CHAPTER 29

SPECIAL ISSUES FOR INCARCERATED PEOPLE WITH MENTAL ILLNESS*

A. Introduction

This Chapter will explain some of the rights you have if you are an incarcerated person with a mental illness.

This Chapter is divided into seven parts. **Part A**—the Introduction you are reading now—provides an introduction to mental illnesses and treatment for incarcerated people. **Part B** discusses your right to receive treatment for a mental illness, including what to do if you are denied or delayed treatment. **Part C** tells you about your right to refuse treatment for a mental illness, including what to do if you received treatment against your will. **Part D** explains situations where you might be transferred to a different facility for treatment. **Part E** explains disciplinary proceedings. Specifically, it discusses what mental health factors your facility might have to consider when they are taking disciplinary measures against you. **Part F** explains your rights if you are in pretrial detention (incarcerated before having a trial or pleading guilty). Finally, **Part G** describes resources that you may use to plan for your release from prison. The **Appendix** at the end of this Chapter includes a list of organizations that provide resources to incarcerated people who have mental illnesses.

It is important to clarify the things this Chapter will *not* discuss. This Chapter does not discuss sex offenders.[1] To find information for people incarcerated for sex offenses, you can read *JLM*, Chapter 36, "Special Considerations for Sex Offenders." This Chapter will also not discuss issues specific to people who were found not guilty due to "mental disease or defect" or "not guilty by reason of insanity."[2] Finally, this Chapter will not discuss issues specific to incarcerated people with developmental disabilities.[3]

1. What is "Mental Illness?"

"Mental illness" is a general term for a condition that affects your thinking, feelings, behavior, or mood.[4] Everyone experiences ups and downs with their mental health, but mental illnesses greatly

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[1] The law does not usually consider "paraphilias" (abnormal sexual activity such as sexual arousal to children or nonconsenting adults) as a type of mental illness. *See, e.g.*, Kansas v. Crane, 534 U.S. 407, 412–413, 122 S. Ct. 867, 870–871, 151 L. Ed. 2d 856, 862–853 (2002) (requiring the state to distinguish dangerous sexual offenders with mental illnesses for civil commitment purposes).

[2] For more information about this topic, see N.Y. CRIM. PROC. LAW § 330.20 (McKinney 2018) ("Procedure following verdict or plea of not responsible by reason of mental disease or defect.").

[3] Mental illness can be a type of disability, and some mental illnesses overlap or share symptoms with some developmental disabilities, but they are not the same. *See, e.g.*, ALA. CODE. § 22-52-1.1(6) (West 2015) (stating that mental illness "excludes the primary diagnosis of epilepsy, an intellectual disability, substance abuse, including alcoholism, or a developmental disability"). Developmental disabilities often start in childhood and can affect skills like reasoning, language, and socializing. Some examples of developmental disabilities are: Attention Deficit Disorder (ADD), Attention Deficit/Hyperactivity Disorder (ADHD), Autism Spectrum Disorder, and learning disabilities. If you think you might have a developmental disability, you may be able to get a diagnosis from a doctor at your facility. You can also read *JLM*, Chapter 28, "Rights of Incarcerated People with Disabilities," to learn more about the rights of incarcerated people with disabilities. You can learn more about developmental disabilities at these sources: *Facts About Developmental Disabilities*, CTRS. FOR DISEASE CONTROL & PREVENTION, *available at* https://www.cdc.gov/ncbddd/developmentaldisabilities/facts.html (last visited Feb. 12, 2024); *Learning Disorders in Children*, CTRS. FOR DISEASE CONTROL & PREVENTION, *available at* https://www.cdc.gov/ncbddd/developmentaldisabilities/learning-disorder.html (last visited Feb. 12, 2024).

[4] *Mental Health Conditions*, NAT'L ALLIANCE ON MENTAL ILLNESS, *available at* https://nami.org/About-Mental-Illness/Mental-Health-Conditions (last visited Feb. 12, 2024).

affect your daily life (like your ability to work, do activities, or connect with others). Mental illness can have many different causes—like genetics, life events, or the environment that a person is in.[5] There is sometimes a stigma (a negative and usually false social judgment) around having a mental illness, but mental illness is extremely common: about one out of five American adults experience mental illness every year.[6] Some mental illnesses last for a short time and then disappear, and others can be longer-term or even life-long. Mental illnesses are different from psychological responses to particular events. For example, experiencing grief and sadness after the death of a loved one is not automatically a mental illness, even though it may significantly affect your life or add to the symptoms of an existing mental illness.[7]

In this Chapter, we use "mental illness" and "mental health conditions" to mean the same thing. You might also see or hear words like "disorder," "abnormality," or "diagnosis" used to describe mental health conditions. There are many kinds of mental illness, including behavioral illnesses (which affect the way that you act or behave) and psychological illnesses (which affect your mental or emotional state).[8] Some examples of mental health conditions are:

- Bipolar Disorder
- Borderline Personality Disorder (BPD)
- Major Depression
- Anxiety Disorders
- Obsessive-Compulsive Disorder (OCD)
- Panic Disorder
- Post-Traumatic Stress Disorder (PTSD)
- Schizophrenia
- Dissociative Disorders
- Eating Disorders
- Schizoaffective Disorder

If you want to learn more about any of these conditions or others, you can visit the National Alliance on Mental Illness website.[9] You can also check to see if the prison library has a copy of a book called the DSM-5 (the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition).[10] The DSM-5 is a manual made by the American Psychiatric Association ("APA") that describes every mental health condition that can be diagnosed by a doctor.

In New York, the definition of mental illness is "a mental disease or mental condition which is [expressed as] a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person afflicted requires care and treatment."[11] The legal definition of mental illness can be

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[5] *Mental Health Conditions*, NAT'L ALLIANCE ON MENTAL ILLNESS, *available at* https://nami.org/About-Mental-Illness/Mental-Health-Conditions (last visited Feb. 12, 2024).

[6] *Mental Health Conditions*, NAT'L ALLIANCE ON MENTAL ILLNESS, *available at* https://nami.org/About-Mental-Illness/Mental-Health-Conditions (last visited Feb. 12, 2024). *See generally*, *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness,* HUMAN RIGHTS WATCH 128 (2003), *available at* https://www.hrw.org/reports/2003/usa1003/usa1003.pdf (last visited Feb. 12, 2024).

[7] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 20 (5th ed. 2013) ("An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder.").

[8] According to the American Psychiatric Association ("APA"), a mental disorder is "a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress or disability in social, occupational, or other important activities." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 20 (5th ed. 2013).

[9] *Mental Health Conditions*, NAT'L ALLIANCE ON MENTAL ILLNESS, *available at* https://nami.org/About-Mental-Illness/Mental-Health-Conditions (last visited Feb. 12, 2024).

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

[11] N.Y. CORRECT. LAW § 400(6) (McKinney 2014); *see also* N.Y. CORRECT. LAW § 137(6)(e) (McKinney 2014) (defining a *serious* mental illness under New York law).

different in different states.[12] For example, addiction to substances may be considered a mental illness under Vermont law, but under Texas law, substance addiction is not part of the definition of mental illness.[13]

2. What is "Treatment?"

After a doctor has diagnosed you with any kind of medical condition, including mental illness, the next step is treatment (taking actions to heal or manage your symptoms). You might also hear people describe treatment for mental illness as "mental health treatment," "mental health services," "mental health care," or "psychiatric services." Usually, psychiatrists and other mental health professionals (like therapists or counselors) are the people who manage treatment for people experiencing mental illness.

There are many different types of treatments for mental illness and different levels of care available to people experiencing mental illness, depending on how much treatment and what types of treatment are necessary.[14] Some levels of psychiatric care are:

(1) Acute (or crisis) care, which is twenty-four-hour care in a hospital setting. This would be used in situations where somebody is showing signs that they might harm themselves or others, or experiencing psychotic symptoms. Acute care is very restrictive and should not last for a long time – just until the person is safer and more stable.
(2) Intermediate care, which is usually outside of a hospital but still involves intensive care management. This might be used if somebody is experiencing a severe or chronic condition that requires frequent communication with the mental health professionals managing their care.
(3) Outpatient care, which is the most common form of mental health care and involves less intensive treatment. This type of care can include medication or seeing a therapist or psychiatrist.

The types of mental health treatment available to you while you are incarcerated are usually more limited than the treatments available to people who are not incarcerated. The types of mental health treatment available might also depend on your state's laws. However, **you have a right to adequate mental health care**, which is discussed next.

B. Your Right to Receive Mental Health Treatment

This Part explains your right to receive mental health treatment. Section 1 tells you about your right to adequate (good enough) mental health treatment under the Eighth Amendment and under federal and state laws. This includes mental health treatment that is medically necessary. However, you do not have the right to choose exactly what type of treatment you receive. Section 2 talks about

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[12] *See, e.g.*, MINN. STAT ANN. § 253B.02(17a)(a) (West 2015 & Supp. 2023) (defining mental illness as "an organic disorder of the brain or a substantial psychiatric disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or to reason or understand, that is manifested by instances of grossly disturbed behavior or faulty perceptions"); OHIO REV. CODE ANN. § 5122.01(A) (West 2010 & Supp. 20232021) ("'Mental illness' means a substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life.").

[13] TEX. HEALTH & SAFETY CODE ANN. § 571.003(14) (West 2017) (defining mental illness as "an illness, disease, or condition, other than epilepsy, dementia, substance abuse, or intellectual disability, that: (A) substantially impairs a person's thought, perception of reality, emotional process, or judgment; or (B) grossly impairs behavior as demonstrated by recent disturbed behavior").); VT. STAT. ANN. tit. 28, § 906 (West 2007). Vermont defines "[m]ental condition or psychiatric disability or disorder" to include Axis I diagnostic categories as listed by the American Psychiatric Association. Substance-related disorders are an Axis I diagnosis. *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 26 (4th ed. 1994).").

[14] *See, e.g.*, *Understanding the Levels of Psychiatric Care is Key to Treatment Success*, MENNINGER CLINIC, *available at* https://www.menningerclinic.org/news-resources/a-guide-to-understanding-the-levels-of-psychiatric-care (last visited Feb. 12, 2024).

substance-related disorders—you do not have a right to drug rehabilitation while you are incarcerated, but in some situations you might be able to get drug treatment (for example, when not getting it would cause a risk to your health). Section 3 talks about what you can do if the treatment you receive is inadequate (not good enough). If you are receiving delayed treatment or no treatment at all, you might be able to file a Deliberate Indifference claim against your facility (meaning your facility recklessly disregards a substantial risk of harm to you). To do this, you must show that you had a serious medical need that prison officials purposely ignored.

If you are a pretrial detainee, you may have access to certain rights and treatments that people who have been convicted and sentenced do not have. For more information on your right to treatment as a pretrial detainee, read Part F of this Chapter.

1. Psychiatric Care

You have a right to adequate medical care and treatment. The Eighth Amendment of the Constitution prohibits "cruel and unusual punishment."[15] The Supreme Court has held that the government must provide adequate medical care to incarcerated people.[16] If a prison official acts with "deliberate indifference" to an incarcerated person's "serious medical need," it is an Eighth Amendment violation.[17] For more information about this general right, see *JLM*, Chapter 23, "Your Right to Adequate Medical Care."

All federal circuit courts have held that the right to adequate medical care includes mental health care that is necessary to maintain incarcerated people's health and safety.[18] However, this right to psychiatric care might be limited based on the cost and timing of treatments, and whether prison officials find that you have a serious medical need or that treatment is medically necessary.[19]

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

[16] Estelle v. Gamble, 429 U.S. 97, 104–105, 97 S. Ct. 285, 291–292, 50 L. Ed. 2d 251, 260–261 (1976) ("It is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself." (citing Spicer v. Williamson, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926))).

[17] .Estelle v. Gamble, 429 U.S. 97, 104–105, 97 S. Ct. 285, 291–292, 50 L. Ed. 2d 251, 260–261 (1976) (holding that the 8th Amendment prohibits the denial of needed medical care).

[18] *See* Brugliera v. Comm'r of Mass. Dept. of Corr., No. 07-40323-JLT, 2009 U.S. Dist. LEXIS 131002, at *20–21 (D. Mass. 2009) (*unpublished*) ("For purposes of the Eighth Amendment, '[t]here is no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterparts.'" (quoting Torraco v. Maloney, 923 F.2d 231, 234 (1st Cir. 1991))); Murphy v. L.A. Spaulding, No. 20-CV-9013, 2022 U.S. Dist. LEXIS 18267, at *18 (S.D.N.Y. 2022) (*unpublished*) (stating that the 8th amendment does not allow deliberate indifference to serious medical needs, and that "[s]uch medical needs include 'psychiatric or mental health care" (citing Langley v. Coughlin, 888 F.2d 252, 254 (2d Cir. 1989))); Dooley v. Wetzel, 957 F.3d 366, 375 (3d Cir. 2020) (stating that the defendant's mental health issues could be considered a serious medical need if he had a mental health diagnosis or if it would be obvious to an average person that he was in need of treatment) (citing Inmates of Allegheny Cnty. Jail v. Pierce, 612 F.2d 754, 763 (3d Cir. 1979)); Doe v. Shenandoah Valley Juvenile Ctr. Comm'n, 985 F.3d 327 (4th Cir. 2021) ("The responsibility to provide care includes care for a person's mental health." (citing Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977))); Gates v. Cook, 376 F.3d 323, 332, 343 (5th Cir. 2004) ("[M]ental health needs are no less serious than physical needs."); Clark-Murphy v. Foreback, 439 F.3d 280, 292 (6th Cir. 2006) (stating that an incarcerated person's right to mental health care, not just physical medical care, is clearly established under the 8th Amendment); Wellman v. Faulkner, 715 F.2d 269, 272 (7th Cir. 1983) ("Treatment of the mental disorders of mentally disturbed inmates is a 'serious medical need.'") (citations omitted); Smith v. Jenkins, 919 F.2d 90, 92–93 (8th Cir. 1990) ("Deliberate indifference by prison personnel to an inmate's serious medical needs violates the inmate's eighth amendment right to be free from cruel and unusual punishment. . . . This principle extends to an inmate's mental-health-care needs.") (citations omitted); Doty v. County of Lassen, 37 F.3d 540, 546 (9th Cir. 1994) ("[W]e now hold that the requirements for mental health care are the same as those for physical health care needs."); Riddle v. Mondragon, 83 F.3d 1197, 1202 (10th Cir. 1996) ("The states have a constitutional duty to provide necessary medical care to their inmates, including psychological or psychiatric care."); Greason v. Kemp, 891 F.2d 829, 834 (11th Cir. 1990) ("[D]eliberate indifference to an inmate's need for mental health care is actionable on eighth amendment grounds.").

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

One important case is *Bowring v. Godwin*, where the Fourth Circuit Court of Appeals held that treatment of mental illnesses was part of the right to medical care.[20] In that case, the Fourth Circuit developed a three-part test to determine whether an incarcerated person has a right to psychiatric care. Under the test, you are likely to have a right to mental health treatment if a healthcare provider decides that:

(1) You have the symptoms of a serious disease or injury (such as a mental illness); and
(2) That disease or injury can be cured, or can be substantially improved; and
(3) There is a substantial likelihood of harm to your safety or health if treatment is delayed or denied.[21]

The *Bowring* test is only the law in the Fourth Circuit, which means the only courts that *must* apply the three-part test are federal courts in Maryland, North Carolina, South Carolina, Virginia, and West Virginia. However, other courts in other circuits have cited *Bowring* in their decisions, and no court has issued an opinion that disagrees with it.[22] It is a good idea to cite *Bowring* even if you are not bringing a case in the Fourth Circuit, because the court in your circuit might find *Bowring* persuasive. For more information on how to find sources in your jurisdiction, see *JLM*, Chapter 2, "Introduction to Legal Research."

Many states also have laws requiring prisons to provide care to incarcerated people with mental illness.[23] New York law requires prisons to provide appropriate mental health programming to incarcerated people, as long as that programming does not disturb the safety of the facility.[24] The New York State Department of Corrections and Community Supervision (DOCCS) and the Office of Mental Health (OMH) work together to develop treatment plans for incarcerated people with mental illness.[25] The DOC can refer you to the OMH for assessment in order to determine any mental health conditions you may have and the amount of mental health treatment you may need. Every DOC facility has procedures for incarcerated people to request and receive mental health services, but the treatment(s) that are available can be different depending on the facility.[26] You might have access to services including therapy (also called counseling), group counseling, crisis care, and/or other programs or services.[27]

The most common type of care that incarcerated people receive is outpatient care. If you require more intensive care, you may be transferred to a hospital within the prison system or at an off-site medical facility set up specifically to treat people with mental illnesses. The severity of your mental illness, the types and availability of facilities, and the doctor's medical diagnosis can all determine where you will receive treatment. Part D(1) of this Chapter describes psychiatric care centers in New York.

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[20] Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977) (finding that an incarcerated person is entitled to psychiatric treatment where a doctor has concluded that the incarcerated person has a serious disease that might be curable, and where a delay in treatment might cause potential harm).

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

[22] *See, e.g.*, Riddle v. Mondragon, 83 F.3d 1197, 1202 (10th Cir. 1996); Ohlinger v. Warson, 652 F.2d 775, 777 (9th Cir. 1980) (finding that the defendants were entitled to an even higher standard of psychiatric treatment than *Bowring* allows for because they were specifically incarcerated for criminal offenses related to "mental disturbance").

[23] For a summary of prison mental health policy in each state, see E. Fuller Torrey et al., *The Treatment of Persons with Mental Illness in Prisons and Jails: A State Survey*, TREATMENT ADVOCACY CTR. (2014), *available at* https://www.treatmentadvocacycenter.org/reports_publications/the-treatment-of-persons-with-mental-ilnnes-in-prisons-and-jails-a-state-survey/ (last visited Feb. 09, 2024).

[24] N.Y. CORRECT. LAW § 401 (McKinney 2014).

[25] *Medical/Dental/Mental Health Services*, STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS & COMMUNITY SUPERVISION, *available at* https://doccs.ny.gov/medical-services (last visited Feb. 09, 2024).

[26] *Medical/Dental/Mental Health Services*, STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS & COMMUNITY SUPERVISION, *available at* https://doccs.ny.gov/medical-services (last visited Feb. 09, 2024).

[27] *Medical/Dental/Mental Health Services*, STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS & COMMUNITY SUPERVISION, *available at* https://doccs.ny.gov/medical-services (last visited Feb. 09, 2024).

Even though you have a right to treatment, you do not have a right to choose exactly what type of care you receive.[28] For example, if you are diagnosed with depression and you are offered medication that meets the minimum standard of adequate treatment, you might not be able to get a different type of treatment, like therapy, even if you would prefer that instead. However, if you are offered a type of treatment that you do not want, you have a right to refuse it.[29] Part C of this Chapter will explain the right to refuse treatment.

2. Substance Use Disorders

The American Psychiatric Association defines "substance use disorders" as a type of mental illness.[30] While substance use, or drug use, is not automatically a mental health condition or disorder, it can become one if it starts causing certain symptoms or behaviors.[31] You might hear substance use disorders described as "drug addiction" or "substance abuse," and you might hear treatment for substance use disorders described as "rehabilitation" or "rehab."

Remember from the previous Section that under *Estelle v. Gamble*, you need to have a "serious medical need" for a court to find that refusing treatment violates your Eighth Amendment rights.[32] As a general rule, you do not have a right to rehabilitation while in prison.[33] Individual states or corrections departments may decide that rehabilitation is an important goal and may develop their

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

[29] *See* Washington v. Harper, 494 U.S. 210, 241, 110 S. Ct. 1028, 1047, 108 L. Ed. 2d 178, 210 (1990) ("There is no doubt . . . that a competent individual's right to refuse [psychotropic medication] is a fundamental liberty interest deserving the highest order or protection."); Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261, 278 (1990) ("A competent person has a constitutionally protected liberty interest [under the Due Process Clause of the Fourteenth Amendment] in refusing unwanted medical treatment.").

[30] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 483 (5th ed. 2013).

[31] If you are using a substance (such as alcohol, weed, or opioids), some behaviors that may indicate that it might be a disorder are: 1) taking the substance in large amounts; 2) using the substance over longer periods of time; 3) having difficulty stopping use; 4) experiencing cravings for the substance; 5) experiencing social problems (like fights with your family and friends or not doing daily activities) because of the substance; or 6) experiencing withdrawal when you do not take the substance. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 483 (5th ed. 2013).

[32] Estelle v. Gamble, 429 U.S. 97, 104–105, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976). Even though cases like Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977), have extended this rule to mental health needs, it is only in situations where a doctor finds that treatment is medically necessary.

[33] Marshall v. United States, 414 U.S. 417, 421–422, 94 S. Ct. 700, 704, 38 L. Ed. 2d 618, 623 (1974) (explaining that there is no "fundamental right" to rehabilitation from narcotics addiction after conviction of a crime and confinement in a penal institution); *see also* Doe v. Goord, 04 Civ. 0570, 2005 U.S. Dist. LEXIS 28850, at *54 (S.D.N.Y. 2005) (*unpublished*) (noting that there is no constitutional right to rehabilitation, and that drug addiction therapy is only an 8th Amendment right when there is deliberate indifference to serious medical needs); Love v. Thompson, 2:15-CV-01712-CRE, 2016 U.S. Dist. LEXIS 163343, at *16 (W. D. Pa. 2016) (*unpublished*) ("Plaintiff alleges that a denial to provide him with methadone was cruel and unusual punishment in violation of the Eighth Amendment. However, it is clear that 'there is no constitutional right to methadone, and a county is under no obligation to provide it." (quoting United States *ex rel.* Walker v. Fayette County, 599 F.2d 573, 575 (3d Cir. 1979))); Hines v. Anderson, 439 F. Supp. 12, 17 (D. Minn. 1977) (stating that even though prisons cannot take away prescriptions without doctor's approval, prisons are not required to administer methadone as part of a maintenance program); Pace v. Fauver, 479 F. Supp. 456, 458–459 (D.N.J. 1979) ("The Court does not regard plaintiffs' desire to establish and operate an alcoholic rehabilitation program within . . . [p]rison as a serious medical need for purposes of Eighth Amendment and § 1983 analysis."), *aff'd*, 649 F.2d 860 (3d Cir. 1981).

own treatment programs for incarcerated people with substance use disorders.[34] However, the Constitution does not automatically require this type of treatment in prisons.[35]

Even though you do not have an automatic constitutional right to drug rehabilitation, there are some situations where courts have found that drug treatment was necessary due to a serious medical need:

- Withdrawal (the symptoms and health issues that you may experience if you suddenly stop using a substance that you have used regularly) can be very painful or even dangerous.[36] Withdrawal symptoms could be a serious medical condition that a prison is required to treat. Some courts have avoided the question of whether withdrawal is a serious medical need.[37] But other courts have held that sometimes drug or alcohol withdrawal becomes serious enough that treatment is medically necessary.[38]
- Some courts have held that you have a right to have your health not deteriorate (get worse) while you are in prison. If you are getting sicker because of a substance use issue, it might become serious enough that treatment is medically necessary.[39] However, more recent cases have made it clear that there is no automatic right to rehabilitation, so it might be hard to succeed in making this argument.[40]

Since there is no constitutional right to drug treatment, courts decide cases based on the facts of the situation, which are different in every case. You might be able to argue that the prison is violating your rights by refusing to treat your symptoms related to substance use, but there is a chance that a court will not find that it is a serious medical need.

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[34] For example, the New York Department of Corrections and Community Supervision (DOCCS) has established an Alcohol and Substance Abuse Treatment program (ASAT) that offers rehabilitation to incarcerated people at most New York facilities. *Alcohol and Substance Abuse Treatment (ASAT)*, STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS & COMMUNITY SUPERVISION, *available at* https://doccs.ny.gov/alcohol-and-substance-abuse-treatment-asat (last visited Feb. 09, 2024).

[35] *See also* Gibson v. Fed. Bureau of Prisons, 121 F. App'x 549, 551 (5th Cir. 2004) (*unpublished*) (holding that an incarcerated person does not have a protected liberty interest in participating in a drug treatment program); Abraham v. Danberg, 832 F. Supp. 2d 368, 375 (D. Del. 2011) ("Prisoners have no constitutional right to drug treatment or other rehabilitation."); Bullock v. McGinnis, 5 F. App'x 340, 342 (6th. Cir. 2001) (*unpublished*) ("[A] prisoner has no constitutional right to rehabilitation . . . .").

[36] *See* Mohit Gupta et al., *Withdrawal Symptoms*, NAT'L CTR. FOR BIOTECHNOLOGY INFORMATION (2021), *available at* https://www.ncbi.nlm.nih.gov/books/NBK459239/ (last visited Feb. 09, 2024).

[37] *See* Quintana v. Santa Fe Cnty. Bd. of Comm'rs, 973 F.3d 1022, 1029 (10th Cir. 2020) ("No Tenth Circuit authorities have concluded that heroin withdrawal presents a 'sufficiently serious' medical need.").

[38] *See* Iacovangelo v. Corr. Med. Care, Inc., 624 F. App'x 10, 13 (2d Cir. 2015) (*unpublished*) ("Although there is no *per se* rule that drug or alcohol withdrawal constitutes an objectively serious medical condition, courts in this Circuit have found many such instances to satisfy the objective prong" (citing Caiozzo v. Koreman, 581 F.3d 63, 72 (2d Cir. 2009) ("[T]here is no dispute that [the defendant, who was experiencing severe alcohol withdrawal] had a serious medical condition"))); Foelker v. Outagamie Cnty... 394 F.3d 510, 513 (7th Cir. 2005) (holding that the defendant, who was experiencing methadone withdrawal, had a serious medical need); Kelley v. Cnty. of Wayne, 325 F. Supp. 2d 788, 791 (E.D. Mich. 2004) ("Heroin withdrawal is a serious medical condition.");")..");.,,

[39] Battle v. Anderson, 564 F.2d 388, 403 (10th Cir. 1977) ("We believe that while an inmate does not have a federal constitutional right to rehabilitation, he is entitled to be confined in an environment which does not result in his degeneration or which threatens his mental and physical well being"); Laaman v. Helgemoe, 437 F. Supp. 269, 316 (D.N.H. 1977) (holding that, even though there is no recognized federal constitutional right to rehabilitation, cases have established that people should be incarcerated in conditions that do not threaten their sanity or mental wellbeing and that allow them to "avoid physical, mental, or social degeneration").

[40] Jacobs v. Dist. Attorney's Office, No. 1:10-cv-02622, 2018 U.S. Dist. LEXIS 44583, at *46 (M.D. Pa. Mar. 19, 2018) (*unpublished*) ("Many courts have held that prisoners have no constitutional right to various rehabilitative programs including drug treatment"); *see also* Reddin v. Israel, 561 F.2d 715, 718 (7th Cir. 1977) ("[T]he state need not avoid conduct which may result in "'detrimental psychological effects" unless the state acts in a torturous or barbarous manner or with a wanton intent to inflict pain") (citation omitted); Abdul-Akbar v. Dept. of Corr., 910 F. Supp. 986, 1002–1003 (D. Del. 1995) (finding that there is also no Due Process right to drug treatment or other rehabilitation in prison unless an incarcerated person shows that not having those opportunities is an "atypical and significant hardship").

3. What to do if Your Treatment is Denied or Delayed

This Section will describe what you can do if you think you have not received adequate care. Because of the Supreme Court's decision in *Estelle v. Gamble*, if a treatment that you need is wrongly denied or delayed, it might be a violation of your constitutional right to be free of cruel and unusual punishment under the Eighth Amendment.[41] You must show two things in order for a court to find that your rights were violated—that you have a serious medical need, and that prison officials were "deliberately indifferent" to that need. If you think that your rights are being violated (or were violated in the past), you can bring a "deliberate indifference" claim against the "persons" that caused the violation. "Persons" is a legal term that can mean individual people (like prison officials), institutions (like a government agency), or both. This Section will describe the requirements you must meet for a court to find that your rights were violated.

(a) The Deliberate Indifference Standard

Not every delay or denial of medical care violates your constitutional rights. A court will only find that there is an Eighth Amendment violation if you can show that two things happened.

(1) You must show that you were denied a serious medical need.
(2) You must show that the people responsible for your care *knew* that you had a serious medical need and ignored those health needs on purpose.[42]

If you prove both of these two requirements, a court will find that the person or persons who were responsible for your care acted with "deliberate indifference" to your health needs.[43]

(i) *Serious Medical Need*

The first part of your deliberate indifference claim must include facts that show you have (or had) a serious medical need that prison officials did not treat. For example, you could show that you have been diagnosed with a mental illness that requires treatment, or you can describe your symptoms and argue that even a non-doctor would recognize them as serious.[44]

To claim that your medical need was not met, you must show that someone either denied you adequate medical care (did not provide you with treatment at all), or delayed your medical care (made you wait for a long time or did not give you treatment regularly). You must also show that this failure of treatment has caused you harm or will cause you harm in the future.[45]

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[41] Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976) ("We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain . . . proscribed by the Eighth Amendment" (citing Gregg v. Georgia, 428 U.S. 153, 173, 96 S. Ct. 2909, 2925, 49 L. Ed. 2d 859, 875 (1976))).

[42] *See* Farmer v. Brennan, 511 U.S. 825, 847, 114 S. Ct. 1970, 1984, 128 L. Ed. 2d 811, 832 (1994) ("[A] prison official may be held liable under the Eighth Amendment . . . only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it"); Wilson v. Seiter, 501 U.S. 294, 297–299, 111 S. Ct. 2321, 2323–2325, 115 L. Ed. 2d. 271, 278–280 (1991) (holding that it is not enough for treatment to be careless or mistaken—officials must have knowingly ignored a "serious" need).

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

[44] *See* Hathaway v. Coughlin, 37 F.3d 63, 66 (2d Cir. 1994) (stating that the medical need in a deliberate indifference claim "must be, in objective terms, 'sufficiently serious,'" such as a symptom or condition that could lead to death, deterioration, or extreme pain (quoting Wilson v. Seiter, 501 U.S. 294, 298, 111 S. Ct. 2321, 2324 115 L. Ed. 2d 271, 279 (1991))). In the Second Circuit, for example, courts have found that risk of suicide is sufficiently serious, but also that a mental disorder (like bipolar disorder or schizophrenia) can be a serious medical need even if there is no suicidal ideation. *See* Case v. Anderson, No. 16 Civ. 983(NSR),, 2017 U.S. Dist. LEXIS 137118, at *24–27 (S.D.N.Y. Aug. 25, 2017) (*unpublished*). Other circuit courts have made similar statements. *See* Thompson v. Baker, No. 2:18-cv-01318, 2020 U.S. Dist. LEXIS 6358, at *25 (S. D. W. Va. Jan. 15, 2020) (*unpublished*) ("[P]sychological needs may constitute serious medical needs, especially when they result in suicidal tendencies" (citing Perez v. Oakland Cnty., 466 F.3d 416, 428 (6th Cir. 2006))).

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

A court will consider different things depending on whether you were completely denied medical care or if your medical care was delayed. If you were denied medical care, a court will consider your symptoms and decide whether they are a serious medical need.[46] In denial cases, you should explain your medical condition and describe why it creates a risk of extreme pain or deterioration. If you experienced a delay or interruption in your medical care, the court will look at the impact of the delay itself, not just the seriousness of your symptoms.[47] In delay cases, you should explain your medical condition *and* explain how the delay of care made your condition worse.[48]

(ii) *Actual Knowledge and Disregard for Risk*

For the second part of your deliberate indifference claim, you must show that the person or persons who did not meet your needs *actually knew* you needed care but still did not treat you.[49] In an important case called *Farmer v. Brennan*, the Supreme Court explained that a prison official (1) must be aware of facts that show an incarcerated person faces a substantial risk of serious harm, *and* (2) must actually realize that there is a serious risk of harm.[50] This part of the deliberate indifference test is subjective (based on the experience of that particular person, not outside facts). This means that your claim should try to show the court that the person who denied your care actually knew or believed there was a risk that you would suffer some serious harm. Sometimes, if the risk to your health is extremely obvious, a court can assume that the prison official knew of the risk.[51] In your claim you can try to show that a risk was obvious by giving evidence that your medical need has been going on for a long time, if it has obvious symptoms, or if prison officials have noticed it or commented on it in the past.[52] If you are experiencing serious symptoms such as thoughts of self-harm, you should start by telling prison officials and attempting to get treatment. Then, if you are not provided with adequate care, you can explain in your claim that the officials knew about your symptoms and did not take action.

After you show that the person you are bringing a claim against had actual knowledge of the risk of refusing you treatment, you must also show that there was "deliberate indifference" to your health

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[46] Salahuddin v. Goord, 467 F.3d 263, 280 (2d Cir. 2006) (explaining that in cases of denial of treatment, "courts examine whether the inmate's medical condition is sufficiently serious . . . Factors relevant to the seriousness of a medical condition include whether 'a reasonable doctor or patient would find [it] important and worthy of comment,' whether the condition 'significantly affects an individual's daily activities,' and whether it causes 'chronic and substantial pain'") (citations omitted).

[47] Case v. Anderson, No. 16 Civ. 983(NSR),, 2017 U.S. Dist. LEXIS 137118, at *23 (S.D.N.Y. Aug. 25 2017) (*unpublished*) ("In cases of alleged delay, 'the seriousness inquiry is 'narrower,' and focuses on the particular risk of harm that resulted from the delay or interruption in treatment rather than the severity of the [plaintiff's] underlying medical condition" (quoting Hamm v. Hatcher, No. 05 Civ. 503(ER), 2013 U.S. Dist. LEXIS 2203, at *8 (S.D.N.Y. Jan. 7, 2013) (*unpublished*))).

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

[49] Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) ("[A] prison official cannot be found liable under the Eighth Amendment . . . unless the official knows of and disregards an excessive risk to inmate health or safety…").

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

[51] Farmer v. Brennan, 511 U.S. 825, 842, 114 S. Ct. 1970, 1981, 128 L. Ed. 2d 811, 829 (1994) ("[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious").

[52] Farmer v. Brennan, 511 U.S. 825, 842–843, 114 S. Ct. 1970, 1981–1982, 128 L. Ed. 2d 811, 829 (1994) ("[I]f an Eighth Amendment plaintiff presents evidence showing that a substantial risk of inmate attacks was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus must have known about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk") (internal quotations omitted).

needs.[53] This means that it is not enough to show that a prison official was careless or made a mistake with your treatment—you must show that the official acted intentionally in refusing treatment.

A prison official can be "deliberately indifferent" by: (1) taking action (doing something), or (2) refusing to act (not doing something, also called an "omission").[54] An example of an act showing deliberate indifference might be *knowingly* taking away your asthma inhaler, knowing that you struggle to breathe without it. An example of a failure to act might be refusing to provide necessary medication or refusing to treat a cavity in someone's tooth.[55]

(b) Examples of Deliberate Indifference Claims

Many court cases concerning the deliberate indifference standard involve medical care for physical illness or injuries, but deliberate indifference to the mental health needs of an incarcerated person can also violate the Eighth Amendment.[56] Incarcerated people have brought successful deliberate indifference claims related to mental health care in different situations, including:

(1) When a facility has not trained correctional staff to work with incarcerated people experiencing mental illness, or when a facility does not allow incarcerated people to access mental health professionals,[57]

(2) When there was a lack of (or inadequate) mental health screening during intake,[58]

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

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

[55] *See* Harrison v. Barkley, 219 F.3d 132, 137 (2d Cir. 2000) (holding that prison officials' refusal to treat cavity in one of incarcerated person's teeth unless he consented to extraction of another tooth constituted deliberate indifference;);; McElligott v. Foley, 182 F.3d 1248, 1257–1258 (11th Cir. 1999) (holding that a jury could find that the medication provided to an incarcerated person was so cursory as to amount to no treatment at all and, therefore, amounted to deliberate indifference to his serious medical needs); *see also* West v. Keve, 571 F.2d 158, 162 (3d Cir. 1978) (finding that an incarcerated person's post-operative treatment, which consisted of aspirin but no prescription-strength medication, may constitute deliberate indifference to his serious medical needs).

[56] Moderwell v. Cuyahoga ,Cnty.,.,., 997 F.3d 653, 658 (6th Cir. 2021) (allowing a claim for deliberate indifference to continue, noting that "numerous members of the [prison's] medical staff lacked proper licenses, comprehensive mental health appraisals were not conducted in a timely manner, and there was no mental health nurse practitioner"); *see also* Gibson v. Cnty. of Washoe, 290 F.3d 1175, 1187 (9th Cir. 2002) ("Th[e] duty to provide medical care encompasses detainees' psychiatric needs."), *overruled in part on other grounds by* Castro v. County of Los Angeles, 833 F.3d 1060 (9th Cir. 2016); Belcher v. City of Foley, 30 F.3d 1390, 1396 (11th Cir. 1994) (holding that the right to treatment "encompasses a right to psychiatric and mental health care"); Torraco v. Maloney, 923 F.2d 231, 234 (1st Cir. 1991) (noting that there is "no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart"); Partridge v. Two Unknown Police Officers, 791 F.2d 1182, 1187 (5th Cir. 1986) ("A serious medical need may exist for psychological or psychiatric treatment, just as it may exist for physical ills").

[57] Perri v. Coughlin, No. 90-CV-1160, 1999 U.S. Dist. LEXIS 20320, at *19–20 (N.D.N.Y. Jun. 11, 1999) (*unpublished*) ("There are six components of minimally adequate prison mental health care delivery system under the Eighth Amendment:. . . 3) Employment of a sufficient number of mental health professionals"); Greason v. Kemp, 891 F.2d 829, 837–840 (11th Cir. 1990) (stating that prison clinic director, prison system mental health director, and prison warden could be found deliberately indifferent based on their knowing toleration of a "clearly inadequate" mental health staff).

[58] *See* Braggs v. Dunn, 257 F. Supp. 3d 1171, 1184–1185 (M.D. Ala. 2017) ("The inadequacies in the mental-health care system start at the door, with intake screening . . . a substantial number—likely thousands—of prisoners with mental illness are missed at intake and referrals for evaluation and treatment are neglected"). *But see* Belcher v. Oliver, 898 F.2d 32, 34–35 (4th Cir. 1990) (holding detainee's right to be free from punishment did not include right to be screened for mental illness or suicide risk without objective evidence that they needed it); Danese v. Asman, 875 F.2d 1239, 1244 (6th Cir. 1989) ("It is one thing to ignore someone who has a serious injury and is asking for medical help; it is another to be required to screen prisoners correctly to find out if they need help").

(3) When prison staff or prison policies fail to follow up with people who have known or suspected mental disorders,[59]
(4) When a facility places incarcerated people with mental illness in inappropriate living conditions,[60] and
(5) When prison officials do not protect you from self-harm or suicide.[61]

In one important decision in 2011, *Brown v. Plata*, the Supreme Court held that California prisons provided inadequate mental health care, which violated the Eighth Amendment.[62] The Court found that a combination of problems with medical treatment in the California prison system (mostly caused by extreme overcrowding) caused "continuing injury and harm."[63] The Supreme Court did not say whether each problem would violate the Constitution individually, but the problems it described were similar to the ones in the list above this paragraph (too little staff, delays in treatment, and "unsafe and unsanitary living conditions").[64] If you are writing a deliberate indifference claim, it is a good idea to include as much evidence and detail as you can about the conditions in your prison.

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

Deliberate indifference is a high standard—a court will only find deliberate indifference when a prison official's act or refusal to act caused "unnecessary and wanton infliction of pain."[65] This means that if you are bringing a claim against a prison official for deliberate indifference, you don't have to prove that that person was trying to harm you intentionally, but you do have to show that they

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[59] *See* Richmond v. Huq, 885 F.3d 928, 940 (6th Cir. 2018) (holding that a reasonable jury could find that the prison doctor failed to ensure that the jail's medical staff was adhering to the plaintiff's treatment plan, "especially . . . in light of [the plaintiff's] well-documented complaints"); Clark-Murphy v. Foreback, 439 F.3d 280, 289–292 (6th Cir. 2006) (holding certain staff members were not entitled to qualified immunity for failing to seek treatment for or provide assistance to a detainee who clearly needed psychological or psychiatric care); *see also* Terry v. Hill, 232 F. Supp. 2d 934, 943–944 (E.D. Ark. 2002) (holding lengthy delays in transferring detainees with mental illness to a mental hospital were unconstitutional).

[60] Gates v. Cook, 376 F.3d 323, 343 (5th Cir. 2004) (finding that incarcerated people on death row were experiencing "conditions of inadequate mental health care [that does] present a risk of serious harm to the inmates mental and physical health"); Jones 'El v. Berge, 164 F. Supp. 2d 1096, 1125–1126 (W.D. Wis. 2001) (granting preliminary injunction requiring removal of prisoners with serious mental illness from "supermax" prison, where detainees spend all but four hours per week in their cells); Madrid v. Gomez, 889 F. Supp. 1146, 1279–1280 (N.D. Cal. 1995) ("[D]efendants cross the constitutional line when they force certain subgroups of the prison population, including the mentally ill, to endure the conditions in the SHU, despite knowing that the likely consequence for such inmates is serious injury to their mental health"); Langley v. Coughlin, 709 F. Supp. 482, 484–485 (S.D.N.Y. 1989) (placement of incarcerated people with mental illness in punitive segregation resulted in conditions that might violate the 8th Amendment), *appeal dismissed*, 888 F.2d 252 (2d Cir. 1989); *see also* Porter v. Clarke, 923 F.3d 348, 361 (4th Cir. 2019) (finding that prison officials were deliberately indifferent because they were aware of the substantial risk of psychological and emotional harm that solitary confinement causes to everyone, not just people with mental illness). *But see* Scarver v. Litscher, 434 F.3d 972, 976–977 (7th Cir. 2006) (holding that prison officials who were not shown to have known that keeping a detainee experiencing psychosis under conditions of extreme isolation and heat would aggravate his mental illness could not be found deliberately indifferent).

[61] *See, e.g.*, Cook v. Sheriff of Monroe Cnty., 402 F.3d 1092, 1122 (11th Cir. 2005) (holding that there was sufficient evidence for a jury to find that prison officials were deliberately indifferent where a reasonable person [cases like this are often analyzed from the perspective of a "reasonable person," i.e., a person who is generally able to understand what's going on] could conclude that an incarcerated person's suicide was a foreseeable result of the prison officials' failure to respond to his requests to see a mental health professional).

[62] Brown v. Plata, 563 U.S. 493, 543–544, 131 S. Ct. 1910, 1947, 179 L. Ed. 2d 969, 1007–1008 (2011) (holding that the medical and mental health care in California prisons violated the 8th Amendment for two groups of incarcerated people: 1) mentally ill incarcerated people and 2) incarcerated people with serious medical conditions. The Court held that there was no way to fix the problem except releasing many people from prisons in the state.).

[63] Brown v. Plata, 563 U.S. 493, 551, 131 S. Ct. 1910, 1923, 179 L. Ed. 2d 969, 1012 (2011).

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

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

understood the serious risk of harm and didn't respond to it.[66] Courts will not find deliberate indifference if a prison official made a mistake, accidentally failed to treat you, or even treated you negligently (carelessly).[67] Courts will also not find deliberate indifference if a doctor provides care to you and you simply disagree with a doctor about what counts as adequate medical care.[68] For example, if a doctor has given you treatment that the doctor finds adequate, you will probably not succeed in a deliberate indifference claim that argues that they should have given you a different treatment that you would have preferred to receive.[69]

If you think that a prison official or doctor has treated you irresponsibly but do not have enough evidence to make a deliberate indifference claim, you may be able to file a negligence tort claim instead. Read *JLM*, Chapter 17, "The State's Duty to Protect You and Your Property: Tort Actions," for more information about negligence tort claims, including how to file them.

(d) How to Bring a Claim Under Section 1983

If you think that you are able to show that someone acted with deliberate indifference to your serious medical need, you may be able to bring a claim using The Civil Rights Act of 1871 (known as "Section 1983").[70] You can use Section 1983 to sue "persons" (including individuals, cities, and local governments) for constitutional violations. For example, you could bring a claim against a specific prison guard or warden, or against the government body (a municipal government, for example, but not a state itself) in charge of the institution where the violation took place.[71] For detailed information on bringing a claim under Section 1983, please read *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law." If you plan to file your suit in federal court, you should also read *JLM*, Chapter 14, "The Prison Litigation Reform Act."

You can bring a Section 1983 claim about any constitutional violation. The facts and information you include in your claim will be different depending on the type of violation you have experienced. If you are bringing an Eighth Amendment claim, you should explain why a prison official violated the

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[66] Farmer v. Brennan, 511 U.S. 825, 835, 114 S. Ct. 1970, 1978, 128 L. Ed. 2d 811, 824 (1994) ("[D]eliberate indifference entails something more than mere negligence and something less than a failure to act which has the intention of harming someone, [but] the cases are also clear that it is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result."); Estelle v. Gamble, 429 U.S. 97, 105, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976) ("An accident, although it may produce added anguish, [i.e., might cause a lot of pain], is not on that basis alone to be characterized as considered a wanton infliction of unnecessary pain.").

[67] *See* Farmer v. Brennan, 511 U.S. 825, 838, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) ("[A]n official's failure to [remove] a significant risk that he should have recognized but did not, while [not a good thing], cannot under [the law be considered the same] as the infliction of punishment."); Estelle v. Gamble, 429 U.S. 97, 105-106, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251, 261 (1976) ("an [accidental] failure to provide adequate medical care cannot be said to [be] . . . a valid claim of medical mistreatment under the Eighth Amendment."); *see also* Domino v. Tex. Dept. of Crim. Justice, 239 F.3d 752, 756 (5th Cir. 2001) ("It is [clear] that an incorrect diagnosis by prison medical personnel [is not enough to] state a claim for deliberate indifference."); United States *ex rel.* Hyde v. McGinnis, 429 F.2d 864, 867 (2d Cir. 1970) (finding that the "faulty judgment on the part of the prison doctor in choosing to administer one form of the same medication instead of another" is not deliberate indifference).

[68] *See, e.g.*, Tucker v. Kivett, No. 1:18CV897, 2019 U.S. Dist. LEXIS 215682, at *15 (M.D.N.C. Dec. 16, 2019) (*unpublished*) ("Plaintiff alleges no facts demonstrating that the treatment proscribed by Defendant . . . was not appropriate, much less that any exceptional circumstances exist so that Plaintiff's disagreement with [Defendant's] course of treatment constitutes deliberate indifference." (citing Mitchell v. Forsyth County, No. 1:18CV574, 2019 U.S. Dist. LEXIS 125700, at *9 (M.D.N.C. July 29, 2019) (*unpublished*))); Banuelos v. McFarland, 41 F. 3d 232, 235 (5th Cir. 1995) (finding that, except in exceptional circumstances, an incarcerated person's disagreement with his medical treatment is not enough for a deliberate indifference claim).

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

[70] 42 U.S.C. § 1983.

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

"deliberate indifference" standard, and give evidence that: 1) you have a mental health need that is serious enough that denial of treatment caused a violation of the Constitution; and 2) the prison was "deliberately indifferent" to your mental health need.[72] The test a court will use to determine if your mental health need is "serious enough" is whether 1) the need has been diagnosed by a physician as requiring treatment, or 2) your mental health need is so obvious that even a person with no medical training could see that you need to see a doctor.[73]

C. Your Right to Refuse Treatment

This Part explains your right to refuse treatment that you do not want. You have a constitutional right to refuse care that you do not want, except in some emergency situations.[74] An "emergency situation" is one where you pose a danger to yourself or others.[75] You also have the right to understand your options and make an educated choice about whether to receive treatment—this is called "informed consent." If you received treatment that you did not want or that you did not give informed consent to, you might be able to file a claim for a violation of your due process rights (Section 3 explains how you can do this). Medication (like antidepressants or antipsychotics) is one of the most commonly used treatments for mental illness, so most of this Part will focus on your right to refuse unwanted medication. However, your right to refuse applies to all types of treatment. For more information on this topic, you should read *JLM*, Chapter 23, "Your Right to Adequate Medical Care."[76]

1. Informed Consent

You have the right to "informed consent," which means that you must be allowed to learn information about the different medical treatments available to you, and the risks and benefits of each option, so that you can make a reasonable decision about whether to move forward with a particular treatment. After you have this information, you can choose whether or not to give the doctor permission to treat you. Informed consent is a way of making sure that you understand, *before* you start the treatment, what it means and what effects it may have on you.[77]

Doctors have a general duty to obtain informed consent from patients, including incarcerated people, before treating them.[78] Doctors must get your informed consent when: 1) you are receiving a non-emergency treatment, procedure, or surgery (required in some states), or 2) the doctor is using a diagnostic (meaning to try and diagnose you) procedure which involves invasion of your body or

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[72] Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994); *see also* Letterman v. Does, 789 F.3d 856, 861 (8th Cir. 2015) (holding that prison staff who were aware of concern for an incarcerated individual's mental health but did nothing in response could be found to be deliberately indifferent by a jury); Russell v. Sheffer, 528 F.2d 318, 318–319 (4th Cir. 1975) (stating that a prisoner must show that his medical mistreatment or the correctional facility's denial of medical treatment can be characterized as "cruel and unusual punishment" to bring a § 1983 claim); Gil v. Vogilano, 131 F. Supp. 2d 486, 492–493 (S.D.N.Y. 2001) (holding that an incarcerated person who was denied access to treatment despite repeated requests and obvious pain had stated a valid claim under § 1983).

[73] Braggs v. Dunn, 257 F. Supp. 3d 1171, 1189 (M.D. Ala. 2017) (defined the standard courts use to determine if your need is serious enough by citing *Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir. 2003)).

[74] Washington v. Harper, 494 U.S. 210, 241, 110 S. Ct. 1047, 1036, 108 L. Ed. 2d 178, 210 (1990) ("There is no doubt . . . that a competent individual's right to refuse [mind-altering drug treatment] is a fundamental liberty interest deserving the highest order of protection.").

[75] Dancy v. Gee, 51 F. App'x 906, 908 (4th Cir. 2002) (*unpublished*).

[76] See especially Sections C(5), "An Incarcerated Person's Right to Psychiatric Care," C(6), "Right to Refuse Psychiatric Treatment," and E(1), "Your Right to Informed Consent."

[77] In New York, informed consent means that medical professionals are required to tell the patient about "such alternatives [to the treatment they are suggesting] and the reasonably foreseeable risks and benefits involved as a reasonable [medical, dental, or podiatric professional would have mentioned under similar circumstances] in a manner [which allows the patient to make an informed decision]." N.Y. PUB. HEALTH LAW § 2805-d(1) (McKinney 2023); *see also* Pabon v. Wright, 459 F.3d 241, 246 (2d Cir. 2006) (stating that the right to refuse includes the right to receive information that would allow a reasonable person to make an informed decision about treatment).

[78] *See* Pabon v. Wright, 459 F.3d 241, 246 (2d Cir. 2006).

disruption of your bodily integrity (required in most states).[79] Some states specifically require by law that doctors consider other possible forms of care and inform you of the procedures and risks associated with each option.[80]

Your right to informed consent is an important part of your right to refuse treatment. However, these rights have important limits. If you pose a danger to yourself or to others, a doctor may be able to treat you without your consent.[81] Part C(2)(d) of this Chapter gives more details about the limits on the right to refuse treatment.

2. Unwanted Medication

You have a right to choose whether or not to take antipsychotic or psychotropic drugs that a doctor or prison official wants to use to treat you, with some exceptions.[82]

"Antipsychotic" medications are used to prevent or control psychosis-related conditions and symptoms.[83] Psychosis is a collection of symptoms that involve a disconnection from reality.[84] The main symptoms are hallucinations and delusions, but psychosis could also involve disorganized thoughts or actions, or a dampening of how you show emotions.[85] "Psychotropic" drugs are ones that impact how the brain works, and can cause changes in mood, awareness, thoughts, feelings, or behavior.[86]

These types of medications can help cure symptoms of mental illness, and being able to take them can be an important part of your right to adequate treatment. However, these medications can also significantly alter your mood, emotions, or energy.[87] For example, some psychotropic drugs can have serious side effects, such as anxiety, constipation, and changes in heartbeat.[88]

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[79] *See* Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261, 269, 110 S. Ct. 2841, 2846, 111 L. Ed. 2d 224, 236 (1990) ("[T]his notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment."); *see also* N.Y. PUB. HEALTH LAW § 2805-d(1) (McKinney 2023) (discussing what constitutes lack of informed consent); Marchione v. State, 194 A.D.2d 851, 854, 598 N.Y.S.2d 592, 594 (3d Dept. 1993) (applying the above statute in a case where an incarcerated person is bringing the suit).

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

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

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

[83] *Antipsychotic Medications*, CLEVELAND CLINIC (2023), *available at* https://my.clevelandclinic.org/health/treatments/24692-antipsychotic-medications (last visited Mar. 4, 2024).

[84] *Antipsychotic Medications*, CLEVELAND CLINIC (2023), *available at* https://my.clevelandclinic.org/health/treatments/24692-antipsychotic-medications (last visited Mar. 4, 2024).

[85] *Antipsychotic Medications*, CLEVELAND CLINIC (2023), *available at* https://my.clevelandclinic.org/health/treatments/24692-antipsychotic-medications (last visited Mar. 4, 2024).

[86] *Psychotropic Substance*, NAT'L CANCER INSTITUTE (2024), *available at* https://www.cancer.gov/publications/dictionaries/cancer-terms/def/psychotropic-substance (last visited Mar. 4, 2024).

[87] *Office of Integrated Health: Health & Safety Information*, VIRGINIA DEPARTMENT OF BEHAVIORAL HEALTH & DEVELOPMENTAL SERVICES (2019), *available at* https://dbhds.virginia.gov/assets/doc/OIH/safety-alert-for-psychotropic-side-effects.final.2.pdf (last visited Mar. 4, 2024).

[88] *Office of Integrated Health: Health & Safety Information*, VIRGINIA DEPARTMENT OF BEHAVIORAL HEALTH & DEVELOPMENTAL SERVICES (2019), *available at* https://dbhds.virginia.gov/assets/doc/OIH/safety-alert-for-psychotropic-side-effects.final.2.pdf (last visited Mar. 4, 2024).

Because these treatments interfere with your body, the law protects your right to refuse to take medication. Your right to refuse treatment is based on your federal constitutional rights (from the Fourteenth Amendment and the Eighth Amendment), but many state laws also protect this right.[89]

The Due Process Clause of the Fourteenth Amendment says that, "no State shall . . . deprive any person of life, liberty, or property, without due process of law."[90] This means that the government (or a person acting for the government, like a prison official) can't take away your life, liberty, or property unless they follow certain rules (called "procedures") first. These procedures, or "procedural protections," are supposed to protect your rights and make sure that an important right is not being taken from you for a bad reason. Some examples of procedures that a state might have to follow are giving you notice (telling you what they plan to do) or having a hearing to allow you to argue against their choice. Because medications can significantly affect your behavior and mood, giving you medication you do not want would deprive you of your liberty.[91] The government must follow certain procedures to make sure you are not being deprived *unfairly* of this liberty.[92]

You might also have a right to refuse medication under the Eighth Amendment, which prohibits cruel and unusual punishment.[93] Some courts have held that making someone take drugs that they do not want is an Eighth Amendment violation if it is used as a punishment rather than a treatment.[94] Some jurisdictions will only analyze involuntary medication claims under the Fourteenth Amendment.[95] Regardless, if you were made to take unwanted drugs as a punishment or if unwanted drugs caused you to suffer mental and emotional distress, you should consider raising a constitutional challenge.

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[89] *See, e.g.,* LA. STAT. ANN. § 40:1159.7 (West 2016); GA. CODE ANN. § 37-3-163 (West 2017); IND. CODE ANN. § 12-27-6-3 (West 2007); *see also* S.D. CODIFIED LAWS § 27A-15-48.

[90] U.S. CONST. amend. XIV, § 1.

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

[92] Washington v. Harper, 494 U.S. 210, 221–222, 110 S. Ct. 1028, 1036–1037, 108 L. Ed. 2d 178, 198 (1990); *see*, *e.g.*, Mills v. Rogers, 457 U.S. 291, 299 n.16, 102 S. Ct. 2442, 2448 n.16, 73 L. Ed. 2d 16, 23 n.16 (1982) (noting that having to take psychotropic drugs against your will can violate your constitutional liberty interests), *cert. denied*, 484 U.S. 1010, 108 S. Ct. 709, 98 L. Ed. 2d 660 (1988).

[93] U.S. CONST. amend. VIII.

[94] Souder v. McGuire, 423 F. Supp. 830, 831–832 (M.D. Pa. 1976) ("[I]nvoluntary administration of drugs which have a painful or frightening effect can amount to cruel and unusual punishment, in violation of the Eighth Amendment"); Knecht v. Gillman, 488 F.2d 1136, 1139–1140 (8th Cir. 1973) (holding that a drug that caused incarcerated people to vomit for 15 minutes to an hour "can only be regarded as cruel and unusual unless the treatment is being administered to a patient who knowingly and intelligently has consented to it"); Mackey v. Procunier, 477 F.2d 877, 878 (9th Cir. 1973) (finding that "serious constitutional questions respecting cruel and unusual punishment or impermissible tinkering with the mental processes" could be raised where an incarcerated person who had consented to shock treatment was given extra drugs, without his consent, that caused fright and nightmares); Thompson v. Bell, 580 F.3d 423, 440 (6th Cir. 2009) ("The logical inference from [holdings analyzing involuntary medication under the 14th Amendment] is that [making someone take medications they don't want] when it is not absolutely necessary or medically appropriate is contrary to the 'evolving standards of decency' that underpin the Eighth Amendment").

[95] Martin v. Kazulkina, No. 12-CV-14286, 2017, at *13 (E.D. Mich. Feb. 21, 2017) (*unpublished*), *report and recommendation adopted*, No. 12-CV-14286, 2017 WL 958081 (E.D. Mich. Mar. 13, 2017) (*unpublished*); Moore v. Hoeven, No. 3:08-CV-50, 2008 WL 4844130, at *4 (D. N.D. Nov. 5, 2008) (*unpublished*) ("This Court therefore recommends that Moore's claims [regarding] involuntary medication and placement in administrative segregation be dismissed"); Hendon v. Ramsey, 528 F. Supp. 2d 1058, 1075 (S.D. Cal. 2007) ("The Court agrees with Defendants . . . that 'the [major portion] of Plaintiff's claim is that Defendants 'forcibly drugg[ed him] with anti-psychotic medications without due process" and therefore Plaintiff's claim is more appropriately analyzed through the rubric of the Fourteenth Amendment").

Your right to refuse medication may come not only from the Constitution, but also from state laws (at least in the state of New York) that protect your right to refuse medication.[96] These laws work the same way as constitutional protections. If your state has this type of law, the government must follow the procedures set out by the law.[97]

3. What to Do if You Receive Unwanted Treatment

There are limitations to the right to refuse medication—in some situations, prison staff can medicate you over your objection (when you don't want it). Even though the Constitution protects your right to due process, that does not mean that the government can never medicate you without your permission. Instead, it means that the government must provide a process or procedures (such as notice or a hearing) that lowers the chance that someone will make a random or unfair decision to medicate you.[98]

You may feel like you were unfairly forced to take medication, but a court might still decide that the state's decision was reasonable if it feels that enough procedural protections were followed to satisfy due process.[99] A court will decide whether or not your rights were violated based on the details of your individual situation, such as current prison conditions, the threat of danger that you pose to yourself or others, and the procedures that the State has in place to protect you from an unfair decision to treat you with drugs.[100]

Courts have frequently held that the State may legally force you to take medication over your objection if prison officials think that you are a danger to yourself or others. In *Washington v. Harper*, the Supreme Court allowed the state of Washington to medicate an incarcerated person without consent if a licensed psychiatrist found that the incarcerated person suffered from a mental disorder, and the incarcerated person was "gravely disabled" or posed a "likelihood of serious harm" to himself or others.[101]

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[96] If you live in New York, state law protects your right to make decisions about your medical treatment. *See* Myers v. Schneiderman, 30 N.Y.3d 1, 14, 85 N.E.3d 57, 63, 62 N.Y.S.3d 838, 844 (2017) ("[E]very human being of adult years and sound mind has a right to determine what shall be done with [such person's] own body." (citing Schloendorff v. Soc'y of N.Y. Hosp., 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914))); Rivers v. Katz, 67 N.Y.2d 485, 493, 495 N.E.2d 337, 341, 504 N.Y.S.2d 74, 78 (1986) ("[I]t is the individual who must have the final say in respect to decisions regarding his medical treatment . . . This right extends equally to mentally ill persons who are not to be treated as persons of lesser status or dignity because of their illness"), *superseded by statute on other grounds*, N.Y COMP. CODES R. & REGS. tit. 14, § 27.8 (2023); *see also* N.Y. PUB. HEALTH LAW § 2504 (McKinney 2023). If you are incarcerated in another state, you should research the public laws on this issue.

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

[98] *See* 28 C.F.R. § 549.46(a) (2022). *See* 28 C.F.R. § 549.46(a) (2022). This rule applies to federal prisons, Procedural requirements may vary based on your state and the type of carceral facility where you are held. *See, .e.g,* N.Y. COMP. CODES R. & REGS. tit. 14, § 527.8(c)(5) (2024).

[99] *See* Riggins v. Nevada, 504 U.S. 127, 134, 112 S. Ct. 1810,, 118 L. Ed. 2d 479, (1992) (stating that forcing an incarcerated person to take antipsychotic drugs is not allowed, unless there is "an overriding justification and a determination of medical appropriateness" under the 14th Amendment); *see also* Pabon v. Wright, 459 F.3d 241, 246 (2d Cir. 2006) (holding that since incarcerated people have a right to refuse treatment, they have a right to get enough information about the treatment "to make an informed decision" on whether to accept or refuse it).

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

[101] Washington v. Harper, 494 U.S. 210, 227, 110 S. Ct. 1028, 1039–1040, 108 L. Ed. 2d 178, 201–202 (1990) ("[G]iven the requirements of the prison environment, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to

In a case called *Turner v. Safley*, the Supreme Court decided that the State is allowed to treat a non-consenting incarcerated person with psychotropic drugs as long as the decision is "reasonably related to legitimate penological interests."[102] "Legitimate interests" can include the health and safety of the public, of the incarcerated person, or of the general prison population.[103] Courts will consider these interests when trying to decide whether it was wrong for the state to give you treatment without your consent.

If you think that prison staff have violated your rights by giving you unwanted treatment, you might be able to bring a suit against them for violating your due process rights. Remember from Part B(3)(d) of this Chapter, "How to Bring a Claim Under Section 1983," that you can use Section 1983 to file a claim about any constitutional violation. If you want to bring a Fourteenth Amendment Due Process claim, you should provide evidence that the official's actions were *not* related to a legitimate penological interest. One way you could do this would be to argue that you were not a danger to yourself or others, or that the treatment you received made you sicker or was not in your best medical interest. If you are filing a Section 1983 claim because you did not receive the information necessary to be able to give informed consent to treatment, you should include evidence that if prison officials had told you more about the risks and benefits of the treatment, you would have refused it.[104]

D. Transfers for Treatment

Depending on the state where you live and the correctional facility where you are housed, you might not have access to the types of treatment you want or need. This Part will describe the process of being transferred to a different location to receive treatment. Section 1 will explain what happens when you are transferred and describe the psychiatric facilities in the state of New York. Section 2 will describe your due process rights and explain what you can do if you were transferred without your permission.

1. What Happens When You Are Transferred?

Usually transfers happen when the state decides that an incarcerated person with a mental illness needs more or different treatment than a regular correctional facility can provide. You might be transferred to a hospital or to a facility that is only for people with mental health conditions. These facilities may have staff from a state agency other than the Department of Corrections. For example, The Division of Forensic Services at the New York State Office of Mental Health ("OMH") runs four forensic psychiatric care centers, which are medical facilities that provide examinations and treatment

himself or others and the treatment is in the inmate's medical interest"); *see also* WASH. REV. CODE ANN. § 71.05.020(25) (West 2020). This law defines "gravely disabled" as a condition where a person's mental disorder is so serious that he (a) cannot care for his own health and safety, or (b) is experiencing repeated and increasing loss of control over his actions. The law defines "likelihood of serious harm" as a substantial risk that the person will physically harm himself, someone else, or someone else's property. WASH. REV. CODE ANN. § 71.05.020(37)(a) (West 2020).

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

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

[104] Pabon v. Wright, 459 F.3d 241, 246 (2d Cir. 2006) (holding that, in order to prove that officials violated your right to informed consent, you must show that: 1) government officials did not tell you enough about the treatment for you to make an informed decision; 2) because you couldn't make an informed decision, you were given treatment that you would have refused if you had been informed; and 3) the prison officials acted with deliberate indifference to your right to be informed).

for incarcerated people with mental illness.[105] If you are incarcerated in New York and need acute psychiatric care, you might be transferred to one of those facilities.[106]

If you are transferred to a psychiatric facility, you maintain many of the same rights you had in prison, including the right to treatment and the right to adequate medical care described earlier in this Chapter.

(a) How Long Will You Be Held?

The amount of time you spend in a psychiatric facility is usually up to mental health staff and prison officials, but it *cannot* be longer than your criminal sentence unless you are first granted significant due process protections.[107] Under New York State law, the psychiatric hospital director can apply for a new commitment (keeping you in the facility for longer) after your sentence expires, but they must follow the same rules as they would for a non-incarcerated person (such as giving you a hearing).[108] If the psychiatric hospital director successfully extends your time in a psychiatric facility after you have completed your sentence, you can request another hearing within thirty days for a jury to determine whether you should still be there.[109]

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

You might be allowed to continue receiving good-time credits even while in the hospital.[110] However, in many cases, your good-time credits will be paused when you are hospitalized for mental health treatment.[111] The reason courts have given for this is that good-time credits are supposed to promote the goals of incarceration (including rehabilitation), which does not apply when you are hospitalized because hospitalization has a different goal (treatment).[112] In states that do not allow you

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[105] *Forensic Mental Health Services*, STATE OF NEW YORK, OFFICE OF MENTAL HEALTH, *available at* https://omh.ny.gov/omhweb/forensic/ (last visited Oct. 10, 2023). The OMH's four forensic facilities are in New York City, Central New York, Mid-Hudson, and Rochester. OMH also operates 29 mental health units in regular prisons across the state. To find out if there is a mental health unit in your facility, check the OMH website. *Central New York Psychiatric Center Corrections Based Components*, STATE OF NEW YORK, OFFICE OF MENTAL HEALTH, *available at* https://omh.ny.gov/omhweb/facilities/cnpc/programs.html (last visited Oct. 10, 2023).

[106] *Forensic Mental Health Services*, STATE OF NEW YORK, OFFICE OF MENTAL HEALTH, *available at* https://omh.ny.gov/omhweb/forensic/ (last visited Oct. 10, 2023). These facilities treat incarcerated people in need of inpatient care, but they also treat people who were found incompetent to stand trial, pretrial detainees in need of inpatient care, and civil patients.

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

[108] N.Y. CORRECT. LAW §§ 402(10), 404(1) (McKinney 2023).

[109] N.Y. CORRECT. LAW § 402(11) (McKinney 2023).

[110] For example, the Connecticut Supreme Court has found that incarcerated people who are being treated in a psychiatric facility are still being "imprisoned," so they should get the same good-time credit as incarcerated people in prisons. Murray v. Lopes, 529 A.2d 1302, 1306–1308, 205 Conn. 27, 36–38 (Conn. 1987).

[111] *See*, *e.g.*, Urban v. Settle, 298 F.2d 592, 593 (8th Cir. 1962) (*per curium*) (finding that an incarcerated person who has "been removed to a hospital for defective delinquents" under federal law to determine mental competency is not entitled to receive further good time for conditional release purposes until, in the judgment of the superintendent of the hospital, he has become "restored to sanity or health"); Bush v. Ciccone, 325 F. Supp. 699, 701 (W.D. Mo. 1971) (holding under the express provisions of 18 U.S.C. § 4241, credit for good time is suspended as to an incarcerated person who has been found by a Board of Examiners to be insane or of unsound mind).

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

to continue to earn credits while you are hospitalized, your existing credits may be "held in abeyance" (paused) and restored when you finish treatment.[113]

2. Constitutional Protections Against Transfer

You can voluntarily agree to be transferred to a different facility for mental health treatment. But you can also refuse to be transferred to a psychiatric facility as part of your right to refuse treatment, which this Chapter explains in Part C.[114] As you read in Part C, in some situations your right to refuse is limited, and the state can transfer you for treatment without your permission. In order to do this, the state must take steps to make sure that your constitutional rights are upheld when you are being transferred. This Section will explain your equal protection and due process rights under the Fourteenth Amendment.

(a) Equal Protection Rights

The Equal Protection Clause of the Fourteenth Amendment of the Constitution requires states to apply laws equally to people in similar conditions and circumstances.[115] This means that incarcerated people who are being transferred for mental health treatment have the same basic rights as a non-incarcerated person would get during an involuntary commitment proceeding.[116] For example, in *United States* ex rel. *Schuster v. Herold*, the Second Circuit found that an incarcerated person in New York who was transferred to a psychiatric institution was deprived of equal protection because there was an unlawful difference between procedural protections given to civilians facing involuntary commitment and protections given to incarcerated people.[117]

(b) Due Process Rights

The Due Process Clause of the Fourteenth Amendment of the Constitution prohibits your state from depriving you of life, liberty, or property without due process of law.[118] You have due process protections against things that would cause a significant and abnormal loss. This refers to actions that are different from normal prison policies and conditions, or actions that significantly change the environment, duration, or degree of a prison condition.[119] For example, placement in solitary

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[113] *See, e.g.*, Dobbs v. Neverson, 393 A.2d 147, 150 n.9 (D.C. Cir. 1978) (holding that an incarcerated person transferred from a prison to a hospital under the D.C. transfer statute is not entitled to statutory early release unless restored to mental health).

[114] This only applies to transfers for psychiatric treatment—the Supreme Court has held that regular transfers from one prison to another do not violate Due Process rights unless there is a special reason why you shouldn't be transferred. Montanye v. Haymes, 427 U.S. 236, 242, 96 S. Ct. 2543, 2547, 49 L. Ed. 2d 466, 471 (1976) ("[N]o Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State, whether with or without a hearing, absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events." (citing Meachum v. Fano, 427 U.S. 215, 225, 96 S. Ct. 2532, 2538, 49 L. Ed. 2d 451, 459 (1976) (finding that transferring an incarcerated person from one prison to another within the state's system does not implicate an incarcerated person's liberty interests and does not violate due process))). One situation where the court found that there *was* a special reason for due process rights was when an incarcerated person was going to be transferred to a supermax prison. Wilkinson v. Austin, 545 U.S. 209, 223–224, 125 S. Ct. 2384, 2394–2395, 162 L. Ed. 2d 174, 190–191 (2005) (noting that Ohio's Supermax facility "imposes an atypical and significant hardship under any plausible baseline" and that incarcerated people, therefore, have a liberty interest in not being confined in the facility).

[115] U.S. CONST. amend. XIV, § 1.

[116] United States *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1073 (2d Cir. 1969) ("[W]e believe that before a prisoner may be transferred to a state institution for insane criminals, he must be afforded substantially the same procedural safeguards as are provided in civil commitment proceedings . . .").

[117] United States *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1073 (2d Cir. 1969).

[118] U.S. CONST. amend. XIV, § 1.

[119] Sandin v. Conner, 515 U.S. 472, 486, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418, 431 (1995) (holding that disciplinary segregation of an incarcerated person "did not present the type of atypical, significant deprivation"

confinement may not count as a serious enough loss because it is similar enough to normal prison conditions that due process protections are not necessary.[120] However, a loss of good-time credits may be considered significant because it can change the length of your prison term.[121]

A transfer for mental health treatment is considered serious because it is different than the loss already suffered as a result of prison confinement, and usually involves a significant change in living conditions and type of confinement.[122] In a case called *Vitek v. Jones*, the Supreme Court found that classifying an incarcerated person as mentally ill and moving him to a psychiatric hospital were such serious ("grievous") losses that the State was required to have procedural protections in place to make sure that the loss was fair.[123] These losses included harm to the incarcerated person's reputation and changes in conditions of confinement.[124]

Because of your constitutional right to due process, states must have some procedures in place that they must follow before they can transfer you to a psychiatric facility without your permission. If your state tries to avoid its own laws, it might violate your due process rights.[125] This is because when your state has created laws that protect your liberty interests (for example, by requiring certain conditions be met before you can be transferred), that creates an "objective expectation" (something that you can reasonably count on) that you will not be transferred before those requirements are met.[126] This does not mean that you are completely protected from being transferred—it just means that the State has to follow certain procedures before it is allowed to transfer you. If the State does not follow those procedures, you may be able to file a Section 1983 claim for violation of your due process

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of a state-created liberty interest after comparing conditions inside and outside of disciplinary segregation in the prison and finding that the placement "did not work a major disruption in his environment"); *see also* Tellier v. Fields, 280 F.3d 69, 80 (2d Cir. 2000) (concluding as a matter of law that "a confinement of 514 days under conditions that differ markedly from those in the general population" may be atypical and significant).

[120] Sandin v. Conner, 515 U.S. 472, 486, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418, 431 (1995) (finding segregated confinement that "mirrored" prison conditions was not significant and atypical); *see also* Frazier v. Coughlin, 81 F.3d 313, 317–318 (2d Cir. 1996) (finding no significant deprivation of a liberty interest to an incarcerated person who failed to show that confinement conditions in a SHU were "dramatically different" from basic prison conditions). *But see* Tellier v. Fields, 280 F.3d 69, 80 (2d Cir. 2000) (holding that an extended confinement in a SHU may amount to a deprivation of a liberty interest).

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

[122] Vitek v. Jones, 445 U.S. 480, 493, 100 S. Ct. 1254, 1264, 63 L. Ed. 2d 552, 565 (1980) (finding "transfer of an incarcerated person to a mental hospital is [not] within the range of confinement justified by imposition of a prison sentence"). Confinement in a psychiatric prison unit might be far more restrictive than prison, and therefore might be considered a serious loss, implicating a liberty interest. *See* United States *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1078 (2d Cir. 1969) ("Not only did the transfer effectively eliminate the possibility of [the defendant's] parole, but it significantly increased the restraints upon him, exposed him to extraordinary hardships, and caused him to suffer indignities, frustrations and dangers, both physical and psychological, [that] he would not be required to endure in a typical prison setting").

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

[124] Vitek v. Jones, 445 U.S. 480, 488, 100 S. Ct. 1254, 1261, 63 L. Ed. 2d 552, 561 (1980) (explaining that three factors made the transfer a grievous loss: 1) there was a high risk of stigma associated with a declaration of mental illness; 2) there was an actual change in the type of confinement; and 3) the treatment involved mandatory behavior modification (taking medication that changes behavior). As with challenges to medication over objection, these changes require that the State provide procedural protections).

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

[126] Vitek v. Jones, 445 U.S. 480, 489–490, 100 S. Ct. 1254, 1262, 63 L. Ed. 2d 552, 562–563 (1980) (holding that an incarcerated person had a state-created liberty interest because Nebraska law created an objective expectation that an incarcerated person would not be transferred unless he suffered from a mental disease or defect that could not be adequately treated in the prison).

rights. Courts decide whether the State has enough due process protections by looking at the procedures that are in place and balancing the interests of the State (for example, prison safety) with your liberty interest in freedom from random deprivations (for example, the right to agree or disagree to medication).[127]

Written notice and a hearing are two common examples of procedures that might be required before you can be involuntarily committed to a psychiatric hospital, but the procedures that are in place to protect your rights will be different depending on your state. For example, these are the procedural steps that prison officials must take in New York if they want to transfer you without your permission:

(1) If a doctor thinks you should be transferred to a psychiatric facility because of a mental illness, the doctor will tell the facility superintendent, who will require two other doctors to examine you.[128]

(2) The two new doctors have to consider if there is an option other than taking you to a hospital that would provide appropriate treatment for your mental illness.[129] If you were ever treated by a doctor for mental illness in the past, then the doctors performing your evaluation must try to contact your previous doctor.[130] If there are no other options, the doctors must both agree that you have a mental illness and need care or treatment in order for you to be hospitalized.[131]

(3) If the two doctors agree that you need to be transferred to treat a mental illness, the superintendent will apply to a judge for permission to commit you (send you to a hospital or psychiatric facility).[132]

(4) You should receive notice of any court order committing you to a facility and have a chance to challenge it.[133]

(5) Your spouse, parent, mother, or nearest relative must also receive notice of the decision to commit you. If you have no known relatives within the state, that notice must be given to any known friend of yours.[134]

(6) You have the right to a lawyer, a hearing, an independent medical opinion, and judicial review including a jury trial before you are transferred.[135]

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[127] Wilkinson v. Austin, 545 U.S. 209, 224, 125 S. Ct. 2384, 2395, 162 L. Ed. 2d 174, 191 (2005) ("Because the requirements of due process are 'flexible and call for such procedural protections as the particular situation demands' . . . we generally have declined to establish rigid rules and instead have embraced a framework to evaluate the sufficiency of particular procedures. The framework . . . requires consideration of three distinct factors: 'First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail") (citations omitted).

[128] N.Y. CORRECT. LAW § 402(2) (McKinney 2023). In New York City, the two doctors may examine you in your prison or you may be transferred to a county hospital for the examination.

[129] N.Y. CORRECT. LAW § 402(2) (McKinney 2023).

[130] N.Y. CORRECT. LAW § 402(2) (McKinney 2023).

[131] *See generally* N.Y. MENTAL HYG. LAW § 9.27(a) (McKinney 2020); *see also* United States *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1084 (2d Cir. 1969) (suggesting that to be found in need of care and treatment through inpatient hospitalization, you must be found, after proper procedures, to be so mentally ill that you pose a danger to yourself or others).

[132] N.Y. CORRECT. LAW § 402(1), (3) (McKinney 2023).

[133] N.Y. CORRECT. LAW § 402(3) (McKinney 2023).

[134] N.Y. CORRECT. LAW § 402(3) (McKinney 2023).

[135] N.Y. CORRECT. LAW § 402(3) (McKinney 2023).

However, if the two doctors agree that your mental illness is likely to result in serious immediate harm to you or to other incarcerated people, you can be moved to another facility without a hearing.[136] If that happens, you are still entitled to notice, a lawyer, an independent medical opinion, a hearing, and a jury trial, but only *after* you have been transferred.[137] If you do not live in New York, you should look up the correctional laws of your state to find out what procedural protections you have related to treatment transfers.[138]

There are also some situations where the state can transfer you without following the necessary due process steps:

(1) When the state decides that you pose an immediate threat to yourself or others.[139] These transfers are called "emergency commitments." However, a hearing must be held as soon as possible after commitment.[140]

(2) In some states, when you are being transferred to participate in clinical evaluations (for example, to be examined by a doctor for diagnosis).[141]

(3) When you are being transferred *back* to prison from a psychiatric hospital or unit. In general, there is no liberty interest in remaining in a psychiatric facility.[142] You should check the laws in your state to determine the necessary steps the state must take to transfer you back to prison.

(4) In a few states, procedural protections do not have to occur before transfer, but may instead occur promptly after physical transfer.[143]

For more information on procedural due process, see *JLM*, Chapter 18, "Your Rights at Prison Disciplinary Hearings," and *JLM*, Chapter 23, "Your Right to Adequate Medical Care." If you want to file a lawsuit because you think your constitutional rights were violated during your transfer, read *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law," for guidance.[144]

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[136] N.Y. CORRECT. LAW § 402(9) (McKinney 2023).

[137] N.Y. CORRECT. LAW § 402(9) (McKinney 2023).

[138] You should also note that if you are transferred for mental illness, that does not automatically mean that you have a mental illness for the purposes of other laws in the state. *See In re* Will of Stephani, 250 A.D. 253, 254–257, 294 N.Y.S. 624, 624 (3d Dept. 1937) (finding that an incarcerated person who was determined to be insane by a physician and transferred to a mental health facility was still found mentally competent when he later wrote his will).

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

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

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

[142] *See, e.g.*, Jackson v. Fair, 846 F.2d 811, 814–815 (1st Cir. 1988) (holding that as the incarcerated person did not have a liberty interest in remaining at a psychiatric hospital, no hearing was required before returning the prisoner to prison); D.C. CODE ANN. § 24-503(b) (West 2017).

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

[144] If you are filing a § 1983 claim arguing that your due process rights were violated, you may want to argue that it was not necessary to transfer you because you were not a danger to yourself or others, or that prison officials did not take all of the steps that they were supposed to before transferring you.

E. Mental Illness and Disciplinary Proceedings

This Part describes your rights as an incarcerated person with mental illness at disciplinary hearings and in segregated housing assignments. In New York and other states, laws require prison officials to consider mental health when deciding whether to punish someone for misconduct and to consider giving a lighter punishment to incarcerated people with mental illness. Incarcerated people with mental illness might also be protected from being transferred to isolated housing as a disciplinary measure.

1. Disciplinary Hearings

Some states require prison administrators to consider mental health during disciplinary proceedings. Some ways they might consider your mental health include: 1) deciding if you are mentally competent to participate in the hearing; 2) deciding if you were responsible for your conduct at the time of the incident (or if you should not be held responsible because of your mental state at the time); and 3) whether your mental status means that you should receive a smaller punishment or no punishment for your alleged misconduct.[145]

In New York, courts recognize that at disciplinary hearings prison officials should consider evidence of an incarcerated person's poor mental health at the time of an incident that led to disciplinary charges.[146] The seriousness of the offense or the number of incidents should not influence a determination that deteriorating mental health caused the alleged misconduct.[147] Litigation has also caused New York to change state regulations about disciplinary hearing procedures.[148] Some of the updated regulations include:

- Hearing officers must consider evidence about a person's mental state or intellectual capacity at a disciplinary hearing.[149] They must also consult a health professional about the person's mental condition both at the time of the incident and at the time of the hearing.[150]
- Each maximum-security prison must have a "special housing unit case management committee" with full-time mental health staff.[151] Every two weeks the committees must review the status of everyone incarcerated in the Special Housing Unit (SHU) and may

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[145] In one New York case, an incarcerated person was involved in an incident where he broke various prison rules and was committed to a psychiatric facility for several days. When he returned to the prison, he had a disciplinary hearing. The court found that the hearing officer correctly considered the defendant's mental condition during the hearing and imposed a more lenient sentence because of the mental health evidence. Huggins v. Coughlin, 155 A.D.2d 844, 845, 548 N.Y.S.2d 105, 106–107 (3d Dept. 1989), *aff'd*, 76 N.Y.2d 904, 905, 563 N.E.2d 281, 282, 561 N.Y.S.2d 910, 911 (1990).

[146] *See* N.Y. COMP. CODES R. & REGS. tit. 7, § 254.6(b) (2023) ("When an inmate's mental state or intellectual capacity is at issue, a hearing officer shall consider evidence regarding the inmate's mental condition or intellectual capacity at the time of the incident and at the time of the hearing.").

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

[148] *See, e.g.*, Settlement Agreement, Anderson v. Goord, 87-cv-141 (N.D.N.Y. Dec. 16, 2003) (challenging the adequacy of mental health treatment for incarcerated people in disciplinary housing units at Attica and Auburn Correctional Facilities), *discussed in* Stefen R. Short, *Grassroots Challenges to the Effects of Prison Sprawl on Mental Health Services for Incarcerated People*, 45 FORDHAM URB. L.J. 437, 488–489 (2018).

[149] N.Y. COMP. CODES R. & REGS. tit. 7, § 254.6(b)(1) (2023).

[150] N.Y. COMP. CODES R. & REGS. tit. 7, § 254.6(c)(3) (2023).

[151] N.Y. COMP. CODES R. & REGS. tit. 7, § 310.1 (2023).

recommend that prison officials restore privileges, reduce isolation time, reassign housing, adjust medication, or make treatment transfers.[152]

- In situations where an incarcerated person is found guilty of a charge during a disciplinary hearing, hearing officers must consider evidence about the person's mental health, and may decide to dismiss the charge or lessen any penalty imposed.[153]

For more information on your rights at disciplinary hearings, see *JLM*, Chapter 18, "Your Rights at Prison Disciplinary Proceedings."

2. Conditions of Confinement

This Section explains the rights of incarcerated people with mental illness who are subjected to isolation and solitary confinement. Many courts have recognized that isolating people in Special Housing Units ("SHUs") or "keep-lock" can be extremely harmful.[154] However, no courts have yet found that isolation alone violates your Eighth Amendment right against cruel and unusual punishment.[155] Courts have only found Eighth Amendment violations in situations where isolation creates a significant or unique amount of psychological pain.[156]

Even though it is not automatically unconstitutional to isolate incarcerated people (including those with mental illness), there is evidence that isolation can pose special risks for people with mental illness or who are on the verge of developing mental illness.[157] Because of this, courts might be more

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[152] N.Y. COMP. CODES R. & REGS. tit. 7, § 310.3 (2023).

[153] N.Y. COMP. CODES R. & REGS. tit. 7, § 254.6(f) (2023).

[154] Isolated confinement—and the deprivation of human contact and other sensory and intellectual stimulation it causes—can be extremely harmful to people who have a mental illness and people who do not. *See* Davenport v. DeRobertis, 844 F.2d 1310, 1316 (7th Cir. 1988) ("[T]here is plenty of medical and psychological literature concerning the ill effects of solitary confinement (of which segregation is a variant) . . . ."); Langley v. Coughlin, 715 F. Supp. 522, 540 (S.D.N.Y. 1989) (citing expert's affidavit regarding effects of SHU placement on individuals with mental disorders); Bono v. Saxbe, 450 F. Supp. 934, 946 (E.D. Ill. 1978) ("Plaintiffs' uncontroverted evidence showed the debilitating mental effect on those inmates confined to the control unit."), *aff'd in part and remanded in part on other grounds*, 620 F.2d 609 (7th Cir. 1980); Madrid v. Gomez, 889 F. Supp. 1146, 1235 (N.D. Cal. 1995) (concluding, after hearing testimony from experts in corrections and mental health, that "many, if not most, inmates in the SHU experience some degree of psychological trauma in reaction to their extreme social isolation and the severely restricted environmental stimulation in the SHU"), *rev'd in part on other grounds*, 190 F.3d 990 (9th Cir. 1999); Jones 'El v. Berge, 164 F. Supp. 2d. 1096, 1098–1099 (W.D. Wis. 2001) (finding that conditions of solitary confinement "can be devastating" to mentally ill incarcerated people housed in "supermax" prison); Clark v. Coupe, 55 F.4th 167, 182 (3d Cir. 2022) (recognizing "the right of a prisoner known to be seriously mentally ill to not be placed in solitary confinement for an extended period of time by prison officials who were aware of, but disregarded, the risk of lasting harm posed by such conditions").

[155] *See, e.g.*, Madrid v. Gomez, 889 F. Supp. 1146, 1261 (N.D. Cal. 1995) ("[W]e are not persuaded that the SHU, as currently operated, violates Eighth Amendment standards vis-a-vis all inmates."), *rev'd in part on other grounds*, 190 F.3d 990 (9th Cir. 1999).

[156] Helling v. McKinney, 509 U.S. 25, 34–35, 113 S. Ct. 2475, 2481, 125 L. Ed. 2d 22, 32–33 (1993) (holding that prison conditions that "pose an unreasonable risk of serious damage to [an incarcerated person's] future health" may violate the 8th Amendment); *see also* Madrid v. Gomez, 889 F. Supp. 1146, 1263–64 (N.D. Cal. 1995) (holding incarcerated people must show more than loneliness, boredom, or mild depression to state a claim of cruel and unusual punishment), *rev'd in part on other grounds*, 190 F.3d 990 (9th Cir. 1999); Jackson v. Meachum, 699 F.2d 578, 583 (1st Cir. 1983) (finding that it did not violate the 8th Amendment to keep an incarcerated person with mental illness in isolation because the confinement was not "wanton, unnecessary, or disproportionate" and there was no deliberate indifference to his mental health needs); Hutto v. Finney, 437 U.S. 678, 685–687, 98 S. Ct. 2565, 2570–2571, 57 L. Ed. 2d 522, 531–532 (1978) (length of time in isolation should be considered when determining whether confinement there violates the 8th Amendment ban on cruel and unusual punishment).

[157] Madrid v. Gomez, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995) (finding the risk of isolating incarcerated people with mental illness or those likely to develop mental illness is unreasonable and violates the 8th Amendment because it causes undue suffering), *rev'd in part on other grounds*, 190 F.3d 990 (9th Cir. 1999); Jones 'El v. Berge, 164 F. Supp. 2d 1096, 1125–1126 (W.D. Wis. 2001) (granting preliminary injunction requiring removal of those with serious mental illness from "supermax" prison, which isolates incarcerated people); Gates v. Cook, 376 F.3d 323, 343 (5th Cir. 2004) ("[T]he isolation and idleness of Death Row combined with the squalor, poor hygiene, temperature, and noise of extremely psychotic prisoners create an environment 'toxic' to the prisoners' mental

likely to find that isolation violates the Eighth Amendment when it involves an incarcerated person with mental illness.[158] If you are thinking about filing a Section 1983 claim arguing that your Eighth Amendment rights have been violated by your conditions of confinement, you might want to include evidence showing that your mental illness makes solitary confinement especially harmful to you.

Over the last twenty-five years, a growing number of court decisions in various states have decreased the number of incarcerated people with serious mental illness in isolation, and increased mental health services for incarcerated people who are held in restrictive settings and have serious mental illness.[159] In New York, a 2007 case called *Disability Advocates, Inc. v. New York State Office of Mental Health* led to more legal protections for incarcerated people with mental illness. The group of advocates who brought the case argued that incarcerated people with mental illness in New York were being harmed by disciplinary processes. The case ended in a private settlement where the Office of Mental Health agreed to take steps to protect incarcerated people with mental illness during disciplinary proceedings. Parts of this agreement have now become part of New York Correctional Law, such as:

- The creation of programs in prisons for incarcerated people in need of mental health services, such as therapy and residential mental health units.[160]
- Restrictions on how incarcerated people with mental illness can be disciplined. For example, people in mental health treatment programs can only be sent to segregated housing in situations where there is a threat to them, other incarcerated people, or staff. If a person with mental illness is sent to SHU, a case management committee must review that decision.[161]
- Training for correctional staff about mental illness and mental health treatment.[162]

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health."); Inmates of Occoquan v. Barry, 650 F. Supp. 619, 630 (D.D.C. 1986) (holding that housing incarcerated people with mental illness in segregation unit is inappropriate), *rev'd in part on other grounds sub nom.* Brogsdale v. Barry, 926 F.2d 1184, 1187 (D.C. Cir. 1991); *see also* FRED COHEN, THE MENTALLY DISORDERED INMATE AND THE LAW 11–18 (1998) ("Social science and clinical literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally.").

[158] *See, e.g.*, Casey v. Lewis, 834 F. Supp. 1477, 1548–1549 (D. Ariz. 1993) (condemning placement and retention of incarcerated people with mental illness on lockdown); Langley v. Coughlin, 715 F. Supp. 522, 540 (S.D.N.Y. 1989) (holding that psychiatric evidence that prison officials fail to screen out from SHU "those individuals who, by virtue of their mental condition, are likely to be severely and adversely affected by placement there" raises a triable 8th Amendment issue); Inmates of Occoquan v. Barry, 717 F. Supp. 854, 868 (D.D.C. 1989) (holding that incarcerated people with mental health problems must be placed in a separate area or a hospital and not in administrative/punitive segregation area), *rev'd in part on other grounds sub nom.* Brogsdale v. Barry, 926 F.2d 1184, 1187 (D.C. Cir. 1991).

[159] Ga. Advoc. Off. v. Jackson, No. 1:19-CV-1634-WMR-JFK, 2019 U.S. Dist. LEXIS 238805, at *25 (N.D. Ga. Sept. 23, 2019) (*unpublished*) ("Solitary confinement . . . directly implicates detainees' constitutional right to necessary mental health care when imposed on individuals with serious mental illness. Accordingly, courts have long recognized the harm that isolation inflicts on the seriously mentally ill and have acted to curb the practice.") (citations omitted); Braggs v. Dunn, 257 F. Supp. 3d 1171, 1246–1247 (M.D. Ala. 2017) ("[I]t is categorically inappropriate to place prisoners with serious mental illness in segregation absent extenuating circumstances."); Graves v. Arpaio, 48 F. Supp. 3d 1318, 1336 (D. Ariz. 2014) ("District courts have found that conditions of extreme social isolation . . . likely would cause serious mental illness or a massive exacerbation of existing mental illness for inmates with active mental illness or a history of mental illness. . . . Thus, the confinement in a maximum security housing unit constituted a *per se* violation of the Eighth Amendment only for inmates with active mental illness or a history of mental illness.") (citations omitted); Gates v. Cook, 376 F.3d 323, 342 (5th Cir. 2004) (ordering mental health examinations and care for death row incarcerated people); Jones 'El v. Berge, 164 F. Supp. 2d 1096, 1125–1126 (W.D. Wis. 2001) (granting preliminary injunction requiring removal of those with serious mental illness from "supermax" prison, which isolates incarcerated people); D.M. v. Terhune, 67 F. Supp. 2d 401, 403 (D.N.J. 1999) ("The Special Administrative Segregation Review Committee shall release the prisoner from Administrative Segregation if the prisoner has a history of mental illness and the Committee decides that continued confinement in the unit would be harmful to the prisoner's mental health.").

[160] N.Y. CORRECT. LAW § 401(1) (McKinney 2023).

[161] N.Y. CORRECT. LAW § 401(5)(a)–(b) (McKinney 2023).

[162] N.Y. CORRECT. LAW § 401(6) (McKinney 2023).

- Monitoring of the mental health care that incarcerated people receive, to make sure that it is appropriate.[163]

If you think that you were treated in a way that violates the above laws and you want to bring a lawsuit against a prison official or facility, you must pursue all administrative remedies first, and then file a separate lawsuit. For more information about administrative remedies, see *JLM*, Chapter 15, "Incarcerated Grievance Procedures."

F. Special Considerations for Pretrial Detainees

Pretrial detainees are individuals in custody who have not yet been convicted of a crime or sentenced to prison time, but still must remain in jail because they cannot afford to post bail or they have been determined to be a flight risk or danger to the community. If you are a pretrial detainee, you are considered "innocent until proven guilty," so you have some of the same rights as you would have if you were not in jail.[164]

In *Bell v. Wolfish*, the Supreme Court established that pretrial conditions should not be assessed under the Eighth Amendment, which bans cruel and unusual punishment, because pretrial detainees cannot be punished *at all*.[165] Instead, your claims pretrial will be assessed under the Due Process Clause of the Fourteenth Amendment. Because you have to be found guilty before the state is allowed to punish you, you have more due process rights than incarcerated people serving a sentence.[166] Most of your rights as a pretrial detainee with mental illness will be based on the *Bell* rule.

For more information about filing a constitutional claim as a pretrial detainee, see *JLM*, Chapter 34, "The Rights of Pretrial Detainees," and *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law."

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

In *City of Revere v. Massachusetts General Hospital*, the Supreme Court applied the *Bell* rule (that pretrial detainees have a due process right to not receive punishment) to the medical care context. In *City of Revere*, the Court found that the Due Process Clause requires the government to provide medical care to pretrial detainees in its custody. It also found that pretrial detainees must receive protections "*at least as great as* the Eighth Amendment protections available to a convicted incarcerated person."[167]

This means that you have all of the rights that this Chapter describes in Part B, with one difference. If you are a pretrial detainee who has been denied adequate medical care, your claim will be assessed under the Due Process Clause of the Constitution, not the Eighth Amendment.[168]

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[163] N.Y. CORRECT. LAW § 401-a (McKinney 2023).

[164] *See*, *e.g.*, Campbell v. McGruder, 580 F.2d 521, 527 (D.C. Cir. 1978) (pretrial detainees are presumed innocent and therefore may not be punished); *see also* Jackson v. Indiana, 406 U.S. 715, 729–730, 92 S. Ct. 1845, 1854, 32 L. Ed. 2d 435, 446 (1972) ("[W]e cannot conclude that pending criminal charges provide a greater justification for different treatment than conviction and sentence.").

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

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

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

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

However, many circuit courts apply *Estelle v. Gamble*'s[169] "deliberate indifference" test, even though it is based on the Eighth Amendment, to evaluate pretrial detainees' claims.[170] In some cases, you might be able to argue that you have more rights than people who have been convicted. For example, some courts have found that delaying treatment for pretrial detainees violates the due process rights of pretrial detainees because delaying treatment is a type of punishment and shows deliberate indifference to a serious medical need.[171]

2. Can I Receive Credit for Pre-Sentence Confinement in a Hospital or Treatment Program?

If you are confined in a hospital or treatment facility before starting your criminal sentence in prison, you may be entitled to have your time spent there count toward your sentence. Different states have different rules about whether or not you are allowed to count this time toward your sentence.

Some courts have ruled that if the facility you are in before you receive your sentence is the "functional equivalent of a jail," you may be entitled to credit.[172] Other courts have said that there is a difference between *treatment* and *incarceration* and argued that people should only get custody

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[169] Estelle v. Gamble, 429 U.S. 97, 107, 97 S. Ct. 285, 293, 50 L. Ed. 2d 251, 262 (1976) ("A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice."). For more information on the deliberate indifference standard, which requires showing more than negligence, please see Section B(3) of this Chapter.

[170] *See, e.g.*, Elliott v. Cheshire County, 940 F.2d 7, 10–12 (1st Cir. 1991) (holding that jail officials violated detainees' rights when they exhibited deliberate indifference to medical needs); Hill v. Nicodemus, 979 F.2d 987, 990–992 (4th Cir. 1992) (finding deliberate indifference is the proper standard under which to assess detainees' rights to medical and mental health care); Partridge v. Two Unknown Police Officers, 791 F.2d 1182, 1186–1187 (5th Cir. 1986) (finding pretrial detainees are entitled to at least the level of medical care required under the deliberate indifference test); Heflin v. Stewart County, 958 F.2d 709, 714–717 (6th Cir. 1992) (holding that pretrial detainees must show jail acted with deliberate indifference to serious medical needs), *overruled on other grounds by* Monzon v. Parmer County, NO. 2:06-CV-39-J, 2007 U.S. Dist. LEXIS 43798 (N.D. Tex. June 15, 2007) (*unpublished*); Hall v. Ryan, 957 F.2d 402, 404–405 (7th Cir. 1992) (finding that pretrial detainees are at least entitled to protection from jailers' deliberate indifference); Bell v. Stigers, 937 F.2d 1340, 1342–1343 (8th Cir. 1991) (holding that under either the 8th or 14th Amendments, deliberate indifference is the appropriate standard for assessing pretrial detainees' claims); Redman v. County of San Diego, 942 F.2d 1435, 1441 (9th Cir. 1991) (*en banc*) (finding deliberate indifference is the appropriate test for pretrial detainees' claims, but distinguishing other levels of culpability in the prison context); Howard v. Dickerson, 34 F.3d 978, 980 (10th Cir. 1994) (holding deliberate indifference test applies to pretrial detainees); Cottrell v. Caldwell, 85 F.3d 1480, 1490–1491 (11th Cir. 1996) (rejecting a pretrial detainee's mistreatment claim because of a failure to show subjective deliberate indifference).

[171] *See* Geness v. Cox, 902 F.3d 344, 363 (3rd Cir. 2018). ("[I]t is well-established that the extended imprisonment of pretrial detainees when they have been ordered to receive [mental health] services violates the Constitution." (citing Foucha v. Louisiana, 504 U.S. 71, 77, 112 S. Ct. 1780, 1784, 118 L. Ed. 2d 437, 446 (1992))); Trueblood v. Wash. State Dept. of Soc. & Health Servs., 73 F. Supp. 3d 1311, 1312–1313 (W.D. Wash. 2014) (holding that the state's failure to provide timely mental health services to pretrial detainees violates their due process rights); Terry v. Hill, 232 F. Supp. 2d 934, 943–944 (E.D. Ark. 2002) ("[T]he delay in transferring court ordered pretrial detainees to the [hospital] for [mental health] evaluation or treatment, amounts to punishment for the detainees. . . . [and] the State has been deliberately indifferent to the needs of pretrial detainees."); Hare v. City of Corinth, 74 F.3d 633, 636 (5th Cir. 1996) (*en banc*) ("We hold that the episodic act or omission of a state jail official does not violate a pretrial detainee's due process right to medical care or protection from suicide unless the official acted or failed to act with subjective deliberate indifference to the detainee's rights.").

[172] Maniccia v. State, 931 So. 2d 1027, 1028–1030, 31 Fla. L. Weekly D 1622 (Fla. Dist. Ct. App. 2006) (holding that pretrial confinement in a "lockdown psychiatric hospital" entitles the incarcerated person to credit for time served); *see also* State v. Mackley, 552 P.2d 628, 629, 220 Kan. 518, 519 (Kan. 1976) (*per curium*) ("The physical place of confinement is not important as the [incarcerated person] technically continued to be in jail while held in custody at the hospitals. [The incarcerated person] was not free on bail, had no control over his place of custody and was never free to leave the hospitals. For all practical intents and purposes, he was still in jail."); Murray v. Lopes, 529 A.2d 1302, 1305, 205 Conn. 27, 33–34 (Conn. 1987) (holding that statute entitles incarcerated people confined pre-sentence to credit for time served); People v. Smith, 175 Cal. Rptr. 54, 56, 120 Cal. App. 3d 817, 822 (Cal. Ct. App. 1981) (finding incarcerated person entitled to credits for time spent in hospital when proceedings were suspended because he was incompetent to stand trial); Lock v. State, 609 P.2d 539, 546 (Alaska 1980) (holding that because defendant would be returned to prison if he violated the terms of the drug treatment program, he is entitled to credit for time spent in that program).

credits for incarceration and not for time spent being treated in a psychiatric hospital.[173] Usually, the judge that sentences you is free to decide whether to award you credit for these programs.[174]

3. Unwanted Treatment as a Pretrial Detainee

Just like you have the right to refuse medication while you are in prison, you have the right to refuse treatment if you are a detainee awaiting trial.[175] However, you still do not have a complete right to refuse medication. Even though you have more rights than a convicted incarcerated person, the government may still have an interest in giving you medication that a court will find outweighs those rights. One special circumstance is that the government may give you medication in order to make you competent to stand trial.[176]

In *Sell v. United States*, the Supreme Court created a test that determines whether the government can medicate you without your consent before your trial.[177] *All* of the following conditions must be true before the government is allowed to medicate you before trial: 1) there must be important government interests at stake; 2) involuntary medication must make it substantially likely that you will be able to stand trial; 3) there must be no other solution to this problem; and, 4) medication must be medically appropriate. These requirements are explained in the following Subsections. It is the government's responsibility to show these things, not yours.

(a) Important Government Interests Are at Stake

The Court has held that deciding a person's guilt or innocence for a "serious crime" is an important government interest.[178] However, there is no clear rule defining what counts as a "serious" enough crime. Courts might decide the seriousness of a crime based on the length of the sentence you could receive if you were convicted.[179] For example, one court found that a crime exposing a defendant to a maximum of 10 years of imprisonment was serious enough for the government to argue an important

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[173] *See, e.g.*, People v. Callahan, 50 Cal. Rptr. 3d 677, 683, 144 Cal. App. 4th 678, 687 (Cal. Ct. App. 2006) ("[A] prisoner is not entitled to credit for presentence confinement unless he shows that the conduct which led to his conviction was the *sole reason* for his loss of liberty during the presentence period."); Closs v. S.D. Bd. of Pardons & Paroles, 656 N.W.2d 314, 320–321, 2003 S.D. 1, ¶ 32 (S.D. 2003) ("Because his mental commitment was unrelated to his criminal punishment, [the incarcerated person] was not entitled to credit for the time spent at the [mental health facility]."); *see also* Kansas v. Hendricks, 521 U.S. 346, 369, 117 S. Ct. 2072, 2085–2086, 138 L. Ed. 2d 501, 519 (1997) (holding that involuntary commitment for treatment following incarceration was not a second punishment); Harkins v. Wyrick, 589 F.2d 387, 392 (8th Cir. 1979) (finding time in hospital to be rehabilitative, not punitive); Makal v. Arizona, 544 F.2d 1030, 1035 (9th Cir. 1976) ("The state hospital was established for the confinement, treatment, and rehabilitation of the mentally ill . . . [not] for purposes of punishment . . . .").

[174] *See*, *e.g.*, Commonwealth v. Fowler, 930 A.2d 586, 596, 2007 Pa. Super. 219, 25 (Pa. Super. Ct. 2007) (noting that "it is within the trial court's discretion whether to credit time spent in an institutionalized rehabilitation and treatment program as time served 'in custody'"). *See generally* Rivera v. Superintendent Garman, No. 20-cv-2717, 2020 U.S. Dist. LEXIS 257185, at *13–14 (E.D. Pa. Aug. 24, 2020) (*unpublished*) ("The decision of the trial judge to grant or not grant credit for time served is an issue of state law . . . there is no constitutional right to credit for time served prior to trial or sentence.") (citations omitted).

[175] Riggins v. Nevada, 504 U.S. 127, 137, 112 S. Ct. 1810, 1816, 118 L. Ed. 2d 479, 490 (1992) (holding that the right to refuse psychotropic drugs under *Washington v. Harper* applies "at least as much . . . to persons the State detains for trial"). *See generally* Bell v. Wolfish, 441 U.S. 520, 545, 99 S. Ct. 1861, 1877, 60 L. Ed. 2d 447, 472 (1979) (holding that pretrial detainees enjoy at least as much protection as convicted incarcerated people).

[176] Sell v. United States, 539 U.S. 166, 169, 123 S. Ct. 2174, 2178, 156 L. Ed. 2d 197, 205 (2003) (concluding that the government may administer antipsychotic drugs to pretrial detainees in limited circumstances).

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

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

[179] *See* United States v. Evans, 404 F.3d 227, 237 (4th Cir. 2005) (looking to the maximum statutory sentence to determine whether a crime is "serious"); United States v. Dallas, 461 F. Supp. 2d 1093, 1097 (D. Neb. 2006) ("The seriousness of the crime is measured by its maximum statutory penalty.").

interest in trying the detainee in that case.[180] However, if special circumstances exist that make it less important for the government to prosecute you, the State might not be able to medicate you without your consent.[181]

(b) Involuntary Medication Will "Significantly Further" the Government's Interests and Make Your Competence to Stand Trial Substantially Likely[182]

The government must show that medicating you against your will "significantly" furthers its important interest. This means that the medication must be "substantially likely" to make you competent to stand trial. "Substantially likely" might mean different things in different courts, but if there is a high chance you will be restored to health, it is less likely that you will successfully challenge the government based on the *Sell* test. One court found that a 50% chance of regaining competency before trial was not enough to justify giving him medication over his objection.[183] Another court held that there was a substantial likelihood when the medication had worked for 70% of people in the past.[184] A different court stated that an 80% chance was enough.[185] A psychiatrist will likely testify at your involuntary medication hearing about how high the chance is that the medication will make you competent to stand trial. Some courts have pointed out that it is not very accurate to predict the success rate of forced medication.[186] Therefore, you might be able to argue at a hearing that these methods of deciding likelihood should not be used. You can also argue that the side effects of the medication you are forced to take, even if they are not medically harmful, may affect the ways that you would be able to assist in your defense.[187]

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[180] United States v. Evans, 404 F.3d 227, 232, 238 (4th Cir. 2005) (finding that a defendant facing federal charges for assaulting a federal agricultural employee and threatening to murder a federal judge had committed a "serious" crime).

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

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

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

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

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

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

[187] *See, e.g.*, Sell v. United States, 539 U.S. 166, 181, 123 S. Ct. 2174, 2185, 156 L.Ed.2d 197, 212 (2003) ("[The court] must find that administration of the drugs is substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair."); Riggins v. Nevada, 504 U.S. 127, 137, 112 S. Ct. 1810, 1816, 118 L. Ed. 2d 479, 490 (1992) (concluding that side effects from an antipsychotic medication likely unfairly impaired the incarcerated person's defense at trial); United States v. Brandon, 158 F.3d 947, 955 (6th Cir. 1998) (holding that courts should consider whether medication will affect the defendant's physical appearance at trial or the defendant's ability to aid in the preparation of his own defense).

(c) Involuntary Medication Is Necessary to Further Government Interests, and Less Intrusive Means Are Unlikely to Achieve the Same Result[188]

The Supreme Court requires the government to explore alternatives before deciding to give you medication over your objection.[189] These alternatives might include non-drug therapies. They may also include a court order backed by the court's power to punish you for contempt if you do not comply.[190]

(d) Involuntary Medication Is Medically Appropriate (in Your Best Interest)[191]

If the State is trying to medicate you, they must show that the treatment is in your best interest. If the side effects are too dangerous, for example, a court may deny the government's request to medicate you.[192] Courts have even held that the government must provide evidence that shows how the drugs are likely to affect *you* specifically, which is different from evidence that shows how the drug affects people generally.[193]

In addition to these requirements, you also have the constitutional due process right to avoid unwanted intrusions into your personal liberty. Instead of arguing the *Sell* test, the government can choose to medicate someone for being a risk to themselves and others, as this Chapter describes in Section C(3).[194] The burden on the government is lower if it desires to medicate you for dangerousness reasons rather than to stand trial, but you still have some procedural protections.[195] If the government wants to medicate a pretrial detainee for dangerousness, there must be an administrative hearing.[196] If the government wants to medicate you to be able to stand trial, there must be a full judicial hearing in a court.[197]

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[188] Sell v. United States, 539 U.S. 166, 181, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 212 (2003).

[189] Sell v. United States, 539 U.S. 166, 181, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 212 (2003).

[190] Sell v. United States, 539 U.S. 166, 181, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 212 (2003).

[191] Sell v. United States, 539 U.S. 166, 181, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 212 (2003).

[192] *See* United States v. Evans, 404 F.3d 227, 242 (4th Cir. 2005) (requiring government to state what the likely side effects will be and whether the benefits of treatment are likely to outweigh them); United States v. Cruz-Martinez, 436 F. Supp. 2d 1157, 1162–1163 (S.D. Cal. 2006) (finding that antipsychotic drugs can have severe side effects and that the government had not met its burden of showing that the benefits of giving them to the detainee outweighed the risks).

[193] *See* United States v. Evans, 404 F.3d 227, 241–242 (4th Cir. 2005) (finding fault with government's failure to provide evidence about this particular detained person). *But see* United States v. Baldovinos, 434 F.3d 233, 241–242 (4th Cir. 2006) (finding that involuntarily medicating a mentally ill defendant was not in his best interests and was done solely to make him competent to stand trial, but upholding the conviction after finding that a procedural mistake did not seriously affect the fairness, integrity, or public reputation of the judicial process), *cert. denied*, 546 U.S. 1203, 126 S. Ct. 1407, 164 L. Ed. 2d 107 (2006).

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

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

[196] *See* United States v. White, 431 F.3d 431, 434–435 (5th Cir. 2005) (finding the federal government regulatory scheme entitled pretrial detainee to an administrative hearing on the issue of forcible medication).

[197] United State v. Brandon, 158 F.3d 947, 956 (6th Cir. 1998) (finding that judicial, rather than administrative, hearing is necessary because there is "great risk" in allowing the decision to be made by individuals without legal training).

Another protection that courts have established is the standard of proof that the government must meet when trying to forcibly administer medication to pretrial detainees. Some courts have not yet given an answer to this question, but the general rule is that the government must show medication is necessary by "clear and convincing evidence."[198] The "clear and convincing" standard is easier to meet than the "beyond a reasonable doubt" standard that the government must meet in criminal cases. However, clear and convincing is higher than the "preponderance of the evidence" standard generally used in civil cases and can still be hard to meet. The government is also not allowed to use conclusory evidence to prove its case.[199] Conclusory evidence is evidence that assumes that the point it is trying to make is true even though there is no proof. Though these protections do not offer you an absolute right to avoid treatment, they make it more difficult for the State to take away your rights.[200]

G. Planning for Release

This Part will explain some of the information you might need to know to get mental health care after you are released.

If you are receiving mental health care while incarcerated, your facility might have rules or procedures to help you plan your treatment after you are released. You can ask a prison official who is familiar with your case if they can help you with discharge planning, or research laws and regulations in your state related to continuation of care after release.

If you are incarcerated in New York, a staff member familiar with your case will help you plan. That person will be an OMH staff member (if your facility is one with an Office of Mental Health Satellite Unit), or a local health service provider.[201] One thing that this transition manager can help you with is submitting a Medicaid application and a Medication Grant enrollment form. New York's Medication Grant Program allows you to access your mental health medications until you qualify for Medicaid.[202]

There is no constitutional right to parole.[203] However, the State may not deny a parole hearing to you just because you have a mental illness.[204] At a parole hearing, you also have the right to the same procedures that incarcerated people without mental illness have.[205] If state regulations provide for

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[198] United States v. Gomes, 387 F.3d 157, 160 (2d Cir. 2004) (requiring the government to make its case for involuntary medication with clear and convincing proof); United States v. Bradley, 417 F.3d 1107, 1114 (10th Cir. 2005) (finding that because important interests are involved, the government must prove its case by clear and convincing evidence); United States v. Cruz-Martinez, 436 F. Supp. 2d 1157, 1160 n.3 (S.D. Cal. 2006) (adopting the "clear and convincing" burden of proof standard).

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

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

[201] State of New York, Department of Corrections and Community Supervision, Handbook for the Families and Friends of New York State DOCCS Incarcerated Individuals 29 (2022), *available at* https://doccs.ny.gov/system/files/documents/2023/03/2022-family-handbook-12-12-2022.pdf (last visited Oct. 8, 2023).

[202] *Medication Grant Program*, STATE OF NEW YORK, OFFICE OF MENTAL HEALTH, *available at* https://omh.ny.gov/omhweb/med_grant/mghome.htm (last visited Oct. 8, 2023).

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

[204] Sites v. McKenzie, 423 F. Supp. 1190, 1195 (N.D. W. Va. 1976) (finding an incarcerated person cannot be denied a parole hearing afforded to other incarcerated persons solely because he is in a mental hospital). *See also* Bowring v. Godwin, 551 F.2d 44, 46 (4th Cir. 1977) (reversing dismissal of incarcerated person's complaint that he had been denied parole in part because of his mental illness, for which he had not received treatment).

[205] *See*, *e.g.*, Sites v. McKenzie, 423 F. Supp. 1190, 1195 (N.D. W. Va. 1976) (holding that liberty interest of the

parole and specific conditions of parole, you may have a constitutionally protected liberty interest in the procedures provided by the state statute.[206]

For more information about release and parole, see *JLM*, Chapter 32, "Parole," *JLM*, Chapter 35, "Getting Out Early: Conditional and Early Release," and *JLM*, Chapter 37, "Rights Upon Release."

H. Conclusion

This Chapter discussed special issues for incarcerated people with mental illnesses. For a list of organizations that might be able to help you with legal issues related to your mental illness, see the Appendix to this Chapter.

incarcerated person with mental illness included the right to a parole hearing and the right to several procedural protections).

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

Appendix A

RESOURCES FOR INCARCERATED PEOPLE WITH MENTAL ILLNESS

This is a list of organizations that you might want to contact for help with legal issues related to your mental illness. There might also be other organizations in your area that are not included in this list.

National Organizations

The Bazelon Center for Mental Health Law
1090 Vermont Avenue NW, Suite 220
Washington, DC 20005
Phone: (202) 467-5730
Fax: (202) 223-0409
TDD: (202) 467-4232
Email: request-for-help@bazelon.org
http://www.bazelon.org
To request legal assistance, send an email to the address above, including your name, phone number, city & state, and a description of your legal issue.

The National Disability Rights Network
820 First Street NE, Suite 740
Washington, DC 20002
Phone: (202) 408-9514
TTY: (202) 408-9521
Fax: (202) 408-9520
https://www.ndrn.org/
The national organization does not provide direct legal services to individuals. For the local agency in your state, please go to
https://www.ndrn.org/about/ndrn-member-agencies/.

The National Institute of Mental Health
6001 Executive Blvd., Room 8184, MSC 9663
Bethesda, MD 20892-9663
Email: nimhinfo@nih.gov
Phone: (301) 443-4513
Toll Free: (866) 615-6464
TTY: (301) 443-8431
https://www.nimh.nih.gov/

California

Disability Rights California
1831 K Street
Sacramento, CA 95811
Phone: (800) 776-5746
TTY: (800) 719-5798
http://www.disabilityrightsca.org/

Florida

Disability Rights Florida
2473 Care Drive, Suite 200
Tallahassee, FL 32308
Phone: (850) 488-9071
Toll Free: (800) 342-0823 (in-state)
Fax: (850) 488-8640
TDD: (800) 346-4127
http://www.disabilityrightsflorida.org
Online Intake Form:
https://disabilityrightsflorida.org/contact/intake_form/

Massachusetts

Disability Law Center, Inc.
11 Beacon Street, Suite 925
Boston, MA 02108
Phone: (617) 723-8455
Toll Free: (800) 872-9992
TTY: (800) 381-0577
Fax: (617) 723-9125
https://www.dlc-ma.org/
Online Intake Form: https://www.dlc-ma.org/ask-for-help/

Texas

Disability Rights Texas
7800 Shoal Creek Blvd., Suite 171-E
Austin, TX 78757-1024
Online Intake Form: https://intake.drtx.org/
Phone (Statewide Intake Phone Line): (800) 252-9108
http://www.disabilityrightstx.org

New York

The Urban Justice Center
40 Rector St., 9th Fl.
New York, NY 10006
Phone: (646) 602-5600
Fax: (212) 533-4598
http://www.urbanjustice.org/
Counties Served: Bronx, Brooklyn, Manhattan, Queens

Legal Aid Society: Plattsburgh Office
100 Court Street, P.O. Box 989
Plattsburgh, NY 12901
Phone: (833)-628-0087
Fax: (518) 563-4058
http://www.lasnny.org/
Counties Served: Franklin, Clinton, Essex, Hamilton

Legal Aid Society: Canton Office
17 Hodskin Street
Canton, NY 13617
Phone: (833)-628-0087
Fax: (315) 386-2868
http://www.lasnny.org/
Counties Served: St. Lawrence, St. Regis Indian Reservation

Legal Aid Society: Saratoga Springs Office
40 New Street
Saratoga Springs, NY 12866
Phone: (833)-628-0087
Fax: (518)-587-0959
http://www.lasnny.org/
Counties Served: Saratoga, Warren, Washington

Legal Aid Society: Amsterdam Office
6 Market Street
Amsterdam, NY 12010
Phone: (833)-628-0087
Fax: (877)-324-1848
http://www.lasnny.org/
Counties Served: Fulton, Montgomery, Schoharie

Legal Aid Society: Albany Office
95 Central Avenue
Albany, NY 12206
Phone: (833) 628-0087
Fax: (518) 427-8352
http://www.lasnny.org
Counties Served: Albany, Columbia, Greene, Rensselaer, Schenectady

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

Neighborhood Legal Services, Inc.: Buffalo Office
237 Main Street, Ste. 400
Buffalo, NY 14203
Phone: (716) 847-0650
TTD: (716) 847-1322
Fax: (716) 847-0227
https://nls.org/
Counties Served: Erie

Neighborhood Legal Services, Inc.: Batavia Office
45 Main Street
Batavia, NY 14020
Phone: (585) 343-5450
Fax: (585) 343-5503
Counties Served: Genesee, Orleans, Wyoming

Neighborhood Legal Services, Inc.: Niagara Falls Office
225 Old Falls Street, 3rd Floor
Niagara Falls, NY 14302
Phone: (716) 284-8831
Fax: (716) 284-8040
Counties Served: Niagara

Legal Services of Central New York
Phone (Legal Helpline): (877) 777-6152
http://www.lscny.org/
Counties Served: Broome, Cayuga, Chenango, Cortland, Delaware, Herkimer, Jefferson, Lewis, Madison, Oneida, Onondaga, Otsego, Oswego

Legal Services of Central New York has seven offices and twelve clinics, spread throughout the region that it serves. To find the nearest one to you, please go to https://www.lscny.org/locations/.

Prisoners' Legal Services of New York: Ithaca Office
102 Prospect Street
Ithaca, NY 14850
Email: ebanks@plsny.org
Phone: (607) 273-2283
http://www.plsny.org
Prisons Served: Auburn, Cape Vincent, Cayuga, Elmira, Five Points, Southport, Watertown, Willard

Prisoners' Legal Services of New York: Albany Office
41 State Street, Suite M112
Albany, NY 12207
Email: gdevane@plsny.org
Phone: (518) 438-8046
http://www.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, Wallkill, Walsh, Washington, Woodbourne

Prisoners' Legal Services of New York: Newburgh Office
10 Little Britain Rd., Suite 204
Newburgh, N.Y. 12550
Email: jbrown@plsny.org
Phone: (845) 391-3110
http://www.plsny.org
Prisons Served: Bedford Hills, Downstate, Fishkill, Green Haven, Sing Sing, Taconic

Prisoners' Legal Services of New York: Buffalo Office
237 Maine Street, Suite 1535
Buffalo, NY 14203
Email: dphillips@plsny.org
Phone: (716) 854-1007
http://www.plsny.org
Prisons Served: Albion, Attica, Collins, Gowanda, Groveland, Lakeview, Orleans, Rochester, Wende, Wyoming