CHAPTER 26

INFECTIOUS DISEASES IN PRISONS: AIDS, HEPATITIS, TUBERCULOSIS, MRSA, AND COVID-19*

A. Introduction

This Chapter explains your legal rights regarding infectious diseases in prison. This Chapter has useful information for incarcerated people who already have an infectious disease and for incarcerated people who want to avoid getting an infectious disease in prison. Specifically, this Chapter focuses on the most common infectious diseases in prison: HIV/AIDS, tuberculosis, Hepatitis B, Hepatitis C, Methicillin-resistant Staphylococcus aureus (MRSA), and Coronavirus Disease 2019.

This Chapter is divided into nine parts. **Part B** gives you some basic facts about infectious diseases. **Part C** explains the general standard used to determine whether a prison policy is constitutional. **Part D** is about medical testing for infectious diseases in prisons, including whether a prison can force you to get tested or have others tested. **Part E** is about disease prevention and segregation issues. **Part F** is about the role of confidentiality and what you can expect in terms of keeping your health status private in prison. **Part G** is about treatment options and your legal rights to those options. **Part H** is about issues relating to discrimination. **Part I** is about sentencing issues. **Part J** is about planning for your release if you have an infectious disease. Finally, **Appendix A** at the end of this Chapter lists resources for further information, counseling, and support for you and your family.

There are more court cases about HIV/AIDS than about the other diseases discussed in this Chapter. Since judges always look at the specific facts of each case, try to find cases about your disease. You can also try to make comparisons between different diseases and explain how the diseases are similar, including how they are spread and their symptoms. For example, if you want to use a case about AIDS and argue that the case should also apply to COVID-19, you should try to explain your reasons as clearly as possible. This will be explained further later in this Chapter.

This Chapter is a summary of some issues infectious diseases may present in the prison system. If you are interested in filing a complaint, it is important to do more research. You should also read other chapters of the *JLM* to understand your legal rights, especially Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law," Chapter 36, "Special Considerations for Sex Offenders," Chapter 28, "Rights of Incarcerated People with Disabilities," Chapter 23, "Your Right to Adequate Medical Care," and Chapter 35, "Getting Out Early: Conditional and Early Release."

B. Background Information on Infectious Diseases

1. HIV and AIDS

Human Immunodeficiency Virus ("HIV"), is the virus that causes acquired immunodeficiency syndrome ("AIDS"). Once someone has HIV and becomes "HIV-positive," the virus weakens their immune system so that the body cannot fight off infection properly. When that happens, you may develop various infections—known as "opportunistic" infections—that take advantage of your body's weakened condition.[1] Being HIV-positive does **not** automatically mean that you have AIDS. Without treatment, HIV-positive people develop AIDS within ten or more years (but the time it takes to develop

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[1] *HIV Basics: About HIV*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 30, 2022), *available at* http://www.cdc.gov/hiv/basics/whatishiv.html (last visited Feb. 10, 2024). Editors of the *JLM* know that many incarcerated people 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 websites.

is different for each person.[2] As HIV gets worse and becomes AIDS, people become sick with serious illnesses and infections. Medical treatments can slow down how fast HIV weakens your body.[3] 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 receive proper medical treatment. The only way you can know for certain whether you are infected is to be tested.

As of 2023, an estimated 1.2 million people in the United States are HIV-positive.[4] In 2021 alone, 36,136 people in the United States were diagnosed with HIV.[5] Although the rate of new HIV diagnoses has actually been decreasing for decades, the rate for incarcerated people is three times the total rate in the United States.[6] In prisons, HIV is more prevalent among Black people and in the South (specifically, Florida, Mississippi, Louisiana, Tennessee, Georgia, and South Carolina).[7]

You cannot get HIV by working with or being around (like sharing a cell with) an HIV-positive person. HIV is spread mostly by having unprotected sex or sharing needles with a person who is HIV-positive.[8] It can also be spread from an HIV-positive mother to her baby, either before/during birth or through breastfeeding (although this is less common).[9] 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 not transmitted through insect bites or stings, donating blood, or through closed-mouth kissing (although there is a very small chance of getting it from open-mouthed or "French" kissing with someone who is HIV positive because of possible blood contact through open wounds, warts, etc.).[10]

If you are currently HIV-negative, taking the following precautions can help protect you from contracting HIV:[11]

(1) Never share needles or syringes if you inject drugs;
(2) Never share needles or syringes if you get a tattoo or body piercing;
(3) Never share equipment used to prepare and inject drugs ("works");
(4) Always use a latex condom—*not* a lambskin condom—every time you have sex, including anal and oral sex;
(5) Never share razors or toothbrushes because of the risk of contact with someone else's blood;
(6) Talk to a healthcare provider about taking PrEP, if possible.

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[2] *HIV Overview: The Stages of HIV Infection*, NAT'L INST. OF HEALTH (Aug. 20, 2021), *available at* https://hivinfo.nih.gov/understanding-hiv/fact-sheets/stages-hiv-infection (last visited Feb. 10, 2024).

[3] *HIV Basics: Living with HIV—HIV Treatment*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 21, 2023), *available at* https://www.cdc.gov/hiv/basics/livingwithhiv/treatment.html (last visited Feb. 10, 2024).

[4] *U.S. Statistics,* DEP'T OF HEALTH & HUM. SERVS. (Dec. 7, 2023), *available at* https://www.hiv.gov/hiv-basics/overview/data-and-trends/statistics (last visited Apr. 10, 2024).

[5] *U.S. Statistics,* DEP'T OF HEALTH & HUM. SERVS. (Dec. 7, 2023), *available at* https://www.hiv.gov/hiv-basics/overview/data-and-trends/statistics (last visited Apr. 10, 2024).

[6] Emily Widra, *New Data on HIV in Prisons During the COVID-19 Pandemic Underscore Links Between HIV and Incarceration,* PRISON POLICY INITIATIVE (June 1, 2023), *available at https://www.prisonpolicy.org/blog/2023/06/01/hiv_in_prisons/* (last visited Apr. 10, 2024).

[7] Emily Widra, *New Data on HIV in Prisons During the COVID-19 Pandemic Underscore Links Between HIV and Incarceration,* PRISON POLICY INITIATIVE (June 1, 2023), *available at https://www.prisonpolicy.org/blog/2023/06/01/hiv_in_prisons/* (last visited Apr. 10, 2024).

[8] *HIV Basics: Transmission*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 28, 2020), *available at* http://www.cdc.gov/hiv/basics/transmission.html (last visited Feb. 10, 2024).

[9] *HIV Basics: Transmission—Ways HIV Can Be Transmitted*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 4, 2022), *available at* https://www.cdc.gov/hiv/basics/hiv-transmission/ways-people-get-hiv.html (last visited Feb. 10 2024).

[10] *HIV Basics: Transmission*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 28, 2020), *available at* http://www.cdc.gov/hiv/basics/transmission.html (last visited Feb. 10, 2024).

[11] *See HIV Basics: Prevention*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 1, 2021), *available at* https://www.cdc.gov/hiv/basics/prevention.html (last visited Feb. 10, 2024); *see also HIV Basics: Prevention—PrEP (Pre-Exposure Prophylaxis)*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 3, 2022), *available at* https://www.cdc.gov/hiv/basics/prep.html (last visited Feb. 10, 2024).

(a) Women and HIV/AIDS

Symptoms of HIV are often different for women than for men. Because these symptoms are typically not associated with HIV, many women go undiagnosed until the virus progresses to AIDS.[12] Early signs for a woman with HIV include gynecological disorders, especially pelvic inflammatory disease ("PID");[13] infections, such as human papillomavirus ("HPV"), that can cause cervical dysplasia;[14] and chronic yeast infections.[15] HIV-positive women also have a higher risk of developing cervical cancer.[16] If you are HIV-positive, getting a complete gynecological exam—including an inspection of the cervix (colposcopy) and a Pap smear—every six months is important in order to detect any problems early. If you believe you may be infected with HIV or AIDS, try to get tested.

The Appendix to this Chapter includes several organizations and sources of information about HIV and AIDS. If you are HIV-positive, it is important that you be tested for tuberculosis, a very contagious and serious disease, because HIV-positive people have a much higher risk of getting tuberculosis.[17]

2. Tuberculosis

Tuberculosis ("TB") is a disease caused by bacteria that are spread through the air. When you breathe in the bacteria, they usually settle in and attack your lungs, but the bacteria can also move to and attack other parts of your body.[18] Outside of prison, TB does not spread very easily. In prison, however, TB spreads much more easily because of overcrowding and poor ventilation.[19] People born outside the United States (especially in Latin America, Africa, Asia, Eastern Europe, or Russia) are more likely to have been infected with TB.[20] Additionally, people who have spent time in places where TB is common, like homeless shelters, hospitals, and prisons, are also more likely to have a TB infection.[21]

It is important to know that being infected with the TB bacteria is **not** the same as having TB disease. If you have a "TB infection" (also referred to as "latent TB"), you will have no symptoms and

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[12] *See* Louise G. Trubek & Elizabeth A. Hoffman, *Searching for a Balance in Universal Health Care Reform: Protection for the Disenfranchised Consumer*, 43 DEPAUL L. REV. 1081, 1087 (1994).

[13] *See Pelvic Inflammatory Disease (PID): Facts & Brochures—Detailed Fact Sheet*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 22, 2021), *available at* https://www.cdc.gov/std/pid/stdfact-pid-detailed.htm (last visited Feb. 10, 2024) (warning that PID is a serious complication of sexually transmitted diseases).

[14] *See* U.S. DEPT. OF HEALTH & HUM. SERVS., GUIDE FOR HIV/AIDS CLINICAL CARE 377 (2011), *available at* https://aidsetc.org/sites/default/files/resources_files/CM_Jan2011%20(1).pdf (last visited Feb. 10, 2024) (explaining that HIV-infected women are at a higher risk of HPV infection).

[15] *See Fungal Diseases: Types of Fungal Diseases—Vaginal Candidiasis*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 13, 2022), *available at* https://www.cdc.gov/fungal/diseases/candidiasis/genital/index.html (last visited Feb. 10, 2024) (explaining that women with HIV are at a higher risk of developing yeast infections); *see also HIV and AIDS: Women and HIV*, U.S. DEPT. OF HEALTH & HUM. SERVS., OFF. ON WOMEN'S HEALTH, *available at* https://www.womenshealth.gov/hiv-and-aids/women-and-hiv (last visited Feb. 10, 2024) (explaining that untreated STIs or yeast infections can increase the likelihood of HIV transmission).

[16] *HIV Infection and Cancer Risk*, NAT'L CANCER INST. (Sept. 14, 2017), *available at* https://www.cancer.gov/about-cancer/causes-prevention/risk/infectious-agents/hiv-fact-sheet (last visited Feb. 10, 2024).

[17] *Basic TB Facts: TB and HIV Coinfection*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 15, 2016), *available at* https://www.cdc.gov/tb/topic/basics/tbhivcoinfection.htm (last visited Feb. 10, 2024).

[18] *Tuberculosis: Basic TB Facts—How TB Spreads*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 3, 2022), *available at* https://www.cdc.gov/tb/topic/basics/howtbspreads.htm (last visited Feb. 10, 2024).

[19] Ctrs. for Disease Control & Prevention, *Prevention and Control of Tuberculosis in Correctional and Detention Facilities: Recommendations from the CDC*, 55 MORBIDITY & MORTALITY WKLY. REP., at 3 (July 7, 2006), *available at* https://www.cdc.gov/mmwr/pdf/rr/rr5509.pdf (last visited Feb. 10, 2024).

[20] Ctrs. for Disease Control & Prevention, *Module 2: Epidemiology of Tuberculosis*, THE SELF-STUDY MODULES ON TUBERCULOSIS, at 13 (2019), *available at* https://www.cdc.gov/tb/education/ssmodules/pdfs/Module2.pdf (last visited Feb. 10, 2024).

[21] John Jereb, *Travel-Related Infections & Diseases: Tuberculosis*, *in* CDC YELLOW BOOK 2024: HEALTH INFORMATION FOR INT'L TRAVEL (2024), *available at* https://wwwnc.cdc.gov/travel/yellowbook/2024/infections-diseases/tuberculosis#prevent (last visited Feb. 2, 2024).

you cannot spread TB to others. But if you do not get medical treatment, your TB infection can develop into "TB disease" (or "active TB").[22] 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 fatigue, weight loss, no appetite, chills, a fever, or night sweating.[23]

TB is particularly dangerous for HIV-positive people because of their weakened immune systems. In fact, TB is one of the leading causes of death for HIV-positive people worldwide.[24] Although as many as 13 million people in the United States have latent TB, only about five to ten percent will develop active TB disease if left untreated.[25] If you are HIV-positive, however, you should be aware that you are much more likely to develop active TB than HIV-negative people.[26]

Be sure to consult other sources and prison medical professionals if you think you have TB. Active TB disease can be prevented, treated, and cured if you get medical care, take prescription medication, and follow your doctor's orders.[27]

3. Hepatitis B, Hepatitis C, and MRSA

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

(a) Hepatitis B

The Hepatitis B virus, like HIV, is spread by having sex with a partner who has Hepatitis B, through sharing needles, syringes, or drug preparation equipment ("works") when shooting drugs, through workplace exposure to infected needles or other sharp objects, or from a mother with Hepatitis B to her baby during birth.[28] Hepatitis can also spread through direct contact with the blood or open sores of a person who has Hepatitis B, or through sharing items like toothbrushes, razors or medical equipment with a person who has Hepatitis B.[29] You can avoid getting Hepatitis B by taking the same precautions as you would take to avoid getting HIV. For more information on HIV prevention, see Section B(1) of this Chapter.

Often, people who have Hepatitis B do not have any symptoms but can still spread the virus to other people.[30] If you do have symptoms, you may develop symptoms including yellow eyes and skin, tiredness, loss of appetite, dark urine, abdominal pains, and nausea.[31] There are vaccines to protect you from Hepatitis B, but once you get Hepatitis B, there is no cure.[32] You should still get medical

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[22] *Basic TB Facts: Latent TB Infection and TB Disease*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 11, 2020), *available at* https://www.cdc.gov/tb/topic/basics/tbinfectiondisease.htm (last visited Feb. 2, 2024).

[23] *Basic TB Facts: Signs & Symptoms*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb 14, 2023), *available at* http://www.cdc.gov/tb/topic/basics/signsandsymptoms.htm (last visited Feb. 2, 2024).

[24] *Basic TB Facts: TB and HIV Coinfection*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 15, 2016), *available at* https://www.cdc.gov/tb/topic/basics/tbhivcoinfection.htm (last visited Feb. 10, 2024).

[25] NAT'L CTR. FOR HIV/AIDS, VIRAL HEPATITIS, STD, & TB PREVENTION, CTRS. FOR DISEASE CONTROL & PREVENTION, TB IN THE UNITED STATES: A SNAPSHOT, at 2 (2018), *available at* https://www.cdc.gov/nchhstp/newsroom/docs/factsheets/tb-in-the-us-a-snapshot.pdf (last visited Feb. 2, 2024).

[26] *Basic TB Facts: TB and HIV Coinfection*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 15, 2016), *available at* https://www.cdc.gov/tb/topic/basics/tbhivcoinfection.htm (last visited Feb. 10, 2024).

[27] *Tuberculosis Facts: TB Can Be Treated Fact Sheet*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 4, 2016), *available at* https://www.cdc.gov/tb/publications/factseries/cure_eng.htm (last visited Feb. 2, 2024).

[28] *Hepatitis B Information: Frequently Asked Questions for the Public*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 9, 2023), *available at* https://www.cdc.gov/Hepatitis/hbv/bfaq.htm (last visited Feb. 10, 2024).

[29] *Hepatitis B Information: Frequently Asked Questions for the Public*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 9, 2023), *available at* https://www.cdc.gov/Hepatitis/hbv/bfaq.htm (last visited Feb. 10, 2024).

[30] *Hepatitis B Information: Frequently Asked Questions for the Public*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 9, 2023), *available at* https://www.cdc.gov/Hepatitis/hbv/bfaq.htm (last visited Feb. 10, 2024).

[31] *Hepatitis B Information: Frequently Asked Questions for the Public*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 9, 2023), *available at* https://www.cdc.gov/Hepatitis/hbv/bfaq.htm (last visited Feb. 10, 2024).

[32] *Hepatitis B Information: Frequently Asked Questions for the Public*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 9, 2023), *available at* https://www.cdc.gov/Hepatitis/hbv/bfaq.htm (last visited Feb. 10, 2024).

attention, however, because there are medical treatments to help your symptoms.[33] If you have Hepatitis B, you should get tested for HIV and Hepatitis C.

(b) Hepatitis C

Hepatitis C virus ("HCV") causes Hepatitis C. Around 70% to 80% of people with new cases of Hepatitis C do not show any signs or symptoms of Hepatitis C.[34] Some people with chronic Hepatitis C do not have any symptoms or have only general symptoms, such as chronic fatigue and depression.[35] Hepatitis C symptoms include yellow skin or eyes, dark urine, fatigue, abdominal pain, and loss of appetite.[36] People with chronic Hepatitis C have a serious risk of developing liver damage and liver disease.[37] If you have Hepatitis C, you should not drink alcohol because alcohol can make your liver damage worse.[38]

While few people outside of prison have HCV, a high percentage of incarcerated people are infected with HCV.[39] To avoid getting Hepatitis C, you should:

(1) Never shoot drugs (if you cannot stop, then never reuse and/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;[40]
(4) Always use a latex condom—*not* a lambskin condom—every time you have sex, including anal and oral sex.

Though the chances of spreading Hepatitis C through sexual intercourse are not known, the risk of spreading Hepatitis C through direct contact with infected blood is high.[41] If you have Hepatitis C, you should be tested for HIV and Hepatitis B.[42]

(c) MRSA

"MRSA" stands for methicillin-resistant *Staphylococcus aureus* ("staph"), a type of bacteria that is resistant to several antibiotics. Many people carry staph bacteria in their nose without getting sick.[43] The illness can develop if the bacteria enter the skin, often through a scratch, scrape, or other minor

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[33] *Hepatitis B Information: Frequently Asked Questions for the Public*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 9, 2023), *available at* https://www.cdc.gov/Hepatitis/hbv/bfaq.htm (last visited Feb. 10, 2024).

[34] *Hepatitis C Basics*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 4, 2020), *available at* https://npin.cdc.gov/pages/Hepatitis-c-basics (last visited Feb. 10, 2024).

[35] *Hepatitis C Information: Hepatitis C Questions and Answers for the Public*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 31, 2023), *available at* https://www.cdc.gov/Hepatitis/hcv/cfaq.htm (last visited Feb. 10, 2024).

[36] *Hepatitis C Information: Hepatitis C Questions and Answers for the Public*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 31, 2023), *available at* https://www.cdc.gov/Hepatitis/hcv/cfaq.htm (last visited Feb. 10, 2024).

[37] *Hepatitis C Information: Hepatitis C Questions and Answers for the Public*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 31, 2023), *available at* https://www.cdc.gov/Hepatitis/hcv/cfaq.htm (last visited Feb. 10, 2024).

[38] *Hepatitis C Information: Hepatitis C Questions and Answers for the Public*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 31, 2023), *available at* https://www.cdc.gov/Hepatitis/hcv/cfaq.htm (last visited Feb. 10, 2024).

[39] *See An Overview of Hepatitis C in Prisons and Jails*, NAT'L HEPATITIS CORR. NETWORK (Feb. 22, 2016), *available at* http://www.hcvinprison.org/resources/articles-documents/71-main-content/content/191-hepcprison#_edn2 (last visited Feb. 10, 2024) (citing a study that estimated that incarcerated people account for one-third of Hepatitis C infections in the United States).

[41] *See Hepatitis C: General Information*, CTRS. FOR DISEASE CONTROL & PREVENTION (2020), *available at* http://www.cdc.gov/Hepatitis/HCV/PDFs/HepCGeneralFactSheet.pdf (last visited Feb. 10, 2022).

[42] *See Viral Hepatitis: Populations and Settings—People Coinfected with HIV and Viral Hepatitis*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 21, 2020), *available at* https://www.cdc.gov/Hepatitis/populations/hiv.htm (last visited Feb. 10, 2024) (explaining that people with HIV should be vaccinated and tested for Hepatitis, and vice versa).

[43] *See Staph Infections*, MAYO CLINIC (May 25, 2022), *available at* https://www.mayoclinic.org/diseases-conditions/staph-infections/symptoms-causes/syc-20356221 (last visited Feb. 10, 2024).

wound.[44] Most cases of MRSA happen in healthcare settings like hospitals, but MRSA is also likely to spread in crowded living conditions, like prisons and jails.[45]

The first symptom of MRSA is usually a skin infection easily mistaken for a pimple, boil, or insect bite.[46] The infection may be painful, swollen, red, or produce pus.[47] It can develop into a large abscess or blister.[48] MRSA can usually be treated by either draining the wound or taking antibiotics.[49] Do not drain the wound yourself because that can cause the infection to spread.[50] The infection may return even after treatment.[51]

MRSA and other staph infections can be spread to other people through direct physical contact or, less commonly, through contact with an infected surface or object.[52] You can reduce the risk of infection by keeping wounds clean, dry, and covered.[53] It is also important to keep shared surfaces clean, to wash your hands often (especially after touching a wound), and to avoid sharing personal items like razors and clothing.[54] If you suspect you have MRSA, it is especially important to seek treatment if you have HIV or another immune-system disorder, because a MRSA infection may lead to more serious problems.[55]

4. Coronavirus Disease 2019 (COVID-19)

Severe acute respiratory syndrome coronavirus 2, or SARS-CoV-2, is an infection that causes coronavirus disease 2019 (COVID-19). COVID-19 virus is spread mainly through the air by close contact between two people (within about 6 feet, or 2 meters).[56] Symptoms of the virus may appear 2 to 14 days after exposure and you can have symptoms for more than four weeks after they are

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[44] *See MRSA: General Information*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 26, 2019), *available at* http://www.cdc.gov/mrsa/community/index.html (last visited Feb. 10, 2024).

[45] *See* Peter Eisler, *Dangerous MRSA Bacteria Expand into Communities*, USA TODAY (Dec. 16, 2013 at 6:16 PM), *available at* https://www.usatoday.com/story/news/nation/2013/12/16/mrsa-infection-community-schools-victims-doctors/3991833/ (last visited Feb. 10, 2024).

[46] Tara Parker-Pope, *MRSA Warning Signs and Preventive Measures*, N.Y. TIMES (Oct. 27, 2007), *available at* https://www.nytimes.com/2007/10/27/nyregion/27mrsa.html (last visited Feb. 10, 2024).

[47] *MRSA: General Information*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 26, 2019), *available at* http://www.cdc.gov/mrsa/community/index.html (last visited Feb. 10, 2024).

[48] Tara Parker-Pope, *MRSA Warning Signs and Preventive Measures*, N.Y. TIMES (Oct. 27, 2007), *available at* https://www.nytimes.com/2007/10/27/nyregion/27mrsa.html (last visited Feb. 10, 2024).

[49] *See Staph Infections*, MAYO CLINIC (May 25, 2022), *available at* https://www.mayoclinic.org/diseases-conditions/staph-infections/symptoms-causes/syc-20356221 (last visited Feb. 10, 2024). (noting that strains of MRSA still respond to certain antibiotics).

[50] Tara Parker-Pope, *MRSA Warning Signs and Preventive Measures*, N.Y. TIMES (Oct. 27, 2007), *available at* https://www.nytimes.com/2007/10/27/nyregion/27mrsa.html (last visited Feb. 10, 2024).

[51] MINN. DEPT. OF HEALTH, LEARNING ABOUT MRSA: A GUIDE FOR PATIENTS (2022), *available at* https://www.health.state.mn.us/diseases/staph/mrsa/book.pdf (last visited Feb. 10, 2024).

[52] FED. BUREAU OF PRISONS, U.S. DEPT. OF JUST., MANAGEMENT OF METHICILLIN-RESISTANT *STAPHYLOCOCCUS AUREUS* (MRSA) INFECTIONS 28 (2012), *available at* https://www.bop.gov/resources/pdfs/mrsa.pdf (last visited Feb. 10, 2024).

[53] *See MRSA: General Information*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 26, 2019), *available at* http://www.cdc.gov/mrsa/community/index.html (last visited Feb. 10, 2024).

[54] *See MRSA: General Information*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 26, 2019), *available at* http://www.cdc.gov/mrsa/community/index.html (last visited Feb. 10, 2024).

[55] *See* Divya Ahuja & Helmut Albrecht, *HIV and Community-Acquired MRSA*, J. WATCH (Feb. 9, 2009), *available at* https://www.jwatch.org/ac200902090000001/2009/02/09/hiv-and-community-acquired-mrsa (last visited Feb. 10, 2024).

[56] *See Coronavirus Disease 2019 (COVID-19)*, MAYO CLINIC (Nov. 1, 2023), *available at* https://www.mayoclinic.org/diseases-conditions/coronavirus/symptoms-causes/syc-20479963 (last visited Feb. 10, 2024).

diagnosed.[57] While some people may have only a few symptoms, others may have no symptoms and still be able to spread the virus.[58]

Some COVID-19 symptoms include, but are not limited to, fever, chills, cough, tiredness, shortness of breath or difficulty breathing, muscle or body aches, headache, new loss of smell or taste, sore throat, congestion, runny nose, diarrhea, nausea, or vomiting.[59] Adults 65 years and older have a higher risk of serious illness due to COVID-19 since the risk increases with age.[60] People with pre-existing medical conditions (including but not limited to cancer, heart or lung disease, diabetes, smoking, pregnancy, or asthma) may also have a higher risk of serious illness from COVID-19.[61] As of July 3, 2023, there have been 647,349 COVID-19 cases among incarcerated people in prisons and 2,933 deaths of incarcerated people in prisons due to COVID-19.[62] You can avoid getting COVID-19 by:

(1) Getting vaccinated (including booster vaccinations);
(2) Avoiding close contact (within about 6 feet, or 2 meters) with anyone who is sick or has symptoms;
(3) Keeping distance between yourself and others (of about 6 feet, or 2 meters);
(4) Washing your hands often with soap and water for at least 20 seconds;
(5) Wearing a face mask in indoor public spaces;
(6) Not touching your eyes, nose, and mouth.[63]

(a) Difference Between COVID-19 and "the Flu"

COVID-19 and Influenza (Flu) are both contagious illnesses that attack a person's breathing process, but they are caused by different viruses—coronavirus and influenza virus, respectively.[64] Additionally, COVID-19 spreads to people faster than the flu and causes more severe illnesses in some people, especially those who are at a higher risk.[65] The symptoms of COVID-19 also take longer to show, and people with the virus can be contagious for longer.[66] Since some symptoms may be similar between COVID-19 and the flu, testing may be needed to confirm a diagnosis.[67]

C. Constitutional Rights in a Prison Setting

The rest of this Chapter discusses your rights to treatment for and protection from infectious diseases in prison. It also explains when and how a correctional facility can limit your rights to

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[57] *See Coronavirus Disease 2019 (COVID-19)*, MAYO CLINIC (Nov. 1, 2023), *available at* https://www.mayoclinic.org/diseases-conditions/coronavirus/symptoms-causes/syc-20479963 (last visited Feb. 10, 2024).

[58] *See Coronavirus Disease 2019 (COVID-19)*, MAYO CLINIC (Nov. 1, 2023), *available at* https://www.mayoclinic.org/diseases-conditions/coronavirus/symptoms-causes/syc-20479963 (last visited Feb. 10, 2024).

[59] *See COVID-19: Symptoms*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 24, 2024), *available at* https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html (last visited Feb. 10, 2024).

[60] *See COVID-19 Risks and Vaccine Information for Older Adults,* CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 22, 2023), *available at* https://www.cdc.gov/aging/covid19/index.html (last visited Feb. 10, 2024).

[61] *See COVID-19: Symptoms*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 24, 2024), *available at* https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html (last visited Feb. 10, 2024).

[62] *See* THE COVID PRISON PROJECT, *available at* https://covidprisonproject.com (last visited Apr. 10, 2024).

[63] *See Coronavirus Disease 2019 (COVID-19)*, MAYO CLINIC (Nov. 1, 2023), *available at* https://www.mayoclinic.org/diseases-conditions/coronavirus/symptoms-causes/syc-20479963 (last visited Feb. 10, 2024).

[64] *Similarities and Differences between Flu and COVID-19,* CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 28, 2022), *available at* https://www.cdc.gov/flu/symptoms/flu-vs-covid19.htm (last visited June 13, 2023).

[65] *Similarities and Differences between Flu and COVID-19,* CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 28, 2022), *available at* https://www.cdc.gov/flu/symptoms/flu-vs-covid19.htm (last visited June 13, 2023).

[66] *Similarities and Differences between Flu and COVID-19,* CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 28, 2022), *available at* https://www.cdc.gov/flu/symptoms/flu-vs-covid19.htm (last visited June 13, 2023).

[67] *Similarities and Differences between Flu and COVID-19,* CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 28, 2022), *available at* https://www.cdc.gov/flu/symptoms/flu-vs-covid19.htm (last visited June 13, 2023).

treatment and protection. This Part explains the general legal standard that courts use to determine if a prison policy is constitutionally valid. Knowing the rule will help you better understand the court decisions in this Chapter.

In general, correctional facilities can limit your constitutional rights if their actions are "reasonably related to a legitimate penological (meaning, prison-related) interest."[68] To decide if a prison policy has a legitimate penological interest, courts look at four factors (called the *Turner* factors after the Supreme Court case *Turner v. Safley*):[69]

(1) The existence of a valid, rational connection between the prison policy and a legitimate state interest (which means that the state has a real or good reason for the policy);[70]
(2) Whether alternative means of exercising the right are limited (which means that there is another way you can exercise your constitutional right);[71]
(3) The impact that exercising the right will have on guards, other incarcerated people, or the allocation of prison resources (which means that a court will look at how your constitutional right affects guards, other incarcerated people, and the prison's resources, like the prison's money or visitor safety);[72] and
(4) Whether the prison policy or regulation is an exaggerated response to prison concerns, as shown by the ready availability of alternative means of exercising the right (which means that a court will consider if the policy is an extreme reaction to the prison's concern).[73]

If you think a prison policy illegally violates your constitutional rights, you may want to argue that "there is no legitimate penological interest which justifies the violation" which means that there is no real reason for the prison to limit your constitutional right, and so their policy is illegal. At the least, you can argue that the interest is not "reasonably related" to the actions or policy of the prison officials. This is different from saying there is no legitimate interest because you're saying that the prison has a real interest, but limiting your rights has nothing to do with it. You can also try to argue that there are other ways for the prison to achieve its goal without limiting your constitutional rights.

D. Legal Rights Concerning Testing for Infectious Diseases

1. Involuntary Testing

Mandatory testing policies, or testing that you are required to do, are different depending on which state you are in. States may also have different policies for different diseases. For example, a state may require incarcerated people to take a TB test but not an HIV test. If you are outside New York State, you should check your state's laws to find out what its testing policies are. Because courts find that the prevention of disease is a legitimate state interest under the *Turner* standard discussed above,

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[68] Turner v. Safley, 482 U.S. 78, 87, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987) (holding that prison systems' regulations of marriages between incarcerated people and incarcerated person-to-incarcerated person correspondence must meet a "reasonable relationship" standard), *superseded in part by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb–bb-4).

[69] Turner v. Safley, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79–80 (1987), *superseded in part by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb–bb-4).

[70] *See*, *e.g.*, Beard v. Banks, 548 U.S. 521, 530, 126 S. Ct. 2572, 2578, 165 L.Ed.2d 697, 706 (2006) (finding that the prohibition on access to newspapers, magazines, and personal photographs was necessary in order to motivate better behavior on the part of incarcerated people who had already been deprived of almost all privileges).

[71] *See*, *e.g.*, Overton v. Bazzetta, 539 U.S. 126, 135, 123 S. Ct. 2162, 2169, 156 L. Ed. 2d 162, 172 (2003) (holding restrictions on incarcerated people's visitation rights to be legitimate when restricted incarcerated people have available alternative means of exercising the right of association, even if those alternative means (letters, telephone calls, and messages sent through those permitted to visit) are not ideal).

[72] *See*, *e.g.*, Overton v. Bazzetta, 539 U.S. 126, 135, 123 S. Ct. 2162, 2169, 156 L. Ed. 2d 162, 172 (2003) (stating that courts will be "'particularly deferential' to prison administrators' regulatory judgments" where the allocation of prison resources and the safety of visitors, guards, and other incarcerated people are implicated).

[73] *See*, *e.g.*, Overton v. Bazzetta, 539 U.S. 126, 136, 123 S. Ct. 2162, 2169–2170, 156 L. Ed. 2d 162, 172–173 (2003) (finding that, although *Turner* requires looking to whether the prison policy is an exaggerated response, *Turner* does not impose a least restrictive alternative test).

courts will generally allow prisons to test you for infectious diseases, even without your consent (which means that you can be tested even if you do not voluntarily agree to testing).[74]

(a) HIV Testing

In New York State prisons, you normally cannot be tested for HIV without your consent (meaning unless you voluntarily agree to be tested).[75] However, if you are convicted of certain sex offenses and the victim requests that you are tested, you can be tested for HIV against your will.[76] If this happens, your test results will be sent to you and the victim, and possibly to the victim's immediate family, guardian, physicians, attorneys, and medical or mental health providers. Past and future contacts of the victim may also be notified if the nature of their contact carries a risk of HIV transmission (for example, sexual partners).[77] Your test results cannot be used against you in a civil or criminal proceeding if they are related to the events that caused you to be convicted.[78]

Federal prisons, unlike New York State prisons, can require you to undergo HIV testing, although federal prisons do not test all incarcerated people. If you have a sentence of six months or longer, and if medical personnel think you might have HIV, they may require you to take an HIV test.[79] If you refuse the test, you might receive an incident report for failing to follow an order.[80] Also, if you refuse HIV testing, you may not be able to file a claim for failure to receive adequate medical care for HIV.[81] Additionally, federal prisons conduct mandatory random testing once a year. If you test positive, the prison cannot subject you to disciplinary action based solely on your results, though you may be punished if you are caught performing an act that could transmit the disease.[82]

Outside of New York State, many states conduct involuntary HIV tests when you enter prison,[83] during custody, and/or upon your impending release.[84] Involuntary HIV testing has been challenged in court based on the Eighth Amendment (which prohibits cruel and unusual punishment), the Fourth Amendment (which prohibits unreasonable searches and seizures), the constitutional right to privacy,

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[74] *See, e.g.*, Rossi v. Portuondo, 277 A.D.2d 526, 527, 714 N.Y.S.2d 816, 817 (3d Dept. 2000) (concluding that requiring inmates to choose between submitting to a tuberculosis test or confinement in a medical keeplock for a year is "reasonably related" to the "legitimate" interest of preventing the spread of the disease).

[75] N.Y. PUB. HEALTH LAW § 2781(1) (McKinney 2023) (stating that, with some exceptions, no one shall order an HIV-related test on someone without "at a minimum, orally advising the protected individual," or a person authorized to consent to health care for that person that an HV-related test is being administered, or "over the objection of such individual or authorized persons"); *see* McLain v. Grosso, 31 A.D.3d 765, 766, 820 N.Y.S.2d 93, 94 (2d Dept. 2006) (holding that a prison could not administer an HIV test on an incarcerated person because according to § 2781(1), "HIV-related testing is prohibited without the written informed consent of the person to be tested, except as authorized by CPLR 3121 or otherwise specifically permitted by statute"); *see also* Siegrist v. State, 55 A.D.3d 717, 718, 868 N.Y.S.2d 670, 671 (2d Dept. 2008) (explaining that a nurse could not administer an HIV test to an incarcerated person in a coma because the incarcerated person could not consent to the test).

[76] N.Y. CRIM. PROC. LAW § 390.15(1)(a) (McKinney 2018) (stating that the sex offense must be an act of "sexual intercourse," "oral sexual conduct," or "anal sexual conduct" as defined by N.Y. Penal Law § 130.00).

[77] N.Y. CRIM. PROC. LAW § 390.15(6)(a)(ii) (McKinney 2018).

[78] N.Y. CRIM. PROC. LAW § 390.15(8) (McKinney 2018).

[79] 28 C.F.R § 549.12(a)(1) (2023).

[80] 28 C.F.R. § 549.12(a)(1) (2023). See Chapter 18 of the *JLM*, "Your Rights at Prison Disciplinary Hearings," for more information about the consequences of prison incident reports.

[81] Walker v. Peters, 989 F. Supp. 971, 975 (N.D. Ill. 1997) (finding that deprivation of HIV medication cannot be considered deliberate indifference unless incarcerated person has received a positive HIV test first). *See* Chapter 23 of the *JLM,* "Your Right to Adequate Medical Care," for more information on the deliberate indifference standard.

[82] 28 C.F.R. § 549.13(c) (2023).

[83] Alabama, Georgia, Idaho, and Missouri are among the states that mandate testing of incarcerated people entering the prison system. *See* ALA. CODE § 22-11A-17(a) (LexisNexis 2019) (subjecting all persons sentenced to confinement or imprisonment for more than 30 consecutive days to mandatory testing); GA. CODE ANN. § 42-5-52.1(b) (2009); IDAHO CODE § 39-604(1) (2013); MO. REV. STAT. § 191.659(1) (2003).

[84] Alabama, Idaho, and Missouri are among the states that test upon release. *See* ALA. CODE § 22-11A-17(a) (LexisNexis 2019); IDAHO CODE § 39-604(1) (2013); MO. REV. STAT. § 191.659(1) (2003).

and the Equal Protection Clause of the Fourteenth Amendment. However, courts tend to uphold involuntary testing because it is reasonably related to a "legitimate penological interest," meaning it is done for a valid interest the prison has (like preventing the spread of HIV amongst incarcerated people).[85]

(b) TB Testing

While HIV cannot be passed from person to person by casual contact, TB is spread through the air. So, prison TB testing policies are usually different from prison HIV testing policies. In New York State, prison policy requires all incarcerated people to be tested for TB after they enter prison. The TB screening includes a chest x-ray and a skin test, where a small amount of 'purified protein derivative' ("PPD") is injected beneath your skin and observed for a reaction. After the initial test, you will be re-tested yearly. If you refuse testing, medical personnel will tell you about the benefits of the test. If you still refuse, then you will be placed in medical keeplock (also known as "tuberculin (TB) hold") for up to a year until you have received three negative chest x-rays or you agree to be tested. While in TB hold, you are only allowed one hour of solitary exercise per day and three showers a week.

Courts have generally upheld the New York TB testing policy when people have claimed the policy violates Fourth Amendment protections against unreasonable searches,[86] Eighth Amendment prohibitions against cruel and unusual punishment,[87] and Fourteenth Amendment due process protections.[88] This is because courts think the policy is reasonably related to preventing the spread of TB in prisons.[89] Additionally, some courts have said mandatory TB testing or confinement in TB hold

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[85] *See, e.g.*, Dunn v. White, 880 F.2d 1188, 1196–1198 (10th Cir. 1989) (finding no 1st, 4th, or 14th Amendment constitutional violations when incarcerated person claimed he was threatened with disciplinary segregation if he failed to submit to the HIV blood test even though he claimed his religious beliefs did not allow the test).

[86] *See* Word v. Croce, 169 F. Supp. 2d 219, 222, 222 n.1, 225, 230 (S.D.N.Y. 2001) (finding that where plaintiff alleged violations of the 4th Amendment because she was put on TB hold, her claims were more appropriately brought under the 8th Amendment, but also finding that the TB hold was not a violation of her constitutional rights).

[87] *See* Smith v. Wright, No. 9:06-CV-00401, 2011 U.S. Dist. LEXIS 109058, at *60–62 (N.D.N.Y. Aug. 31, 2011) (*unpublished*) (finding that an incarcerated person's 8th Amendment rights were not violated by prolonged confinement in medical keeplock for refusing take a TB test or because, under normal conditions, keeplock does not constitute a violation of the 8th Amendment rights); Lee v. Frederick, 519 F. Supp. 2d 320, 327 (W.D.N.Y. 2007) (finding that incarcerated person's 8th Amendment rights were not violated when he was placed on TB hold because, while plaintiff did suffer some loss of his freedom of movement, he did not present evidence that he suffered a serious deprivation of his rights or that defendants acted with the required state of mind associated with the "unnecessary and wanton infliction of pain"); Delisser v. Goord, No. 9:02-CV-00073 (FJS/GLS), 2003 U.S. Dist. LEXIS 488, at *4, *16, *18–19, *22–23 (N.D.N.Y. Jan. 15, 2003) (*unpublished*) (holding that an incarcerated person's 8th Amendment rights were not violated by being placed in TB hold after refusing to submit to PPD testing and then for refusing to take TB medication); Davidson v. Kelly, No. 96-2066, 1997 U.S. App. LEXIS 33796, at *4–5, *8 (2d Cir. Nov. 24, 1997) (*unpublished*) (holding that placing an incarcerated person in TB hold for three days until he agreed to be tested did not violate the incarcerated person's 8th Amendment rights).

[88] *See* Smith v. Wright, No. 9:06-CV-00401, 2011 U.S. Dist. LEXIS 109058, at *60–62 (N.D.N.Y. Aug. 31, 2011) (*unpublished*) (finding that placement in medical "keeplock" for refusing TB testing did not violate 14th Amendment due process protections given that keeplock is not a condition which rises to the level of "conscience-shocking behavior that would support a substantive due process claim" and that the incarcerated person was not denied procedural due process receiving "notice" through "care[ful] coun[sel] about the importance of the TB test" and "a meaningful opportunity to be heard" through repeated offers to test which they could agree to "at any time"); Delisser v. Goord, No. 9:02-CV-00073 (FJS/GLS), 2003 U.S. Dist. LEXIS 488, at *4, *16, *18–19, *22–23 (N.D.N.Y. Jan. 15, 2003) (*unpublished*) (finding that an incarcerated person's placement in TB hold for refusing to submit to PPD test and then for refusing to take TB medication, did not implicate a "liberty interest" so as to trigger 14th Amendment due process protections).

[89] *See* Smith v. Wright, No. 9:06-CV-00401, 2011 U.S. Dist. LEXIS 109058, at *60–62 (N.D.N.Y. Aug. 31, 2011) (*unpublished*) (stating that DOCS has a strong, legitimate interest in containing contagious diseases, including TB); Davidson v. Kelly, No. 96-2066, 1997 U.S. App. LEXIS 33796, at *4–5, *8 (2d Cir. Nov. 24, 1997) (*unpublished*) (holding that TB holds furthered a legitimate penological (prison-related) interest).

is legal even if the test violates the incarcerated person's religious beliefs.[90] However, in some situations the prison may (though it is not required to) order a blood test instead of a PPD test—for example, if there are sincere religious objections and if the prison can do this without putting other's health in significant danger.[91] According to the policy, if you refuse the PPD test because of your religion, you will be placed in TB hold while the Chief Medical Officer decides if you are telling the truth. If the Chief Medical Officer thinks that you hold a religious belief that prohibits PPD testing, he may ask you to take a blood test and chest x-ray instead of the skin test. You will remain in TB hold until the results of the blood test, chest x-ray, and physical examination show that you do not have latent TB (TB that is hidden because you do not have any symptoms).[92]

If the TB test is against your religion and you want to challenge the policy as a violation of your First Amendment right to free exercise of religion, you should try to show how applying the policy to you does not make sense.[93] If you have submitted to the test in the past or are willing to undergo a chest x-ray, you might increase your chances of winning.[94] Although courts do not always agree with incarcerated people's Eighth Amendment claims, you may also be able to argue that being placed on TB hold is a violation of your Eighth Amendment right to be free from cruel and unusual punishment. This is especially true if your prison's ventilation system does not prevent the air in your cell from

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[90] *See* Smith v. Wright, No. 9:06-CV-00401, 2011 U.S. Dist. LEXIS 109058, at *49–53 (N.D.N.Y. Aug. 31, 2011) (*unpublished*) (stating that DOCS amended its testing policy in 2004 to accommodate those with religious objections to the PPD test and there is no case law for concluding it to violate the 1st Amendment); Redd v. Wright, 597 F.3d 532, 537 (2d Cir. 2010) (finding that the TB policy was motivated by a legitimate public health concern, not animus, and so did not target incarcerated people for engaging in a religious practice); Rossi v. Portuondo, 277 A.D.2d 526, 527, 714 N.Y.S.2d 816, 817 (3d Dept. 2000) (holding that giving incarcerated people the option of testing or being placed in medical confinement is "reasonably related" to the "legitimate penological interest" of preventing the spread of the disease and did not violate the plaintiff's religion).

[91] *See* Smith v. Wright, No. 9:06-CV-00401, 2011 U.S. Dist. LEXIS 109058, at *53–54 n.26 (N.D.N.Y. Aug 31, 2011) (*unpublished*).

[92] *See* Smith v. Wright, No. 9:06-CV-00401, 2011 U.S. Dist. LEXIS 109058, at *6–8 (N.D.N.Y. Aug 31, 2011) (*unpublished*).

[93] *See* Reynolds v. Goord, 103 F. Supp. 2d 316, 337 (S.D.N.Y. 2000) (holding that Rastafarian incarcerated person who expected to be in tuberculin hold for a year after refusing a TB test showed a clear likelihood of proving at trial that the prison policy as applied to him violated his 1st Amendment rights because it was a substantial burden on his constitutional rights). Note that an incarcerated person making a 1st Amendment claim in this context must frame the 1st Amendment right as one that is clearly established and not too generalized. *See, e.g.*, Redd v. Wright, 597 F.3d 532, 536 (2d Cir. 2010) (holding that, if the court can determine that the rights were not clearly established at the time of the alleged violation, the court is not required to determine if the incarcerated person's rights are violated under the 1st Amendment). If you are incarcerated in federal prison, also see Jolly v. Coughlin, 76 F.3d 468, 478–480 (2d Cir. 1996) (explaining that prison officials likely violated the incarcerated person's religious freedom under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb–bb-4). If you are incarcerated in state prison, however, RFRA is no longer good law and *Jolly* will not apply to your case. *See* City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997). After RFRA was declared unconstitutional as applied to states, some states enacted state laws modeled on RFRA to fill the gap. If you are incarcerated in state prison, you should check to see if your state has enacted a "mini-RFRA" state law. If you are a state or federal incarcerated person, you may also be able to make an argument under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) which states that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution" unless the government establishes that the burden furthers "a compelling governmental interest," and does so by "the least restrictive means." 42 U.S.C. § 2000cc-1(a)(1)–(2). For a discussion of a possible RLUIPA argument, see Johnson v. Sherman, 2007 U.S. Dist. LEXIS 24098, at *6–7, *14 (E.D. Cal. Apr. 2, 2007) (*unpublished*) ("Preventing the spread of tuberculosis among the closely confined population within the prison by use of the least restrictive means possible greatly outweighs the harm posed to the plaintiff by submitting to the skin test. While the harm to plaintiff's ability to practice his belief is no doubt burdened, the CDCR has a grave responsibility to protect the inmate populations confined within its prisons from the spread of a highly contagious and debilitating disease.").

[94] *See* Selah v. Goord, 255 F. Supp. 2d 42, 54–55 (N.D.N.Y. 2003) (stating DOCS TB policy as applied to petitioner was irrational since he had been tested while incarcerated); Word v. Croce, No. 00 CIV. 6496 (SAS), 2001 U.S. Dist. LEXIS 9071, at *10–13 (S.D.N.Y. July 5, 2001) (*unpublished*) (describing that it is DOCS practice to exempt an incarcerated person from TB hold if he who refuses the PPD test on religious grounds undergoes a chest x-ray instead); Reynolds v. Goord, 103 F. Supp. 2d 316, 337 (S.D.N.Y. 2000) (holding that Rastafarian incarcerated person who expected to be in TB hold for a year after refusing a PPD test showed a clear likelihood of proving at trial that the prison policy as applied violated his 1st Amendment rights).

getting to other incarcerated people or staff. You might be able to argue that the keeplock policy should not be applied to you because the air from your cell can still reach others through the vents, which means that your confinement does not help protect others' safety.[95]

If you are in a federal prison, you must undergo a PPD test and possibly a chest x-ray when you enter the facility.[96] If you refuse both tests, the prison will test you without your consent, meaning that the prison can test you even if you do not agree to take the test.[97] Refusing to be tested may result in an incident report, although you will not be placed in medical isolation unless the prison has a reason to think you have TB.[98]

(c) Hepatitis B and Hepatitis C Testing

New York State tests all incarcerated people for Hepatitis C once they arrive at reception facilities.[99] During your initial health screening, you may be offered a Hepatitis A or Hepatitis B vaccine, and the New York State Department of Health recommends vaccination for Hepatitis A and B if you have already been diagnosed with Hepatitis C. The policies surrounding access and qualifications for these vaccines vary from facility to facility so check with your doctors and nurses about what is available.[100]

If you are in a federal prison, you will be screened to determine if you have HBV or HCV. Like the TB policy in the federal prison system discussed in Subsection (D)(1)(b), refusal to take the test will result in an incident report.

(d) MRSA Testing

The Federal Bureau of Prisons recommends that all incarcerated people should be checked for skin infections at their initial intake screening and after returning from the hospital.[101] Incarcerated people

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[95] *See* Smith v. Wright, No. 9:06-CV-00401, 2011 U.S. Dist. LEXIS 109058, at *23–24 (N.D.N.Y. Aug. 31, 2011) (*unpublished*) (indicating that the 8th Amendment could be violated by keeplock confinement if it deprived an incarcerated person of a basic human need); Jolly v. Coughlin, 76 F.3d 468, 480 (2d Cir. 1996) (finding a substantial likelihood of an 8th Amendment violation when New York State prison officials placed an incarcerated person in "medical keeplock" for three-and-a-half years, after the incarcerated person refused to undergo a TB test for religious reasons). In *Jolly*, the court considered these facts: (1) incarcerated people who refused to be tested were placed in medical keeplock; (2) medical keeplock did not involve "respiratory isolation" and thus did not reduce the risks of infection; (3) incarcerated people were allowed to leave their cells only once each week for a 10-minute shower and could leave for meetings with counsel; and (4) plaintiff suffered headaches, hair loss, rashes, and difficulty standing or walking due to his confinement. Jolly v. Coughlin, 76 F.3d 468, 472 (2d Cir. 1996). Although the portion of *Jolly* addressing RFRA violations is no longer good law for people incarcerated in state prison, it is still good law for both state and federal incarcerated people for arguments based on Eight Amendment violations.

[96] *See* FED. BUREAU OF PRISONS, U.S. DEPT. OF JUST., PROGRAM STATEMENT P6190.04, INFECTIOUS DISEASE MANAGEMENT 7 (2014), *available at* http://www.bop.gov/policy/progstat/6190_004.pdf (last visited Feb. 10, 2024); *see also* Washington v. Cambra, No. 96-16925, 1998 U.S. App. LEXIS 30072, at *2–3 (9th Cir. 1998) (*unpublished*) (holding that the policy of conducting TB tests was reasonably related to the legitimate penological goal of detecting and containing TB).

[97] *See*, *e.g.*, Ballard v. Woodard, 641 F. Supp. 432, 437 (W.D.N.C. 1986) (performing a PPD test without an incarcerated person's consent does not constitute the denial of any federal constitutional rights where the prison had a legitimate interest in "orderly and uniform implementation" of the test); Dunn v. Zenk, No. 1:07-CV-2007-RLV, 2007 U.S. Dist. LEXIS 73891, at *9 (N.D. Ga. Oct. 1, 2007) (*unpublished*) (holding that involuntary testing for TB does not violate incarcerated person's constitutional rights).

[98] *See* FED. BUREAU OF PRISONS, U.S. DEPT. OF JUST., PROGRAM STATEMENT P6190.04, INFECTIOUS DISEASE MANAGEMENT 9 (2014), *available at* http://www.bop.gov/policy/progstat/6190_004.pdf (last visited Feb. 10, 2024).

[99] *See* N.Y. DEP'T OF CORR. AND CMTY. SUPERVISION, ELIMINATING HEPATITIS C (2019), *available at* https://doccs.ny.gov/system/files/documents/2020/01/legislative-hep-c-report-1-8-20-final-002.pdf (last visited Feb. 10, 2024).

[100] *See* N.Y. DEP'T OF HEALTH, HEPATITIS C IN PRISON AND JAIL (2017), *available at* https://www.health.ny.gov/diseases/aids/providers/corrections/docs/hcv_inmate_brochure.pdf (last visited Feb. 10, 2024).

[101] *See* FED. BUREAU OF PRISONS, U.S. DEPT. OF JUST., MANAGEMENT OF METHICILLIN-RESISTANT *STAPHYLOCOCCUS AUREUS* (MRSA) INFECTIONS 2 (2012), *available at* https://www.bop.gov/resources/pdfs/mrsa.pdf (last visited Feb. 10, 2024).

at high risk for MRSA infections are supposed to be screened at all routine medical examinations.[102] Incarcerated people with HIV, diabetes, or open wounds are considered high risk for MRSA.

(e) COVID-19 Testing

DOCCS follows the Centers for Disease Control and Prevention's guidance for managing COVID-19 in correctional facilities to help stop the spread of the virus.[103] The testing process in prison is the same as the process used in the community. Incarcerated people are tested when they have COVID-19 symptoms or have been exposed to someone else who tested positive for COVID-19.[104] If your test comes back positive, then you will be isolated away from other people for ten days since your symptoms first started or from the date of your positive test result.[105] You may be let out of isolation early if you test negative and your symptoms are getting better.[106]

2. Right to Testing upon Request

(a) HIV Testing

Many states provide HIV tests for incarcerated people upon request. If you are denied a test, you might want to challenge the denial as a violation of the correctional facility's own policy. In New York State prisons, you will be offered a test when you first enter the facility. Testing is also available through the Corrections Health Initiative ("CHI").[107]

If you are incarcerated in federal prison, you can request HIV testing, but only once per year.[108] Some federal courts do not recognize the constitutional right to HIV testing, especially if you cannot give a reason for why you think you might have HIV.[109] But, even in those courts, you may have an Eighth Amendment claim if you are high-risk and are denied an HIV test on the grounds that the denial will prevent you from getting proper medical care. Additionally, if your prison has listed

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[102] *See* FED. BUREAU OF PRISONS, U.S. DEPT. OF JUST., MANAGEMENT OF METHICILLIN-RESISTANT *STAPHYLOCOCCUS AUREUS* (MRSA) INFECTIONS 2 (2012), *available at* https://www.bop.gov/resources/pdfs/mrsa.pdf (last visited Feb. 10, 2024).

[103] *See Guidance on Management of COVID-19 in Homeless Service Sites and in Correctional and Detention Facilities* (*as revised* May 11, 2023), CTR. FOR DISEASE CONTROL & PREVENTION, *available at* https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-correctional-settings.html (last visited Feb. 25, 2024).

[104] *See Guidance on Management of COVID-19 in Homeless Service Sites and in Correctional and Detention Facilities* (*as revised* May 11, 2023), CTR. FOR DISEASE CONTROL & PREVENTION, *available at* https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-correctional-settings.html (last visited Feb. 25, 2024).

[105] *See* Guidance on Management of COVID-19 in Homeless Service Sites and in Correctional and Detention Facilities (*as revised* May 11, 2023), CTR. FOR DISEASE CONTROL & PREVENTION, *available at* https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-correctional-settings.html (last visited Feb. 25, 2024).

[106] *See* Guidance on Management of COVID-19 in Homeless Service Sites and in Correctional and Detention Facilities (*as revised* May 11, 2023), CTR. FOR DISEASE CONTROL & PREVENTION, *available at* https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-correctional-settings.html (last visited Feb. 25, 2024).

[107] The Corrections Health Initiative is a project funded by the New York Department of Health's AIDS Institute. Community-based organizations go into prisons and provide tests, counseling, peer education, and discharge planning through the initiative. *HIV/STD/HCV Prevention and Related Services: Corrections Health Initiative*, N.Y. DEPT. OF HEALTH (last updated Jan. 2023), *available at* https://www.health.ny.gov/diseases/aids/general/about/prevention.htm#cji (last visited Feb. 10, 2023).

[108] 28 C.F.R. § 549.12(a)(4) (2023).

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

standards for who should get an HIV test, and you meet these standards but are refused a test, you may have a claim.[110] You should check to see how the courts in your state have decided this issue.

(b) Hepatitis Testing

While there is no right to be tested for Hepatitis B specifically, if you are a federally incarcerated person on a work assignment that might expose you to blood or bodily fluids, you should be offered the Hepatitis B vaccine.[111] If you are told that you cannot get HCV treatment while incarcerated or that you must wait, you should:

(1) Ask questions so you know why the treatment is denied or delayed;
(2) Follow the procedures at your facility so you can get more answers;
(3) See nurses and doctors regularly to monitor your liver, catch any potential problems early, and prepare for future treatment;
(4) Get copies of your medical records during release so you can check in with your doctor;
(5) Ask your facility to help sign you up for health insurance or Medicaid once released;
(6) After release, consider joining a patient assistance program offered by drug companies or ask about clinical trials.[112]

(c) MRSA Testing

If you have a skin infection that you think may be caused by MRSA, you can ask to be tested by informing a correctional staff member. If you were recently hospitalized, you may be specifically instructed to self-report any skin infections or fevers for a few weeks after.[113]

3. Consequences of Testing Positive for HIV in New York

States have different rules about what happens after an incarcerated person tests positive for HIV. New York has an HIV Reporting and Partner Notification (HIVRPN) law that requires doctors and other medical providers (including the laboratories doing the tests) to report to the Department of Health the names of people infected with HIV, HIV-related illness, or AIDS.[114] The information is supposed to remain confidential.[115] However, New York regulations allow for HIV status to be given to employees or agents of the Division of Probation and Correctional Alternatives, Division of Parole, Commission of Correction, or any local probation department. An incarcerated person's HIV status

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[110] *See* Doe v. Wigginton, 21 F.3d 733, 739–740 (6th Cir. 1994) (holding the prison did not violate the 8th or 14th Amendments for refusing to test for HIV on request because the prison could reasonably limit the testing based on an incarcerated person's history, medical symptoms, prior drug use, or sexual activity). It is possible the court would have allowed Doe's claim if he had given officials information indicating that he met the criteria for testing and was still refused a test.

[111] 28 C.F.R. § 549.15(b) (2023).

[112] N.Y. DEP'T OF HEALTH, HEPATITIS C IN PRISON AND JAIL (2017), *available at* https://www.health.ny.gov/diseases/aids/providers/corrections/docs/hcv_inmate_brochure.pdf (last visited Feb. 10, 2024).

[113] *See* FED. BUREAU OF PRISONS, U.S. DEPT. OF JUST., MANAGEMENT OF METHICILLIN-RESISTANT *STAPHYLOCOCCUS AUREUS* (MRSA) INFECTIONS 2 (2012), *available at* https://www.bop.gov/resources/pdfs/mrsa.pdf (last visited Feb. 10, 2023).

[114] *See* N.Y. COMP. CODES R. & REGS. tit. 10, § 63.4(a)(1) (2023); *see also What You Need to Know About the Law*, N.Y. DEPT. OF HEALTH (last updated Jan. 2010), *available at* http://www.health.ny.gov/diseases/aids/regulations/reporting_and_notification/about_the_law.htm#quest1 (last visited Feb. 10, 2024).

[115] *See* N.Y. COMP. CODES R. & REGS. tit. 10, § 63.6 (2023); *see also What You Need to Know About the Law*, N.Y. DEPT. OF HEALTH (last updated Jan. 2010), *available at* http://www.health.ny.gov/diseases/aids/regulations/reporting_and_notification/about_the_law.htm#quest8 (last visited Feb. 10, 2024) ("Under the law, identifying information about people with HIV infection is ONLY to be used to help the Health Department track the epidemic and for partner notification. The Health Department will NOT disclose this information to other government or private agencies like . . . police, welfare, insurance companies or landlords."). The Health Department will also not disclose this information to Immigration and Customs Enforcement (ICE).

can only be given to people who need the information in order to carry out their jobs.[116] If you are diagnosed with an HIV-related illness, your medical care provider will ask for the names of your spouse, sexual partners, and/or needle-sharing partners.[117] If you provide those names, those individuals will receive notice they are at risk of being infected with HIV,[118] and they will be offered counseling and HIV testing.[119] Your name will not be given to them.[120] You have the right to refuse to tell your doctor the names of your partners, and will not face any legal penalty (civil or criminal) if you choose not to share this information.[121]

E. Legal Rights and Prevention of Infectious Diseases

1. Prevention and Prison Policy

The government has a responsibility to give medical care to incarcerated people.[122] This duty may also include protecting incarcerated people from infectious diseases, such as TB.[123] But, it is also very important to take the necessary precautions to protect yourself and others from disease. If you have anal, vaginal, or oral sex, it is extremely important to use latex condoms in order to protect yourself against HIV infection and other sexually transmitted diseases. This is particularly important in the prison system, where more people are HIV-positive. Very few jails or prisons provide condoms for incarcerated people. A few jails in Los Angeles, New York City, Philadelphia, San Francisco, the District of Columbia, Mississippi, and Vermont supply condoms on a limited basis.[124]

Prisons have some duty to prevent MRSA's spread once they know the infection is present within the prison. As an incarcerated person, you have limited options to make the prison protect you. If you show that the prison is "deliberately indifferent" to your serious medical needs, you can bring an Eighth Amendment claim against the jail or prison for failing to protect you from MRSA.[125] Courts generally say that prisons do not have to take every possible measure to prevent MRSA's spread. If a prison takes reasonable steps, you will not be able to make a constitutional claim by showing that the prison could have done more to protect you.[126]

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[116] N.Y. COMP. CODES R. & REGS. tit. 10, § 63.6(a)(13) (2023).

[117] *See* N.Y. COMP. CODES R. & REGS. tit. 10, § 63.8(a)(3) (2023).

[118] *See* N.Y. COMP. CODES R. & REGS. tit. 10, § 63.8(a)(3) (2023).

[119] *See* N.Y. COMP. CODES R. & REGS. tit. 10, § 63.8(g) (2023).

[120] *See* N.Y. COMP. CODES R. & REGS. tit. 10, §§ 63.6(b)(3), 63.8(a)(3) (2023).

[121] *See What You Need to Know About the Law*, N.Y. DEPT. OF HEALTH (last updated Jan. 2010), *available at* http://www.health.ny.gov/diseases/aids/regulations/reporting_and_notification/about_the_law.htm#quest11 (last visited Feb. 10, 2024).

[122] *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 also *JLM* Chapter 23, "Your Right to Adequate Medical Care," for more information on a prison's duty to provide medical care and what you can do if you are not receiving proper care.

[123] *See* Lareau v. Manson, 651 F.2d 96, 109 (2d Cir. 1981) (finding that a prison's failure to adequately screen incoming incarcerated people constituted a serious "threat to the well-being of the inmates," and the practice was considered punishment under the Due Process clause because defendants lacked justification for the policy,); Smith v. Sullivan, 553 F.2d 373, 380 (5th Cir. 1977) (holding that though a prison is not required to conduct medical exams on incarcerated people within 36 hours of entering the facility, leaving persons with communicable or contagious diseases, like scabies or gonorrhea, among other incarcerated people for a month or more without medical care violated the standard of adequate medical services).

[124] Beth Shuster, *Sheriff Approves Handout of Condoms to Gay Inmates*, L.A. TIMES (Nov. 30, 2001 at 3:00 AM), *available at* http://articles.latimes.com/2001/nov/30/news/mn-10008 (last visited Feb. 10, 2024); George Lavender, *California Prisons Aim to Keep Sex Between Inmates Safe, If Illegal*, NPR (Jan. 21, 2015 at 6:53 PM), *available at* https://www.npr.org/2015/01/21/378678167/california-prisons-aim-to-keep-sex-between-inmates-safe-if-illegal (last visited Feb. 10, 2024).

[125] *See* Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d. 251, 260 (1976).

[126] *See* Lopez v. McGrath, No. C 04-4782 MHP, 2007 U.S. Dist. LEXIS 39409 at *24–25 (N.D. Cal. May 31, 2007) (*unpublished*) (stating that, while taking more hygienic measures would have reduced the risk of infection,

2. Segregation of Incarcerated People with Infectious Diseases

(a) Mandatory Segregation

(i) *Mandatory Segregation of Incarcerated People with TB*

Prisons may want to segregate (separate) incarcerated people with infectious diseases from other incarcerated people to prevent the disease's spread. This type of segregation is often mandatory and involves separate housing. New York State law allows prison officials to separate incarcerated people if a "contagious disease" (which means a disease that spreads easily) becomes widespread.[127] But, New York law also says that all incarcerated people who are "sick shall receive all necessary care and medical assistance," and that all such incarcerated people should be transferred back to the general population as soon as possible.[128]

Because TB can be spread through the air, the law often treats incarcerated people with TB differently from incarcerated people who have other diseases. Normally, prisons *can* separate incarcerated people who are suffering from TB to prevent the spread.[129] New York City law even allows non-incarcerated persons infected with TB to be detained in a hospital in certain circumstances.[130] DOCCS TB policy requires incarcerated people with contagious TB to be placed in respiratory isolation. If you are in respiratory isolation, you are only allowed to leave the area for certain medical treatment, and you will have to wear a surgical mask.[131]

(ii) *Mandatory Segregation of Incarcerated People with COVID-19*

There are a small number of legal cases regarding the mandatory segregation of incarcerated people with COVID-19. It can be compared to TB because TB is also a contagious disease that primarily attacks the lungs.[132] DOCCS follows the Centers for Disease Control and Prevention's guidance for

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there is no evidence they were necessary to reduce risk to the plaintiff to acceptable levels); Walker v. Floyd County, No. 4:07-CV-0014-SEB-WGH, 2007 U.S. Dist. LEXIS 56134 at *25–27 (S.D. Ind. July 31, 2007) (*unpublished*) (holding that there were additional measures a prison could have taken to stop MRSA's spread is not enough to demonstrate a constitutional violation).

[127] N.Y. CORRECT. LAW § 141 (McKinney 2014).

[128] N.Y. CORRECT. LAW § 141 (McKinney 2014).

[129] *See* Washington v. Cambra, No. 96–16925, 1998 U.S. App. LEXIS 30072, at *3 (9th Cir 1998) (*unpublished*) (holding that a policy of testing incarcerated people twice for TB is reasonably related to the legitimate penological goal of detecting and containing TB, and that the second test did not violate the incarcerated person's rights under the 8th or 14th Amendments); Davidson v. Kelly, No. 96-2066, 1997 U.S. App. LEXIS 33796, at *4, *8 (2d Cir. Nov. 24, 1997) (*unpublished*) (holding that placing an incarcerated person in TB hold for three days until he agreed to be tested for TB did not violate the incarcerated person's 8th Amendment rights because it furthered a legitimate penological interest); McCormick v. Stalder, 105 F.3d 1059, 1061–1062 (5th Cir. 1997) (holding that prison policy requiring TB patients to be medicated or isolated was reasonably related to legitimate penological interests); Dunn v. Zenk, No. 1:07-CV-2007-RLV, 2007 U.S. Dist. LEXIS 73891, at *9 (N.D. Ga. 2007) (*unpublished*) (holding that states have a legitimate penological interest in controlling the spread of tuberculosis so that the involuntary administration of a TB test does not go against the Constitution); Delisser v. Goord, No. 9:02-CV-00073 (FJS/GLS), 2003 U.S. Dist. LEXIS 488, at *16, *18–19, *23 (N.D.N.Y. Jan. 15, 2003) (*unpublished*) (holding that an incarcerated person, who was placed in TB hold for a total of ninety-three days for refusing to submit to PPD test and then for refusing to take TB medication, did not suffer a violation of his 8th or 14th Amendment rights).

[130] *See* N.Y.C. HEALTH CODE § 11.21(d)(1) (2024), *available at* https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-44336 (last visited Feb. 10, 2024) (authorizing "the removal to and/or detention in a hospital or other treatment facility for appropriate examination for tuberculosis of a person who has active tuberculosis or who is suspected of having active tuberculosis and who is unable or unwilling to voluntarily submit to such examination by a physician or by the Department"); City of New York v. Doe, 205 A.D.2d 469, 470, 614 N.Y.S.2d 8, 9 (1st Dept. 1994) (holding that a patient could be detained pursuant to then-New York City Health Code § 11.47 where there was no less restrictive way to treat patient's TB infection).

[131] Bureau of Tuberculosis Control, N.Y.C. Dept. of Health, Clinical Policies & Program Manual, at 239 (5th ed. 2022), *available at* https://www.nyc.gov/assets/doh/downloads/pdf/tb/tb-protocol.pdf (last visited Feb 10, 2024).

[132] *Tuberculosis and COVID-19*, WORLD HEALTH ORG., *available at* https://www.who.int/teams/global-tuberculosis-programme/covid-19 (last visited Sept. 25, 2022).

managing COVID-19 in correctional facilities to identify patients who are ill and have the greatest risk of giving COVID-19 to others.[133] When an incarcerated person shows symptoms of COVID-19, they will be tested for COVID-19 and they will be isolated for ten days if the test is positive.[134]

(iii) *Mandatory Segregation of Incarcerated People with HIV*

Because HIV does not spread as easily as TB, New York state prisons[135] and federal prisons[136] do not decide housing or program assignments based only on HIV status. New York prisons are not allowed to automatically separate HIV-positive incarcerated people. New York State courts have found that mandatory segregation because of your HIV status violates your right to privacy—specifically, your right to medical confidentiality. This is because segregated housing tells other incarcerated people and staff that you are HIV-positive.[137] If you are incarcerated in federal prison and have HIV or AIDS, the prison can only separate you if prison officials have reliable evidence to think that you pose a health risk.[138] For more information on confidentiality issues, see Part F of this Chapter, and for information regarding discriminatory treatment based on your health status, see Part H of this Chapter.

Although New York State prisons cannot separate HIV-positive incarcerated people, some states say that all HIV-infected incarcerated people must be separated from other incarcerated people. Many courts outside of New York have upheld prisons' decisions to separate HIV-positive incarcerated people. Courts generally think that segregation is a reasonable way to prevent other incarcerated people from getting HIV, and courts consider preventing the spread of HIV to be a legitimate interest of prisons.[139] Additionally, at least one federal court of appeals found that there is a high risk of HIV spreading in prison. In that case, the prison did not present evidence that HIV spread between incarcerated people, but the court thought that high-risk behavior happening in the prison (like intravenous drug use, sex, and violence) was enough to prove that there was a significant risk of HIV spreading.[140] The court rejected the alternative solutions offered by the incarcerated people, including that the prison should either hire more corrections officers or identify incarcerated people who were both HIV-positive and likely to engage in high-risk conduct and only separate them. The court thought

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[133] Guidance on Management of COVID-19 in Homeless Service Sites and in Correctional and Detention Facilities, CTR. FOR DISEASE CONTROL AND PREVENTION (*as revised* May 11, 2023), *available at* https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-correctional-settings.html (last visited Feb. 25, 2024).

[134] Guidance on Management of COVID-19 in Homeless Service Sites and in Correctional and Detention Facilities (*as revised* May 11, 2023), CTR. FOR DISEASE CONTROL & PREVENTION, *available at* https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-correctional-settings.html (last visited Feb. 25, 2024).

[135] *See, e.g.*, Nolley v. Erie, 776 F. Supp. 715, 719 (W.D.N.Y. 1991) (noting that "DOCS stopped isolating HIV+ inmates from the general population in 1987").

[136] 28 C.F.R. § 549.13(c) (2023) ("Except as provided for in our disciplinary policy, no special or separate housing units may be established for HIV-positive inmates."). However, as a person incarcerated in federal prison, you can be placed in controlled housing if there is reasonable evidence that you will pose a health risk to others. 28 C.F.R. § 541.61 (2023).

[137] Nolley v. Erie, 776 F. Supp. 715, 733–736 (W.D.N.Y. 1991) (holding that segregating HIV-positive incarcerated people violated constitutional and statutory rights to privacy because HIV status was improperly disclosed to non-medical personnel); *see also* Doe v. Coughlin, 697 F. Supp. 1234, 1240–1241 (N.D.N.Y. 1988) (holding that involuntary segregation of incarcerated people with HIV or AIDS violates incarcerated people's right to privacy).

[138] 28 C.F.R. § 541.61 (2023).

[139] *See, e.g.*, Moore v. Mabus, 976 F.2d 268, 271 (5th Cir. 1992) (holding that Mississippi prisons had reasonable interests in segregating HIV-positive incarcerated people, and that segregation did not violate rights to privacy, equal protection, or due process).

[140] Onishea v. Hopper, 171 F.3d 1289, 1299 (11th Cir. 1999) (holding that risk of HIV transmission justified segregation of HIV-positive incarcerated people, including exclusion from programs and activities offered to other incarcerated people).

these two suggestions were unreasonable and created an "undue hardship" on the prison facility.[141] The court's ruling might make it more difficult to argue that your segregation because of your HIV-positive status is unconstitutional.

(iv) *Mandatory Segregation of Incarcerated People with MRSA*

Prisons may segregate incarcerated people who have active MRSA infections to prevent the spread of the infection to others. However, the Federal Bureau of Prisons generally says that incarcerated people do not need to be housed separately if they have MRSA wounds that are not draining or that can be easily covered with bandages.[142] As the infection becomes more serious or develops into MRSA pneumonia, separate housing may be recommended or required.[143] A prison may have the right to put you in solitary confinement if you refuse to accept the prison's prescribed treatment for your MRSA infection.[144]

(b) Segregation Requested by Incarcerated People

If you are worried about contracting an infectious disease, read Part B of this Chapter to get a sense of the steps that you can take to protect yourself. In general, incarcerated people who are afraid of getting infectious diseases from other incarcerated people have not been able to successfully sue prison officials. Some incarcerated people have tried to get prisons to separate other incarcerated people who are infected with a communicable disease, but these efforts have been generally unsuccessful. Incarcerated people who are already infected have also been unsuccessful when they request that the prison give them a single cell or vaccinate other incarcerated people so that they do not spread their diseases.[145] Courts will generally support a prison's decision not to separate incarcerated people with HIV-related illnesses.[146]

Although prisons may have a legal responsibility to protect incarcerated people from exposure to communicable diseases,[147] to win a lawsuit against prison officials for exposing you to infectious diseases, you must prove that: (1) there was a specific and significant risk of infection, and (2) prison

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[141] Onishea v. Hopper, 171 F.3d 1289, 1302–1304 (11th Cir. 1999) (finding that the cost of special programs to reduce the risk of HIV transmission would be too high).

[142] *See* FED. BUREAU OF PRISONS, U.S. DEPT. OF JUST., MANAGEMENT OF METHICILLIN-RESISTANT *STAPHYLOCOCCUS AUREUS* (MRSA) INFECTIONS 33 (2012), *available at* https://www.bop.gov/resources/pdfs/mrsa.pdf (last visited Feb. 10, 2024).

[143] *See* FED. BUREAU OF PRISONS, U.S. DEPT. OF JUST., MANAGEMENT OF METHICILLIN-RESISTANT *STAPHYLOCOCCUS AUREUS* (MRSA) INFECTIONS 33 (2012), *available at* https://www.bop.gov/resources/pdfs/mrsa.pdf (last visited Feb. 10, 2024).

[144] *See* Keller v. County of Bucks, No. 05-2146, 209 F. Appx. 201, 205–206 (3d Cir. 2006) (*unpublished*) (holding that it was not a constitutional violation to isolate a pre-trial detainee who refused treatment for a MRSA infection when the isolation was medically determined); *see also* Munoz v. Fortner, No. 6:07cv170, 2007 U.S Dist. LEXIS 91543, at *20–21 (E.D. Tex. Dec. 13, 2007) (*unpublished*) (holding that it does not violate the Constitution to threaten to put incarcerated people in isolation who have MRSA and do not comply with recommended treatment).

[145] *See* Johnson v. Horn, 782 A.2d 1073, 1076–1077 (Pa. Commw. Ct. 2001) (refusing to force prison officials to assign incarcerated person to a single cell so he would not spread Hepatitis C to other incarcerated people).

[146] *See* Glick v. Henderson, 855 F.2d 536, 539–540 (8th Cir. 1988) (holding that incarcerated person's fear of contracting HIV either through sharing work assignments with an HIV-infected incarcerated person or through eating food that might have been prepared by an HIV-infected incarcerated person was not sufficient to justify an order to segregate HIV-infected incarcerated people); *see also* 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 an incarcerated person did not have the right to have another HIV-positive incarcerated person segregated unless the incarcerated person poses a known health risk).

[147] *See* Hutto v. Finney, 437 U.S. 678, 682–688, 98 S. Ct 2565, 2569–2572, 57 L. Ed. 2d 522, 529–533 (1978) (finding prison conditions unconstitutional under the 8th Amendment where, among other concerns, incarcerated people in "punitive isolation" were crowded into cells and some had infectious conditions such as Hepatitis and venereal diseases); *see also* Lareau v. Manson, 651 F.2d 96, 109 (2d Cir. 1981) (finding that prison's failure to adequately screen incoming incarcerated people violated the due process and 8th Amendment rights of other incarcerated people); 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 incarcerated people violated the required standard of adequate medical services).

officials were aware of that risk and chose to ignore it.[148] In order to win this kind of lawsuit, you must show that there is a significant possibility that you will contract the virus or disease. For example, some courts have decided against a prison when its incarcerated people were housed with people who have known MRSA infections. In order to meet the standard, however, the infected incarcerated person must have open wounds that are not being adequately covered or cleaned and, therefore, are likely to infect other incarcerated people.[149] You are unlikely to win if you only have a general fear of getting the virus.

Additionally, the Prison Litigation Reform Act ("PLRA") makes winning money damages even more difficult. Under the PLRA, if you seek money damages, you will have to show you were physically injured, not just mentally or emotionally injured, or placed at an increased risk of being infected. For more information on the PLRA, see *JLM*, Chapter 14, "The Prison Litigation Reform Act."

F. Legal Rights and Confidentiality

Under the U.S. Constitution, you have a right to privacy (a "privacy interest") regarding the disclosure of personal matters.[150] For information about your medical privacy, please see Section E(3) of *JLM,* Chapter 23, "Your Right to Adequate Medical Care."

Incarcerated people with infectious diseases generally have a limited right to have information about their medical condition kept confidential. Some courts have held that the right to medical confidentiality also applies to an individual's HIV status.[151] But, other courts have held that there is no constitutional right to privacy regarding HIV status.[152] If you are in federal prison, your HIV test results, if positive, must be disclosed to the prison's employees.[153]

In New York, your HIV-related information cannot be disclosed to anyone other than you and certain individuals or institutions who are authorized to know by law.[154] Individuals who are

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[148] *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 incarcerated person, 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); *see also* Billman v. Ind. Dept. of Corr., 56 F.3d 785, 788–789 (7th Cir. 1995) (holding that prison officials who knowingly and without warning assigned an incarcerated person to share a cell with an HIV-positive incarcerated person with 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"); *see also* DeGidio v. Pung, 920 F.2d 525, 532–533 (8th Cir. 1990) (holding that prison officials' pattern of reckless or negligent responses to tuberculosis outbreaks was sufficient to constitute deliberate indifference, violating the 8th Amendment).

[149] *See* Lopez v. McGrath, No. C 04-4782 MHP, 2007 U.S. Dist. LEXIS 30409 (N.D. Cal. May 30, 2007) (*unpublished*) (finding an issue of fact where plaintiff claimed that administrators knew medical staff were putting incarcerated people with MRSA infections back into the general population, possibly creating "substantial risk" to other incarcerated people); *see also* Kimble v. Tennis, No. 4:CV-05-1871, 2006 U.S. Dist. LEXIS 36285 (M.D. Pa. June 5, 2006) (*unpublished*) (holding that evidence that a prison doctor authorized release of a MRSA-infected incarcerated person with open sores to the general population may be sufficient to support a claim of deliberate indifference).

[150] *See* Whalen v. Roe, 429 U.S. 589, 599–600, 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 about the disclosure of your personal information, but not involving an incarcerated person); *see also* O'Connor v. Pierson, 426 F.3d 187, 201 (2d Cir. 2005) (noting "[m]edical information in general, and information about a person's psychiatric health and substance-abuse history in particular, is information of the most intimate kind," not involving an incarcerated person).

[151] *See* Doe v. Delie, 257 F.3d 309, 315–317 (3d Cir. 2001) (finding incarcerated people have a right to medical privacy and that the right is "particularly strong" regarding one's HIV status); *see also* Doe v. New York, 15 F.3d 264, 267 (2d Cir. 1994) (noting that "[i]ndividuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition").

[152] *See, e.g.,* Sherman v. Jones, 258 F. Supp. 2d 440, 444 (E.D. Va. 2003) (holding that there is no constitutional right to privacy of HIV status and noting that different circuit courts have reached different conclusions on this issue).

[153] 28 C.F.R. § 549.14 (2023).

[154] N.Y. PUB. HEALTH LAW § 2782 (McKinney 2023). State agencies authorized to obtain confidential HIV-related

authorized to receive your HIV information include health care providers (when knowledge is necessary to provide you or your child with adequate care),[155] employees of the Division of Parole,[156] employees of the Division of Probation and Correctional Alternatives or local probation department,[157] the medical director of the local correctional facility,[158] or an employee or agent of the Commission of Correction.[159] These authorized individuals are allowed to access your HIV information only if they need the information to carry out their duties and functions.[160]

In New York, incarcerated people have won lawsuits that found statutory and constitutional rights violations when their HIV status was improperly disclosed. Prison officials cannot disclose your HIV status to other incarcerated people or non-medical personnel.[161] The courts seem to permit disclosure of your HIV status only if such disclosure is reasonably related to legitimate prison interests, like protecting incarcerated people or corrections officers from infection. However, unnecessary disclosure of such information for reasons such as humor or gossip violates your constitutional rights.[162]

In other jurisdictions, courts are divided about medical privacy. Prior to the Prison Litigation Reform Act (PLRA), some courts found that an incarcerated person's right to medical privacy was not that strong.[163] Other courts protected medical privacy rights for incarcerated people and people who were arrested.[164] Similar cases brought today, however, may turn out differently as a result of the PLRA. For more information on the PLRA, see *JLM*, Chapter 14, "The Prison Litigation Reform Act."

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information should have regulations to prevent discrimination, prohibit unauthorized disclosure, and establish rules for determining who should receive the information and when. N.Y. PUB. HEALTH LAW § 2786(2)(a) (McKinney 2023).

155 N.Y. PUB. HEALTH LAW § 2782(1)(d) (McKinney 2023).

156 N.Y. PUB. HEALTH LAW § 2782(1)(l) (McKinney 2023).

157 N.Y. PUB. HEALTH LAW § 2782(1)(m) (McKinney 2023).

158 N.Y. PUB. HEALTH LAW § 2782(1)(n) (McKinney 2023).

159 N.Y. PUB. HEALTH LAW § 2782(1)(o) (McKinney 2023).

160 N.Y. PUB. HEALTH LAW § 2782(1)(l)–(o) (McKinney 2023).

161 *See* Lipinski v. Skinner, 781 F. Supp. 131, 139–140 (N.D.N.Y. 1991) (allowing incarcerated person to force protected media sources to give deposition testimony in connection with lawsuit against law enforcement officials and prison officials when they disclosed incarcerated person's HIV status to a newspaper); Doe v. Coughlin, 697 F. Supp. 1234, 1240–1241 (N.D.N.Y. 1988) (temporarily forbidding a plan to segregate AIDS-infected incarcerated people, because it would disclose their AIDS status and therefore violate their right to privacy); Matter of V. v. New York, 150 Misc. 2d 156, 157–158, 566 N.Y.S.2d 987, 988–989 (N.Y. Ct. Cl. 1991) (holding that an incarcerated person stated a proper claim for relief when he accused his prison of improperly revealing his HIV information). *But see* Cordero v. Coughlin, 607 F. Supp. 9, 11 (S.D.N.Y. 1984) (holding that a plan which segregated incarcerated people with AIDS did not violate the incarcerated people's 1st Amendment right to privacy, because the right to privacy is limited by the prison's needs and by the incarcerated people's confinement).

162 *See* Powell v. Schriver, 175 F.3d 107, 112–113 (2d Cir. 1999) (holding that a prison official does not violate an incarcerated person's right to medical privacy if the official's actions are reasonably related to legitimate prison interests. A prison official does violate an incarcerated person's medical privacy if he discloses an incarcerated person's medical information as gossip or a joke.); *see also* Baez v. Rapping, 680 F. Supp. 112, 115 (S.D.N.Y. 1988) (holding that prison officials did not violate an incarcerated person's right to confidentiality when they warned other officials to avoid contact with incarcerated person's body fluids). *But see* Nolley v. County of Erie, 776 F. Supp. 715, 725–728 (W.D.N.Y. 1991) (holding that a policy of putting red stickers on HIV-positive incarcerated people's possessions, and therefore revealing incarcerated people's HIV status, violated privacy rights under New York law).

163 *See* Anderson v. Romero, 72 F.3d 518, 523–524 (7th Cir. 1995) (holding that incarcerated people do not have a constitutional right to the confidentiality of their HIV status, especially in light of the fact that HIV-positive incarcerated people could be identified when segregated from the rest of the prison population); Doe v. Wigginton, 21 F.3d 733, 740 (6th Cir. 1994) (holding that the incarcerated person's right to privacy was not violated when a corrections officer opened his file in the presence of other witnesses after the incarcerated person refused to answer questions about his medical condition); Adams v. Drew, 906 F. Supp. 1050, 1055–1058 (E.D. Va. 1995) (stating that prison officials' unintentional disclosure of incarcerated person's HIV status to another incarcerated person did not violate right to privacy).

164 *See* A.L.A. v. W. Valley City, 26 F.3d 989, 990–991 (10th Cir. 1994) (stating that an arrestee brought a valid claim against the police for disclosing that he was HIV-positive to his family and strangers, even though it was later found that the arrestee was not HIV-positive).

It is important to remember that the PLRA requires a showing of *physical injury*, not just mental or emotional injury, to recover monetary damages. Thus, to be successful in a lawsuit, you would probably have to prove that the prison official's actions physically injured you. Some courts may require you to show the harm is likely to occur again in order to get equitable relief like a declaratory judgment (a court's statement of your legal rights) or injunctions (orders requiring officials to stop or change a policy).[165]

G. Legal Rights and Medical Treatment

1. Right to Medical Treatment

If you are denied medical treatment for an infectious disease, you may 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."[166] 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.[167] In a recent case, the court found that a showing of deliberate indifference required proof that the defendants "recklessly disregard[ed] [the] . . . risk" of COVID-19.[168] However, a few courts have held that a denial of prescribed AIDS or Hepatitis C medical treatment violates an incarcerated person's constitutional rights.[169] See *JLM,* Chapter 23, "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 medication, you will probably have to show that the medical community agrees that this medication will help your condition. Otherwise, the court may see your claim as a simple disagreement between you and the prison doctor.[170] If you want to bring a claim about medical treatment or medication that was denied

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[165] *See* Davis v. District of Columbia, 158 F.3d 1342, 1348 (D.C. Cir. 1998) (holding that an HIV-positive incarcerated person could not obtain declaratory relief against prison officials for the unauthorized disclosure of his medical files because he could not show a threat that it might happen again).

[166] *See* 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, 50 L. Ed. 2d 251, 260 (1976))). HIV and Hepatitis are generally considered "serious medical needs." Brown v. Johnson, 387 F.3d 1344, 1351 (11th Cir. 2004) (defining a "serious medical need" as "one that has been diagnosed by a physician as mandating treatment" or "one that is so obvious that even a lay person would recognize the necessity for a doctor's attention" and finding that HIV and Hepatitis satisfy either definition (quoting Farrow v. West, 320 F.3d 1235, 1243 (11th Cir. 2003))).

[167] *See* Smith v. Carpenter, 316 F.3d 178, 184, 186–187 (2d Cir. 2003) (holding that brief interruptions of HIV medications, with no noticeable bad effects, was not a denial of serious medical needs, but also noting that a showing of increased risk, even without noticeable symptoms, might be serious enough to be denial of medical care (citing Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976))).

[168] *See* Swain v. Junior, 961 F.3d 1276, 1285–1286 (11th Cir. 2020) (finding that the defendants are not liable, even if the harm was not avoided, if they acted reasonably (citing Farmer v. Brennan, 511 U.S. 825, 836, 114 S. Ct. 1970, 1978 (1994))).

[169] *See* Montgomery v. Pinchak, 294 F.3d 492, 500 (3d Cir. 2002) (finding HIV-positive incarcerated person'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 incarcerated person had met the serious medical need prong of *Estelle v. Gamble*); *see also* Johnson v. Wright, 412 F.3d 398, 400 (2d Cir. 2005) (finding that a reasonable jury could find that a facility acted with deliberate indifference to an incarcerated person's medical needs when the facility refused to give him the medication most incarcerated people received for Hepatitis C because he had used illegal drugs.). *But see* Niemic v. Maloney, 448 F. Supp. 2d 270, 280 (D. Mass. 2006) (finding that the denial of a medicine subsequent to a failed drug test without a hearing 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).

[170] *See* Perkins v. Kan. Dept. of Corr., 165 F.3d 803, 811 (10th Cir. 1999) (upholding the denial of protease inhibitor to incarcerated person with HIV because other treatment was provided); Loch v. County of Bucks, No. 03-cv-4833, 2006 U.S. Dist. LEXIS 62620, at *10–11 (E.D. Pa. Sept. 1, 2006) (*unpublished*) (holding that an incarcerated person who was treated for conditions including MRSA did not assert a constitutional violation where

to you sometime in the past, a court may look back to see what the accepted medical practices were at that time.[171]

If you got medical treatment, but you think that a prison doctor incorrectly diagnosed your condition, it will be hard to bring a successful case against the prison officials. In the past, courts have dismissed cases for different reasons. Sometimes, a case is dismissed because the incarcerated person could not prove that the prison officials had personal involvement.[172] Other times, cases were dismissed because the incarcerated person could not show any physical harm, or because the incarcerated person could not show that his needs were ignored.[173]

If you have Hepatitis C and prison officials determine 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. The first requirement to bring a claim will be met if you can say that being denied the prescribed treatment is risking your life by not treating your disease.[174] You do *not* have to also claim that you have suffered a separate harm in addition to your disease in order to bring your claim.[175] 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.[176]

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,[177] or if your doctors said you do not have a condition requiring any treatment, this rule will *not* allow you to bring suit.[178]

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she merely claimed that the treatment she received was inadequate); Matthews v. Crosby, No. 3-06-CV-38, 2006 U.S. Dist. LEXIS 35049, at *6–7, 2006 WL 1529568, at *3 (N.D. Fla. May 31, 2006) (*unpublished*) (holding that a complete denial of available treatment, but not a dispute over the care received, could be a constitutional violation).

[171] *See* 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) (holding that, to show a prison official's actions were deliberately indifferent, a plaintiff could produce opinions of medical experts stating that the official's actions were contrary to medical practices accepted at the time).

[172] *See* Timmons v. N.Y. State Dept. of Corr. Servs., 887 F. Supp. 576, 580 (S.D.N.Y. 1995) (holding an incarcerated person bringing a claim against prison officials for misdiagnosing him with HIV in 1986 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 *JLM,* Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law."

[173] *See* Smith v. Carpenter, 316 F.3d 178, 184–187 (2d Cir. 2003) (dismissing 8th Amendment claim because incarcerated person failed to show that he suffered any adverse medical effects from the sporadic lack of treatment).

[174] *See* Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081, 1085 (2007) (holding that the pleading requirements of Federal Rule of Civil Procedure 8(a)(2) were met by statements that an incarcerated person 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).

[175] *See* Erickson v. Pardus, 551 U.S. 89, 93, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081, 1085 (2007) (stating that allegations (that is, the incarcerated person's claims of harm) in complaint were sufficient to bring an initial claim and that no claim of "cognizable independent harm" (that is, separate harm) apart from removal from treatment is required).

[176] *See* Estelle v. Gamble, 429 U.S. 97, 104–106, 97 S. Ct. 285, 291–292, 50 L. Ed. 2d 251, 260–261 (1976) (holding that only "deliberate indifference to serious medical needs" will be found to violate the 8th Amendment).

[177] *See* Loukas v. Mich. Dept. of Corr., No. 2-07-CV-142, 2008 U.S. Dist. LEXIS 14724, at *8–10 (W.D. Mich. Feb. 27, 2008) (*unpublished*) (holding that an incarcerated person who has received medical care, but just questions whether the treatment he has been receiving is adequate, does not have an 8th Amendment claim).

[178] *See* Hix v. Tenn. Dept. of Corr., 196 F. Appx. 350, 357 n.1 (6th Cir. 2006) (stating that Hepatitis C does not require treatment in all cases, and a difference of opinion over medical treatment does not violate the 8th Amendment).

(a) Right to Experimental Treatment

Courts generally do *not* believe incarcerated people have a constitutional right to a private doctor or experimental medication.[179] You may still be able to get experimental drugs, but you will probably not have an Eighth Amendment claim against your facility if it does not prescribe them for you. But some prisons have participated in clinical trials for anti-retroviral therapy for AIDS. To take part in such trials, you must first get approval from the Institutional Review Board of the testing site and your prison's medical department.[180]

2. Right to Refuse Medical Treatment

Some people, for a variety of reasons, choose to refuse medical treatment. Competent people (people who can think and understand well enough to make medical decisions for themselves) have the right to refuse treatment, even if it means they will die as a result.[181] However, your right to refuse treatment is limited as an incarcerated person.[182] Most courts have held that prisons can treat TB-infected incarcerated people without their consent.[183] Courts balance your interest in refusing treatment with the prison's "legitimate penological interest" in preventing the spread of disease. Courts will also consider whether the prison's actions are reasonably related to the prison's interests. If you do not have a disease that is transmitted through air, the prison will have a weaker argument for forcing you to take medication than if you have a disease such as TB that is easily spread. See *JLM*, Chapter 29, "Special Issues for Incarcerated People with Mental Illness," for more information about your right to refuse medical treatment.

H. Discriminatory Treatment and Infectious Diseases

1. Constitutional Rights

The Fourteenth Amendment may protect you from being discriminated against for having an infectious disease. For example, your rights under the Equal Protection Clause of the Fourteenth Amendment prohibit discrimination by the state that is not rationally related to a legitimate

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[179] *See* Chance v. Armstrong, 143 F.3d 698, 703 (2d Cir. 1998) ("[M]ere disagreement over the proper treatment does not create a constitutional claim."); McKenna v. Wright, No. 01 Civ. 6571 (WK), 2002 U.S. Dist. LEXIS 3489, at *28 (S.D.N.Y. Mar. 4, 2002) (*unpublished*) (dismissing plaintiff's claim on the basis that the doctor's treatment decision was his medical judgment and consistent with current medical literature); Carter v. Cash, No. 92-CV-5526 (JG), 1995 U.S. Dist. LEXIS 22209, at *6–8 (E.D.N.Y. May 31, 1995) (*unpublished*) (finding that incarcerated person was not entitled to medication of his choice if doctor decided, based on his professional judgment, that it would not be in the incarcerated person's best interest).

[180] You can find information about clinical trials from publications such as the American Foundation for AIDS Research ("AMFAR") AIDS/HIV Treatment Direction. AMFAR's contact information is included in the Appendix at the end of this Chapter.

[181] Vacco v. Quill, 521 U.S. 793, 800, 117 S. Ct. 2293, 2298, 138 L. Ed. 2d 834, 841 (1997) ("*Everyone*, regardless of physical condition, is entitled, if competent, to refuse unwanted lifesaving medical treatment . . . ."). For New York State law, see N.Y. PUB. HEALTH LAW §§ 2960–2979 (McKinney 2023) ("Orders Not to Resuscitate") (regulating right of "adult with capacity" to direct issuance of orders not to resuscitate); N.Y. PUB. HEALTH LAW §§ 2980–2994 (McKinney 2023) ("Health Care Agents and Proxies") (allowing appointment of agents to make important health care decisions including the refusal of life-saving treatment for the appointer); Quill v. Koppell, 870 F. Supp. 78, 84 (S.D.N.Y. 1994) ("It is established under New York law that a competent person may refuse medical treatment, even if the withdrawal of such treatment will result in death.").

[182] *See* Washington v. Harper, 494 U.S. 210, 223–227, 110 S. Ct. 1028, 1037–1040, 108 L. Ed. 2d 178, 198–202 (1990) (recognizing 14th Amendment right to refuse medical treatment, using Turner v. Safley, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79–80 (1987) (superseded by statute), balancing incarcerated person's rights against the state's duty to treat mentally ill incarcerated people and to protect the safety of incarcerated people and correction officers, and finding the state did not deprive right to refuse treatment without due process).

[183] *See* McCormick v. Stalder, 105 F.3d 1059, 1062 (5th Cir. 1997) (holding that prison officials did not violate the 8th Amendment when they required an incarcerated person with TB to undergo drug therapy without his consent).

purpose.[184] The Due Process Clause of the Fourteenth Amendment forbids the prison facility from taking away your life, liberty, or property without due process of law.[185] The Eighth Amendment protects you from "cruel and unusual punishment."[186] Keep in mind, however, that the courts balance these constitutional rights against legitimate penological (prison-related) interests,[187] which may allow prison officials to lawfully infringe upon or violate your rights. Prison policies are valid if they are reasonably related to a legitimate penological interest, but the prison is required to use the least restrictive means of achieving the goals of the policy.[188]

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.[189] 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 incarcerated people with infectious diseases differently from other incarcerated people if they have legitimate penological interests in doing so;[190] however, the reasons must be rational and not purely discriminatory.

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[184] 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.").

[185] 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.").

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

[187] *See* Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987) (analyzing whether prison regulations that burden fundamental rights are "reasonably related" to legitimate penological objectives), *superseded in part by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb–2000bb-4).

[188] *See* 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 penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard."), *superseded in part by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb–bb-4). This means if an incarcerated person 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. Dept. of Corr., 165 F.3d 803, 810–811 (10th Cir. 1999) (holding HIV-positive incarcerated person 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, 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 incarcerated person 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).

[189] *See* Anderson v. Romero, 72 F.3d 518, 527 (7th Cir. 1995) (ruling that a state statute making prisons 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).

[190] *See* Laureano v. Vega, No. 92 Civ. 6056, 1994 U.S. Dist. LEXIS 2107, at *23–25 (S.D.N.Y. Feb. 23, 1994) (*unpublished*) (rejecting incarcerated person'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), *aff'd*, 40 F.3d 1237 (2d Cir. 1994); 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 incarcerated person's request for food service job was not denial of equal protection); Doe v. Coughlin, 71 N.Y.2d 48, 54, 56, 60, 518 N.E.2d 536, 540, 541, 544, 523 N.Y.S.2d 782, 786, 787, 790 (1987) (upholding prison officials' refusal to allow an incarcerated person with AIDS to participate in a Family Reunion Program and holding that incarcerated person's privacy rights and his rights under the Due Process Clause and the Equal Protection Clause had not been violated, reasoning that there is no right to marital relations and that the prison officials had a rational basis to believe that such visits would help the spread of a disease). Note, however, the New York State Department of Corrections and Community Supervision's official policy does not currently deny participation in the Family Reunion Program based solely on the HIV status of the incarcerated person. Instead, there is a special review of each incarcerated person's application because of potential health risks to the visitor. N.Y. COMP. CODES R. & REGS. tit. 7 §§ 220.2–220.9 (2023).

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 also consider bringing your lawsuit under federal statutes, rather than under the Fifth Amendment.

2. Statutory Rights

Certain laws protect you from forms of discrimination based on disabilities, including HIV status. 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.[191] Similarly, the Americans with Disabilities Act ("ADA") prohibits public and private entities from discriminating, excluding, or denying services, programs, or activities to a person with a disability.[192] These laws recognize TB and HIV infection as a form of disability because they are physical impairments limiting major life activities.[193] 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."[194]

Although HIV is considered a disability according to 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.[195] Also, the U.S. Supreme Court has decided that individuals cannot recover monetary damages from the state for its failure to comply with the ADA.[196] 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.[197]

The Government[198] has provided new guidance for when symptoms of COVID-19 last weeks or months (also known as "long COVID").[199] Under this guidance, "long COVID" can be a disability under the ADA, Section 504 of the Rehabilitation Act, and Section 1557 of the Affordable Care Act.[200]

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[191] 29 U.S.C. § 701(a)–(c).

[192] 42 U.S.C. § 12132.

[193] 28 C.F.R. § 35.108(a)(1)(i), (b)(2) (2023) ("Physical or mental impairment includes, but is not limited to, contagious and non-contagious diseases and conditions such as . . . [HIV disease] (whether symptomatic or asymptomatic), tuberculosis . . . ."); 42 U.S.C. §§ 12102(1)(A)–(C) ("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.").

[194] *See* Bragdon v. Abbott, 524 U.S. 624, 637, 118 S. Ct. 2196, 2204, 141 L. Ed. 2d 540, 556–557 (1998). This case was about a dentist's refusal to examine an HIV-infected patient in his office. Though the facts did not involve incarcerated people, the legal principle is the same regarding HIV infection as a disability. For a lower court decision finding an HIV-positive incarcerated person disabled under the FRA and ADA, see Dean v. Knowles, 912 F. Supp. 519, 521 (S.D. Fla. 1996).

[195] *See* Onishea v. Hopper, 171 F.3d 1289, 1297–1299, 1305 (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 incarcerated people).

[196] *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374, 121 S. Ct. 955, 967–968, 148 L. Ed. 2d 866, 884 (2001) (holding Alabama State employees could not recover damages because of the State's failure to comply with the ADA).

[197] *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 n.9, 121 S. Ct. 955, 968 n.9, 148 L. Ed. 2d 866, 884 n.9 (2001) ("[ADA] standards can be enforced by . . . private individuals in actions for injunctive relief.").

[198] The U.S. Department of Justice (DOJ), Civil Rights Division, and the U.S. Department of Health and Human Services (HHS), Office for Civil Rights (OCR).

[199] *See* Press Release, U.S. Dept. of Just., DOJ and HHS Issue Guidance on 'Long COVID' and Disability Rights Under the ADA, Section 504, and Section 155 (July 26, 2021), *available at* https://www.justice.gov/opa/pr/doj-and-hhs-issue-guidance-long-covid-and-disability-rights-under-ada-section-504-and-section (last visited Feb. 10, 2024).

[200] *See* Press Release, U.S. Dept. of Just., DOJ and HHS Issue Guidance on 'Long COVID' and Disability Rights Under the ADA, Section 504, and Section 155 (July 26, 2021), *available at* https://www.justice.gov/opa/pr/doj-and-hhs-issue-guidance-long-covid-and-disability-rights-under-ada-section-504-and-section (last visited Feb. 10, 2024).

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.[201] 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. Sometimes states and localities (like cities) enact additional laws to protect people with communicable diseases like HIV or Hepatitis from discrimination. So, it is important for you to also research the laws in your city and state. In New York State, the Executive Law prohibits discrimination in several settings against people who carry diseases like HIV or Hepatitis.[202] If you are suing in New York, you should review New York law to see if it applies to your circumstances.

Most prison facilities are controlled and financed by federal, state, or local governments, so the ADA and FRA usually apply to prison facilities. Furthermore, the U.S. Supreme Court has stated the ADA and FRA prohibit discrimination in the prison system.[203] This means prison facilities cannot exclude or deny incarcerated people "benefits of the services, programs, or activities of a public entity" or subject them to discrimination.[204] Benefits include recreational activities, medical services, and educational and vocational programs.[205]

However, when a court evaluates a prison policy, it will consider whether the restriction is reasonably related to a legitimate penological interest.[206] When a prison is defending a policy, it is only required to show that the possibility of a risk exists; it does not have to demonstrate that the risk has occurred. Examples of interests cited by prison authorities include prison safety and undue financial or administrative burden.[207]

I. Sentencing People with Infectious Diseases

If you have an infectious disease and have been charged with (but not yet sentenced for) a crime, you may be able to ask the judge to dismiss the indictment or decrease your sentence because of your health condition. Different states have different rules, so be sure to look at your state's statutes and cases.

If your case is in New York State and you have a terminal illness, you may: (1) ask for lower bail, (2) ask to be released on your own recognizance, or (3) make a *Clayton* motion to have your case dismissed "in the interest of justice" (under New York Criminal Procedure Law § 210.40 and

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[201] 42 U.S.C. § 12133 ("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].").

[202] *See* N.Y. EXEC. LAW § 296 (McKinney 2018).

[203] *See* Pa. Dept. of Corr. v. Yeskey, 524 U.S. 206, 213, 118 S. Ct. 1952, 1956, 141 L. Ed. 2d 215, 221 (1998) ("[T]he plain text of Title II of the ADA unambiguously extends to state prison inmates.").

[204] 42 U.S.C. § 12132.

[205] *See* Pa. Dept. of Corr. v. Yeskey, 524 U.S. 206, 210, 118 S. Ct. 1952, 1955, 141 L. Ed. 2d 215, 219 (1998) (stating that "[m]odern prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs,' all of which at least theoretically 'benefit' the prisoners.").

[206] *See* Gates v. Rowland, 39 F.3d 1439, 1448 (9th Cir. 1994) (finding that a legitimate penological interest allowed prison to discriminate against HIV-positive incarcerated people by denying them food service jobs). In *Gates*, the prison claimed that although the medical risk of infecting other incarcerated people through food service is admittedly small, the perception of a risk by other incarcerated people could be threatening and could lead to violence. So, the prison interest was not in preventing the spread of HIV so much as promoting prison safety, a typical prison interest. *See also* Onishea v. Hopper, 171 F.3d 1289, 1300–1301 (11th Cir. 1999) (finding that the prison's interest in avoiding violence based on incarcerated people's HIV status was a valid penal interest).

[207] *See* 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 incarcerated people from visiting their spouses in a family visiting program permitting incarcerated people 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, 2261–2262, 96 L. Ed. 2d 64, 79 (1987) (superseded by statute), as a legitimate penological interest if accommodating HIV-positive incarcerated people proved to be an undue financial or administrative burden, or if the concerns of other incarcerated people could lead to prison violence, and noting that proof of previous prison violence is not required to prove a legitimate penological interest).

§ 210.45).[208] The court will look at the evidence of guilt, the seriousness of the offense, your character, and your criminal record.[209] To support a request for dismissal, try to provide medical documentation that imprisonment would worsen your health.

If you have a terminal disease and are in prison because you violated your parole, you can request to: (1) be returned to parole status, (2) be released to time served or granted conditional release to probation, or (3) have your case adjourned in contemplation of dismissal. The adjournment may be extended indefinitely, which may allow you to live your last days out of prison.

If you are facing sentencing in federal court, judges consider the sentencing guidelines on an advisory basis.[210] This means the court can give you a lesser sentence ("downward departure") if mitigating circumstances exist.[211] The U.S. Sentencing Commission Guidelines Manual states, "an extraordinary physical impairment may be a reason to depart downward; for example, in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment."[212] Courts usually do not reduce sentences for diseases like AIDS unless the defendant's AIDS is serious enough to be an "extraordinary physical impairment."[213] Some courts only consider the defendant's health at the time of sentencing, even if the disease will likely worsen in prison.[214]

Most courts require you to be very sick before dismissing an indictment or reducing your sentence. However, one federal district court did grant a downward departure to an HIV-positive defendant in stable condition. The court thought that the defendant believed his good health was a result of his special regimen of strict diet, regular exercise, acupuncture, and a combination of vitamins and natural supplements under the close supervision of a medical professional.[215] In this case the judge was not worried about whether the treatment contributed to the defendant's good health. The judge thought that since the defendant believed his regimen was effective, he would suffer emotional harm if he had to change treatments in prison.[216]

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[208] *See* People v. Clayton, 41 A.D.2d 204, 208, 342 N.Y.S.2d 106, 110 (2d Dept. 1973) (listing factors a court should consider where a person seeks to dismiss case "in the furtherance of justice," including the (1) nature of the crime; (2) available evidence of guilt; (3) defendant's prior record; (4) punishment already suffered by defendant; (5) purpose and effect of further punishment; (6) any prejudice to defendant by the passage of time; and (7) the impact of the indictment's dismissal on the public interest); *see also* People v. Lawson, 198 A.D.2d 71, 73–74, 603 N.Y.S.2d 311, 313 (1st Dept. 1993) (dismissing indictment of defendant, described as "thin as a rail" and unable to stand properly, who had not been involved in any other criminal activity, was honorably discharged from the Air Force, and was in final stages of AIDS), *aff'd sub som.*, People v. Herman L., 83 N.Y.2d 958, 960, 639 N.E.2d 404, 405, 615 N.Y.S.2d 865, 866 (1994) (dismissing indictment pursuant to N.Y. CRIM. PROC. LAW § 210.40 (McKinney 2007), which allows dismissals "in furtherance of justice" and in judge's discretion).

[209] *See*, *e.g.*, People v. Sierra, 149 Misc. 2d 588, 590–591, 566 N.Y.S.2d 818, 819 (Sup. Ct. Kings County 1990) (refusing to dismiss conviction because defendant suffered from AIDS Related Complex ("ARC") and would eventually develop AIDS, since he was a repeat felon with a long criminal history; the court also considered the evidence of the defendant's guilt, the offense's seriousness, his character, and criminal history to find he was not entitled to dismissal).

[210] *See* United States v. Booker, 543 U.S. 220, 245, 125 S. Ct. 738, 756–757, 160 L. Ed. 2d 621, 651 (2005) (holding that the use of facts under the sentencing guidelines are not binding on federal judges).

[211] U.S. SENT'G GUIDELINES MANUAL, §§ 5H1.4, 5C1.1 app. n.7 (U.S. SENT'G COMM'N 2015).

[212] U.S. SENT'G GUIDELINES MANUAL, § 5H1.4 (U.S. SENT'G COMM'N 2015).

[213] *See* Eric Surette, Annotation, Downward Departure Under § 5H1.4 of United States Sentencing Guidelines Permitting Downward Departure for Extraordinary Physical Impairment, 16 A.L.R. Fed. 2d 113 §§ 34–36 (2007).

[214] *See* United States v. Thomas, 49 F.3d 253, 261 (6th Cir. 1995) (denying downward departure because defendant's HIV infection had not progressed into advanced AIDS and was not an "extraordinary physical impairment"); *see also* United States v. Woody, 55 F.3d 1257, 1275–1276 (7th Cir. 1995) (refusing downward departure because HIV-positive defendant did not have "full-blown AIDS"); United States v. Rabins, 63 F.3d 721, 729 (8th Cir. 1995) (denying downward departure because defendant's AIDS had not become life-threatening; also holding that the defendant's condition should be assessed at the time of sentencing, regardless of the serious physical difficulties that may develop over the years).

[215] *See* United States v. Blarek, 7 F. Supp. 2d 192, 212 (E.D.N.Y. 1998).

[216] *See* United States v. Blarek, 7 F. Supp. 2d 192, 212 (E.D.N.Y. 1998).

In another case, the court decreased the defendant's sentence because of the pandemic.[217] In addition to posing a threat to the defendant's health, the pandemic also made incarceration "harsher and more punitive" than it would have been pre-pandemic.[218] The judge balanced the defendant's grounds for compassionate release against the nature of the underlying crime.[219] The court concluded that the defendant's sentence should be reduced to 30 years' imprisonment followed by a lifetime of supervised release.[220]

If you are trying to get your sentence dismissed or reduced because of your health, you have a greater chance of success if you suffer from a very serious illness, like advanced-stage AIDS. You should try to present medical documentation that being in prison will harm your health. Also, keep in mind that courts might not be sympathetic to you if you have a long criminal history. Remember, courts have discretion to grant downward departures. The law does not say exactly what an "extraordinary physical impairment" is, so you may be able to get a reduced sentence or dismissal even if you do not have AIDS but have TB or Hepatitis instead.

J. Life After Imprisonment: Planning for Your Release

JLM, Chapter 35, "Getting Out Early: Conditional & Early Release," has information about compassionate release and medical parole. If you have been diagnosed with an infectious disease, you should read that Chapter carefully to see whether you might be eligible for either of these options.

If you are about to be paroled or released, you should get a confidential HIV test before leaving prison. Getting a test can be more difficult or expensive outside of prison. If you do have HIV/AIDS or Hepatitis, you should keep taking preventative measures to protect others. Before release, you should also try to contact local agencies and organizations for help in transitioning from prison to community life. You can contact the public health department in your area for free brochures. The Appendix at the end of this Chapter lists other helpful agencies.

K. Conclusion

If you have AIDS, TB, Hepatitis B or C, MRSA, COVID-19, or another infectious disease, people may treat you differently due to ignorance and fear. You can protect yourself by becoming aware of the facts of the disease and your legal rights. As an incarcerated person, you may find that information and support is not always readily available, but many of the organizations in the Appendix at the end of this Chapter work with incarcerated people and may be able help you.

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[217] *See* United States v. Rodriguez, 492 F. Supp. 3d 306, 311 (S.D.N.Y. 2020).

[218] *See* United States v. Rodriguez, 492 F. Supp. 3d 306, 311 (S.D.N.Y. 2020).

[219] *See* United States v. Rodriguez, 492 F. Supp. 3d 306, 311 (S.D.N.Y. 2020).

[220] *See* United States v. Rodriguez, 492 F. Supp. 3d 306, 316 (S.D.N.Y. 2020); *see also* United States v. Brooker, 976 F.3d 228, 237–238 (2d Cir. 2020) (finding that the compassionate release statute does, in fact, provide the flexibility to use a balancing test to weigh factors while sentencing).

APPENDIX A

RESOURCES FOR INFORMATION, COUNSELING, AND SUPPORT

Below is a list of organizations that might be able to offer you infectious-disease related information, counseling, and/or support. If you are hearing-impaired, some of these organizations have a special phone number you can call, which is indicated by "TTY." The JLM does not endorse any of the following organizations and cannot guarantee that they will be able to help you.

National AIDS Organizations

Centers for Disease Control National Health Information Hotline
Phone: (800) CDC-INFO (232-4636)
TTY: (888) 232-6348
Hours: Monday–Friday, 8am–8pm ET
Available in English and Spanish

Department of Health & Human Services HIV Hotline
Phone: (800) 448-0440
TTY: (888) 480-3739
https://hivinfo.nih.gov/
Hours: Monday–Friday, 1pm–4pm ET
Available in English and Spanish

National Hepatitis Corrections Network
1621 South Jackson Street, Suite 201
Seattle, WA 98144
Phone: (206) 732-0311 or (800) 218-6932
Email: mandy@hepeducation.org
http://www.hcvinprison.org/
Education, advocacy, and support for incarcerated people with Hepatitis C and HIV co-infection.

National Minority AIDS Council Prison Initiative
1000 Vermont Ave. NW, Suite 200
Washington, DC 20005
Phone: (202) 997-5598
Email: info@nmac.org
http://www.nmac.org/
The Prison Initiative is a project of NMAC, which helps community and faith-based organizations, correctional facilities and health departments evaluate, improve, and implement effective discharge planning for HIV-positive incarcerated people and formerly incarcerated people.

National Native American AIDS Prevention Center
1031 33rd St., #270
Denver, CO 80205
Phone: (720) 382-2244
Hours: Monday–Friday, 9am–5pm MT
http://nnaapc.international/
Email: information@nnaapc.org
The National Native American AIDS Prevention Center (NNAAPC) offers a variety of programs to help promote education about HIV/AIDS, support prevention efforts, and help foster healthy attitudes about sexuality and sexual health in the Native community.

AIDS Organizations in New York

Hudson Valley Community Services
40 Saw Mill River Rd., Suite UL-5
Hawthorne, NY 10532
Phone: (914) 345-8888
Fax: (914) 785-8299
http://www.hudsonvalleycs.org/

Mount Vernon Office:
105 Stevens Ave., Suite 309
Mount Vernon, NY 10550
Phone: (914) 699-1025
Fax: (914) 699-1621

Rockland County Office:
72 Route 59 East
Spring Valley, NY 10977
Phone: (845) 356-0570
Fax: (845) 356-0589

Ulster County Office:
144 Pine St., Suite 230
Kingston, NY 12401
Phone: (845) 339-3281
Fax: (845) 339-6195

Dutchess County Office:
40 Garden St., Suite 401
Poughkeepsie, NY 12601
Phone: (845) 471-0707
Fax: (845) 471-0857

Orange County Office:
280 Broadway, 4th Floor
Newburgh, NY 12550
Phone: (845) 562-5005
Fax: (845) 562-5212

Sullivan County Office:
20 Crystal Street
Monticello, NY 12701
Phone: (845) 791-8871
Fax: (845) 791-8872.

Asian Pacific Islander Coalition on HIV/AIDS
400 Broadway
New York, NY 10013
Phone: (212) 334-7940
Info Line: (866) 274-2429
Hours: Monday–Friday, 9am–5:30pm ET
https://www.apicha.org/
This group is a non-profit organization providing HIV/AIDS-related services, education, and research to Asian and Pacific Islander Communities in New York City. Services include HIV testing, STI screening and treatment, acupuncture, and more.

Correctional Association of New York
PO Box 793
Brooklyn, NY 11207
Phone: (212) 254-5700
https://www.correctionalassociation.org/
This organization provides advocacy, research, information, and referral to incarcerated people and parolees living with HIV.

Gay Men's Health Crisis (GMHC)
Phone: (212) 367-1000
Legal Hotline: (212)357-1144
Hours: Monday–Friday, 9am–6pm ET
https://www.gmhc.org/
Assists HIV-positive incarcerated people with gaining access to resources and services. Pro bono legal assistance available.

Housing Works
81 Willoughby St.
Brooklyn, NY 11201
Phone: (347) 473-7400
After-hours: (718) 277-0386
Email: info@housingworks.org
Hours: Monday–Friday, 9am–5pm ET
https://www.housingworks.org/
Provides free civil legal services primarily related to entitlements, housing, immigration (including permanency planning), and family law. It serves residents of Manhattan and the Bronx, and homeless people in all five boroughs. Collect calls are accepted. Available in English and Spanish.

Hispanic AIDS Forum, Inc. (HAF)
https://hafnyc.org/
The Hispanic AIDS Forum is New York's largest Latino-run AIDS outreach organization. It has a bilingual staff and provides seminars, outreach programs, case management services, counseling and other support, and referrals to other organizations. Available in English and Spanish.

Bronx Office:
HAF—Latino Pride Center
975 Kelly St., Suite 201
Bronx, NY 10459
Phone: (718) 328-4188

Queens Office:
HAF—Queens Pride House
76-11 37th Ave., Suite 206
Jackson Heights, NY 10372
Phone: (718) 429-5309

ACLU - Jon L. Stryker and Slobodan Randjelović LGBTQ & HIV Project
125 Broad Street, 18th Floor
New York NY 10004
https://www.aclu.org/issues/hiv
The Jon L. Stryker and Slobodan Randjelović LGBTQ & HIV Project seeks to create a just society for all people living with HIV regardless of race or income.

Latino Commission on AIDS
24 West 25th Street, 9th Floor
New York, NY 10010
Phone: (212) 675-3288
Fax: (212) 675-3288
A grass-roots organization working in collaboration with the AIDS in Prison Project.

Legal Action Center (LAC)
225 Varick Street #401
New York, NY 10014
Phone: (212) 243-1313
Toll-free: (800) 223-4044
This organization provides legal services for ex-offenders with HIV, such as help with housing and employment discrimination.

New York AIDS Coalition (NYAC)
400 Broadway
New York, NY 10013
Phone: (646) 744-1597
Brings together community-based HIV/AIDS organizations and their supporters to work for increased funding and fair policies for people living with HIV/AIDS in New York State.

Living Well Program
The Osborne Association
809 Westchester Ave.
Bronx, NY 10455
Phone: (718) 707-2600
Email: livingwell@osborneny.org
Hours: Monday–Friday, 8am–5pm ET
https://www.osborneny.org/our-services/living-well
Provides testing, counseling, and prevention education to HIV-positive people in New York State prisons.

Prisoners' Rights Project of the Legal Aid Society
199 Water St.
New York, NY 10038
Phone: (212) 577-3300
Hours: Monday–Friday, 9am–5pm ET
https://legalaidnyc.org/programs-projects-units/the-prisoners-rights-project/
Provides services to incarcerated people only. It also helps incarcerated people in New York City and New York State with medical concerns and brutality cases.

Prisoners Legal Services of New York (PLSNY)
https://plsny.org/
PLSNY is a non-profit legal services organization providing representation to people incarcerated in New York State prisons who cannot afford or have not otherwise obtained a lawyer. It helps address issues related to conditions of confinement, including programming and access to medical care.

Albany Office:
41 State St., Suite M112
Albany, NY 12207
Phone: (518) 445-6050
Email: gdevane@plsny.org
Prisons Served: Adirondack, Altona, Bare Hill, Clinton, CNYPC, Coxsackie, Eastern, Edgecombe, Franklin, Gouverneur, Great Meadow, Greene, Hale Creek, Hudson, Marcy, Mid-State, Mohawk, Otisville, Queensboro, Riverview, Shawangunk, Sullivan, Ulster, Upstate, Wallkill, Walsh, Washington, Woodbourne

Buffalo Office:
14 Lafayette Sq., Suite 510
Buffalo, NY 14203
Phone: (716) 854-1007
Email: dphillips@plsny.org
Prisons served: Albion, Attica, Collins, Gowanda, Groveland, Lakeview, Orleans, Rochester, Wende, Wyoming

Ithaca Office:
114 Prospect St.
Ithaca, NY 14850
Phone: (607) 273-2283
Email: ebanks@plsny.org
Prisons served: Auburn, Cape Vincent, Cayuga, Elmira, Five Points, Southport, Watertown, Willard.

Newburgh Office:
10 Little Britain Rd., Suite 204
Newburgh, NY 12550
Phone: (845) 391-3110
Email: cculbreth@plsny.org
Prisons served: Bedford Hills, Fishkill, Green Haven, Sing Sing, Taconic.

Women's Prison Association (WPA)
110 2nd Ave.
New York, NY 10003
Phone: (646) 292-7740
Reentry Services: (718) 637-6877
WPA provides a full array of prison-, jail-, and community-based assistance to help women become full participants in community life following incarceration or other criminal justice involvement.

AIDS Organizations in California

San Francisco AIDS Foundation
940 Howard St.
San Francisco, CA 94103
Phone: (415) 487-8000
Email: info@sfaf.org
http://www.sfaf.org
Provides vital services and programs designed to improve the quality of life for people living with HIV/AIDS and to reduce the number of new infections that occur each year.

Center for Health Justice
900 Avila Street, Stes. 102 & 301
Los Angeles, CA 90012
Phone: (213) 229-0985
Fax: (213) 229-0986
Email: info@healthjustice.net
http://www.healthjustice.net
Provides HIV legal and education information inside and outside correctional facilities.

AIDS Project Los Angeles (APLA)
611 South Kingsley Dr.
Los Angeles, CA 90005
Phone: (213) 201-1600
Hours: Monday–Friday, 9am–5pm PT
https://aplahealth.org/
Provides high-quality medical, HIV support, and sexual health services—as well as counseling, food, housing, and other essential support services—to people living with HIV throughout LA County.

AIDS Organizations in Illinois

Illinois AIDS Hotline
Phone: (800) 243-2437
Hours: Every day, 8am–10pm CT
Up-to-date information on HIV transmission, HIV counseling and testing sites. Offers information and support resources, risk reduction.

AIDS Organizations in Pennsylvania

Lewisburg Prison Project
PO Box 128
Lewisburg, PA 17837
Phone: (570) 523-1104
Fax: (570) 523-3944
Email: info@lewisburgprisonproject.org
Provides legal and other assistance to incarcerated people in Central Pennsylvania for non-criminal issues. Counsels and assists incarcerated people who encounter treatment they perceive as illegal or unfair.

Pennsylvania Department of Health AIDS Fact Line
625 Forster Street
Harrisburg, PA 17120
Toll-free: (800) 662-6080
Hours: Monday–Friday, 9am–4pm ET
Up-to-date information on HIV transmission, HIV counseling and testing sites. Offers information and support resources, risk reduction.

AIDS Organizations in Texas

Prism Health North Texas Administration
3900 Junius St, #300
Dallas, Texas 75246
Phone: (214) 521-5191
Hours: Monday–Friday, 8am–5pm CT
http://www.phntx.org
Assists individuals in accessing healthcare, resources, and support necessary to successfully manage the challenges of living with HIV/AIDS.

Allies in Hope
Phone: (713) 623-6796
Fax: (713) 623-4029
Email: info@AIHHouston.org
Hours: Monday–Friday, 9am–5pm CT
https://www.aihhouston.org/
Offers peer-based service programs to both currently and formerly incarcerated people.

Midtown Office:
2328 Fannin St.
Houston, TX 77002

Southwest Office:
6260 Westpark Dr., Suite 100
Houston, TX 77057

National Hepatitis B Organizations

Hepatitis B Foundation
3805 Old Easton Rd.
Doylestown, PA 18902
Phone: (215) 489-4900
Fax: (215) 489-4920
Email: info@hepb.org
Hours: Monday–Friday, 9am to 5pm ET
Hepatitis B Foundation provides information and support for people with Hepatitis B and supports research for a cure. It also offers an online support group.

National COVID-19 Organizations

Centers for Disease Control and Prevention
1600 Clifton Rd.
Atlanta, GA 30329-4027
Phone: (800) 232-4636
TTY: (888) 232-6348
Hours: Monday–Friday, 8am–8pm ET
https://www.cdc.gov/coronavirus/2019-nCoV/
The CDC offers live agents by phone and email to help you find the latest, reliable, and science-based health information on more than 750 health topics, including COVID-19.

The COVID Prison Project
Email: lauren.br@duke.edu
https://covidprisonproject.com
The COVID Prison Project offers analysis and resources to better understand how COVID-19 is impacting people who are incarcerated.