleading requirements of Federal Rule of Civil Procedure 8(a)(2) were met by statements that a prisoner with hepatitis C had been removed from his prescribed course of treatment and denied all treatment for his disease due to suspicion of drug use).

<sup>139</sup> *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285 (1976).

<sup>140</sup> *Loukas v. Mich. Dep't. of Corr.*, No. 2-07-CV-142, 2008 U.S. Dist. LEXIS 14724, at \*9 (W.D. Mich. Feb. 27, 2008) (holding that a prisoner who has not been denied medical care, but simply questions whether the treatment he has been receiving is adequate, does not have an 8th Amendment claim).

<sup>141</sup> *Hix v. Tenn. Dep't. of Corr.*, 196 Fed. App'x. 350, 357 n.1, 358 (6th Cir. 2006) (stating hepatitis C does not require treatment in all cases, and a difference of opinion over medical treatment does not violate the 8th Amendment).

<sup>142</sup> LA. REV. STAT. ANN. § 15:860 (2017).

<sup>143</sup> LA. REV. STAT. ANN. § 15:860 (2017).

<sup>144</sup> *McCormick v. Stalder*, 105 F.3d 1059, 1061–1062 (5th Cir. 1997).

<sup>145</sup> *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997).

## H. DISCRIMINATORY TREATMENT AND INFECTIOUS DISEASES

### 1. Constitutional Rights

The Fourteenth Amendment may protect you from discriminatory treatment because of having an infectious disease. For example, the Equal Protection Clause of the Fourteenth Amendment does not allow discrimination by the state that is not “rationally related to a legitimate purpose.”<sup>146</sup> The Due Process Clause of the Fourteenth Amendment forbids the prison facility from taking away your entitlements without “due process of law.”<sup>147</sup> The Eighth Amendment protects you from “cruel and unusual punishment.”<sup>148</sup> Keep in mind, however, that the courts balance these constitutional rights against legitimate penal interests,<sup>149</sup> which may allow prison officials to lawfully infringe upon your rights. Prison policies are valid if they are reasonably related to a legitimate penal interest. However, the prison is required to use the least restrictive means of achieving the goals of the policy.<sup>150</sup>

If you bring a suit challenging a prison practice under the Fourteenth Amendment’s Due Process Clause, you must prove you were entitled to something the prison took away.<sup>151</sup> Any entitlement must be created by state law. If you think you are entitled to something, you should first determine whether a state statute or regulation gives you a right to that entitlement. Also, know that prison officials can treat prisoners with infectious diseases differently from other prisoners if their reasons further legitimate penal interests.<sup>152</sup> Those reasons must be rational and not purely discriminatory.

The Fourteenth Amendment only applies to the states, but the Fifth Amendment’s Due Process Clause protects your rights against the federal government. If you are in a federal prison, you might consider bringing your lawsuit under federal statutes, instead of under the Fifth Amendment.

### 2. Statutory Rights

Certain laws protect you from forms of discrimination based on disabilities, including HIV status.

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<sup>146</sup> U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>147</sup> U.S. CONST. amend. XIV, § 1. (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>148</sup> U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

<sup>149</sup> *Turner v. Safley*, 482 U.S. 89, 107 S. Ct. 2254, (1987) (stating that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penal interests”).

<sup>150</sup> *Turner v. Safley*, 482 U.S. 78, 91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 80 (1987) (“But if an inmate claimant can point to an alternative that fully accommodates the prisoner’s rights at *de minimis* cost to valid penal interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.”). This means if a prisoner can point to a different procedure not requiring more money or time, the alternative can be used as evidence that the challenged policy is not reasonable); *Perkins v. Kan. Dep’t. of Corr.*, 165 F.3d 803, 811–812, (10th Cir. 1999) (holding HIV-positive prisoner could claim a constitutional violation for being forced to wear a face mask whenever he left his cell and noting that wearing such a mask could become a humiliating form of branding that violated the 8th Amendment’s prohibition of punishing individuals for a physical condition). *But see Parker v. Proffit*, Civ. A. No. 94-00815-R, 1995 U.S. Dist. LEXIS 15941, at \*19–21 (W.D. Va. Oct. 27, 1995) (unpublished) (stating that making an HIV-positive prisoner wear a mask and protective clothing may have caused some embarrassment, but the practice did not rise to a constitutional violation of the 8th Amendment prohibition on cruel and unusual punishment).

<sup>151</sup> *Anderson v. Romero*, 72 F.3d 518, 527 (7th Cir. 1995) (ruling a state statute directing prisons to provide “barber facilities” gave the plaintiff an entitlement to a haircut, and keeping plaintiff from this entitlement because of his HIV status deprived him of his property and liberty rights under the 14th Amendment’s Due Process Clause).

<sup>152</sup> *Laureano v. Vega*, 92 Civ. 6056 (LMM), 1994 U.S. Dist. LEXIS 2107, at \*23–24 (S.D.N.Y. Feb. 25, 1994) (unpublished), *aff’d*, 40 F.3d 1237 (2d Cir. 1994) (rejecting prisoner’s claim that he had received difficult work assignments because of his HIV status; holding that he had failed to establish any retaliatory motive by prison officials and that there is no right to a particular prison job); *Farmer v. Moritsugu*, 742 F. Supp. 525, 528 (W.D. Wis. 1990) (finding that prison had legitimate interest in maintaining security and order and therefore refusal of HIV-infected prisoner’s request for food service job was not denial of equal protection).

The Federal Rehabilitation Act of 1973 (“FRA”) prohibits discrimination or denial of programs or benefits based on disability, by a federal, state, or local government agency, or any recipient of federal funding.<sup>153</sup> Similarly, the Americans with Disabilities Act (“ADA”) prohibits public and private organizations from discriminating, excluding, or denying services, programs, or activities to a person with a disability.<sup>154</sup> These laws recognize TB and HIV infections as a form of disability because they are physical impairments limiting major life activities.<sup>155</sup> Also, in *Bragdon v. Abbott*, the Supreme Court clearly stated that under the ADA, “HIV infection satisfies the . . . definition of a physical impairment during every stage of the disease.”<sup>156</sup>

Although HIV is treated as a disability by the FRA and the ADA, your rights are limited to some extent if: (1) your HIV infection poses a significant risk to the health or safety of others; or (2) it would be an undue hardship on the prison facility to accommodate your needs.<sup>157</sup> Also, the U.S. Supreme Court has decided that individuals cannot recover money from the state for its failure to comply with the ADA.<sup>158</sup> However, you can still seek injunctive relief, which means that you can file a claim in which you ask the court to require the state to end practices that violate the ADA.<sup>159</sup>

If you are suing for violation of your statutory rights, you should cite both the FRA and the ADA, since the remedies, procedures, and rights are the same under both laws.<sup>160</sup> The only difference is the FRA only applies to public (government) entities while the ADA can support a claim against both private and public entities. You should also check the law of your state and city since sometimes states, cities, or towns enact additional laws to protect persons with contagious diseases, like HIV or hepatitis, from discrimination.

Most prison facilities are controlled and financed by federal, state, or local governments, so they are generally subject to the ADA and FRA. Furthermore, the U.S. Supreme Court has stated the ADA and FRA prohibit discrimination in the prison system.<sup>161</sup> This means prison facilities cannot exclude or deny prisoners “benefits of the services, programs, or activities of a public entity” or subject them to discrimination.<sup>162</sup> Benefits include recreational activities, medical services, and educational and vocational programs.<sup>163</sup>

However, when a court evaluates a prison policy, it will consider whether the restriction is reasonably related to a legitimate penal interest.<sup>164</sup> When a prison is defending a policy, it only has to

<sup>153</sup> 29 U.S.C. § 794(a)–(c) (2012).

<sup>154</sup> 42 U.S.C. §§ 12132, 12182 (2012).

<sup>155</sup> 42 U.S.C. § 12102(1) (2012) (“The term ‘disability’ means . . . a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such impairment; or being regarded as having such an impairment.”).

<sup>156</sup> *Bragdon v. Abbott*, 524 U.S. 624, 637, 118 S. Ct. 2196, 2204 (1998). This case concerned a dentist’s refusal to examine an HIV-infected patient in his office. Though the facts did not involve prisoners, the legal principle is the same regarding HIV infection as a disability. For a lower court decision finding an HIV-positive prisoner disabled under the FRA and ADA, see, e.g., *Dean v. Knowles*, 912 F. Supp. 519, 521 (S.D. Fla. 1996).

<sup>157</sup> *Onishea v. Hopper*, 171 F.3d 1289, 1297–1299 (11th Cir. 1999) (holding any amount of risk through a “specific and theoretically sound means of possible transmission” is a significant risk, and allowing segregation of HIV-positive prisoners).

<sup>158</sup> *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374, 121 S. Ct. 955, 968 (2001) (holding Alabama State employees could not recover damages because of state’s failure to comply with the ADA).

<sup>159</sup> *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9, 121 S. Ct. 955, 968 n.9 (2001) (“[ADA] standards can be enforced by . . . private individuals in actions for injunctive relief.”).

<sup>160</sup> 42 U.S.C. § 12133 (2012) (“The remedies, procedures, and rights set forth in [29 U.S.C. § 794(a)] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of [42 U.S.C. § 12132].”).

<sup>161</sup> *Pa. Dept. of Corr. v. Yeskey*, 524 U.S. 206, 213, 118 S. Ct. 1952, 1956 (1998) (“[T]he plain text of Title II of the ADA unambiguously extends to state prison inmates . . .”).

<sup>162</sup> 42 U.S.C. § 12132 (2012).

<sup>163</sup> *Pa. Dep’t. of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998).

<sup>164</sup> *Gates v. Rowland*, 39 F.3d 1439, 1447–1448 (9th Cir. 1994) (finding a legitimate penal interest allowed prison to discriminate against HIV-positive prisoners by denying them food service jobs). In *Gates*, the prison claimed that although the medical risk of infecting other prisoners through food service is admittedly small, the perception of a



show that the possibility of a risk exists; it does not have to show that the risk has actually occurred. Examples of interests cited by prison authorities include prison safety and undue financial or administrative burden.<sup>165</sup>

## I. SENTENCING PERSONS WITH INFECTIOUS DISEASES

The Louisiana state constitution and the U.S. Constitution both prohibit cruel and unusual punishment.<sup>166</sup> The Louisiana state constitution also prohibits excessive punishment.<sup>167</sup> You should know that under Louisiana law, a sentence will not be set aside as cruel and unusual unless the underlying statute is ruled unconstitutional.<sup>168</sup> This means that if the sentence complies with what a law says, then it will not be ruled cruel and unusual under Louisiana law. A sentence can be set aside if it is ruled excessive, even if it is authorized by law.<sup>169</sup> A sentence is excessive if it is out of proportion with the severity of the crime. It is also excessive if it is a purposeless infliction of pain and suffering.<sup>170</sup>

When you are sentenced, courts can consider your health. They can consider whether or not you have an infectious disease.<sup>171</sup> However, consideration of your health is at the discretion (will) of the court.<sup>172</sup> This means that the court does not have to consider your health when sentencing you. Typically, your health will affect your sentence only if you are seriously ill, like if you have advanced-stage AIDS. In addition, the court may think that other factors are more important than your health. These factors could include your prior criminal history, the nature of your crimes, and any other aggravating factors (factors that make your crime worse in the eyes of the court).<sup>173</sup>

### 1. Parole and Infectious Diseases

Before you are placed on parole, you will be tested for infectious diseases, including HIV/AIDS and hepatitis.<sup>174</sup> If you test positive, then you will be referred to counseling and appropriate medical and support services.<sup>175</sup> Your parole may require that you follow up on those referrals.<sup>176</sup> Failure to follow up on referrals for counseling and treatment may result in the revocation (taking away) of your parole.<sup>177</sup> You will not be tested if you are released early because of “good time,” unless you were originally serving a sentence for a sexual offense.<sup>178</sup>

Louisiana also permits parole for medical reasons.<sup>179</sup> To be eligible for medical parole, you have to be terminally ill or “permanently incapacitated” *and* not be a danger to yourself or society.<sup>180</sup> If you were

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risk by other prisoners could be threatening and could lead to violence. Thus, the prison interest was not in preventing the spread of HIV so much as promoting prison safety, a typical prison interest.

<sup>165</sup> *Bullock v. Gomez*, 929 F. Supp. 1299, 1305–1308 (C.D. Cal. 1996) (finding the California Men’s Colony possibly violated the ADA and the FRA when it prohibited HIV-infected prisoners from visiting their spouses in a family visiting program that permitted prisoners to visit immediate family members in private conditions for relatively extended periods of time, including overnight stays; stating that the discrimination may be justified under the standard in *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254 (1987), as a legitimate penal interest if accommodating HIV-prisoners proved to be an undue financial or administrative burden, or if the concerns of other prisoners could lead to prison violence; and noting that proof of previous prison violence is not required to prove a legitimate penal interest).

<sup>166</sup> LA. CONST. art. I, § 20; U.S. CONST. amend. VIII.

<sup>167</sup> LA. CONST. art. I, § 20.

<sup>168</sup> LA. CODE CRIM. PROC. ANN. art. 878 (2017).

<sup>169</sup> *State v. McKinney*, 94-2113, p. 5 (La. App. 4 Cir. 4/24/96); 673 So. 2d 1205, 1207.

<sup>170</sup> *State v. McKinney*, 94-2113, p. 5 (La. App. 4 Cir. 4/24/96); 673 So. 2d 1205, 1207.

<sup>171</sup> LA. CODE CRIM. PROC. ANN. art. 894.1(B)(31), (33) (2017).

<sup>172</sup> LA. CODE CRIM. PROC. ANN. art. 894.1(B) (2017).

<sup>173</sup> LA. CODE CRIM. PROC. ANN. art. 894.1(B) (2017).

<sup>174</sup> LA. REV. STAT. ANN. § 15:574.4.2(G)(1) (2017).

<sup>175</sup> LA. REV. STAT. ANN. § 15:574.4.2(G)(3) (2017).

<sup>176</sup> LA. REV. STAT. ANN. § 15:574.4.2(G)(3) (2017).

<sup>177</sup> LA. REV. STAT. ANN. § 15:574.4.2(G)(3) (2017).

<sup>178</sup> LA. REV. STAT. ANN. § 15:574.4.2(G)(5) (2017); LA. REV. STAT. ANN. § 15:571.3(B)(3) (2017).

<sup>179</sup> LA. REV. STAT. ANN. § 15:574.20 (2017).

<sup>180</sup> LA. REV. STAT. ANN. § 15:574.20(B) (2017).

convicted of first or second-degree murder, you cannot be released on medical parole.<sup>181</sup> See Chapter 35 of the main *JLM*, “Getting Out Early: Conditional & Early Release,” and Chapter 21 of the *Louisiana State Supplement*, “Parole,” for more information on medical parole.

#### J. CONCLUSION

If you have AIDS, TB, hepatitis B or C, MRSA or another infectious disease, people may treat you differently due to ignorance and fear. Protect yourself. Learn about the facts of the disease and your legal rights. Because you are confined in a prison or jail, you may be subject to testing and treatment that you may not want. However, there are also laws that protect your privacy, health, and treatment preferences. In addition to the information contained in this Supplement and the main *JLM*, you should also consider contacting organizations that work with prisoners. You can find a list of national organizations in Appendix A of Chapter 26 of the main *JLM*. Appendix A to this chapter contains a list of organizations based in Louisiana that may be able to help you.

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<sup>181</sup> LA. REV. STAT. ANN. § 15:574.20(A)(2) (2017).

## APPENDIX A

### RESOURCES

**CrescentCare Legal Services (formerly AIDS Law of Louisiana, Inc.)**

2601 Tulane Ave. Suite 500

New Orleans, LA 70119

Phone: (504) 568-1631

Website: <http://crescentcarehealth.org/crescentcare/services/cc-legal-services/>

**Acadiana Legal Services Corporation**

1020 Surrey St.

Lafayette, LA 70501

Phone: (337) 237-4320 or (800) 256-1175

Fax: (337) 237-8839

Website: <http://www.la-law.org>

Email: [alsclaf@la-law.org](mailto:alsclaf@la-law.org)

**Southwest Louisiana Law Center**

1011 Lakeshore Drive, Suite 402

Lake Charles, LA 70601

Phone: (337) 436-3308

Website: <http://www.swla-law-center.com/>

**Legal Services of North Louisiana**

720 Travis Street

Shreveport, LA 71101

Phone: (318) 222-7186 or (800) 826-9265

Website: <http://www.lsnl.org/>

**Southeast Louisiana Legal Services**

P. O. Drawer 2867

Hammond, LA 70404

Phone: (800) 349-0886

Website: <http://www.slls.org/>

**ACLU of Louisiana**

P.O. Box 56157

New Orleans, LA 70156

Phone: (504) 522-0617 or (866) 522-0617

Website: [www.laaclu.org](http://www.laaclu.org)