

CHAPTER 26

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

A. Introduction

This Chapter explains your legal rights about infectious diseases in prison. This Chapter has information both for prisoners who already have an infectious disease (like HIV/AIDS, tuberculosis, hepatitis B, hepatitis C, or Methicillin-resistant *Staphylococcus aureus* (MRSA)), and for prisoners who want to avoid getting an infectious disease. Part B gives you some basic facts about infectious diseases. Section (1)(a) of Part B also describes how women may have different symptoms of HIV/AIDS. Part C explains the general standard used to determine whether a prison policy is constitutional. Part D is about medical testing for infectious diseases in prisons—whether a prison can force you to get tested or have others tested. Part E discusses disease prevention and segregation issues. Part F discusses the role of confidentiality and what you can expect in terms of keeping your health status private in prison. Part G deals with treatment options and your legal rights to those options. Part H discusses issues of discrimination. Part I discusses sentencing issues. Part J discusses planning for your release, if you have an infectious disease. Finally, Appendix A lists resources for further information, counseling, and support for you and your family.

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

There are more court cases about HIV/AIDS than about tuberculosis, hepatitis B, hepatitis C and MRSA. Because judges always look at the specific facts of each case, try to find cases about your disease. But, you also can try to make comparisons between different diseases and explain how the diseases are very similar, including how they are spread and their effects on prisoners. For example, if you want to use a case about AIDS and argue the law should also apply to hepatitis C, you should try to explain your reasons as clearly as possible.

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

B. Background Information on Infectious Diseases

1. HIV and AIDS

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

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1. Div. of HIV/AIDS Prevention, U.S. Dep’t of Health & Human Servs. What is HIV?, *available at* <http://www.cdc.gov/hiv/resources/qa/definitions.htm> (last visited Aug. 7, 2012). The *JLM* knows that many prisoners do not have access to the Internet, but because we want this information to be up-to-date, we cite frequently to different agencies’ and organizations’ Internet websites.

2. Div. of HIV/AIDS Prevention, U.S. Dep’t of Health & Human Servs., Basic Information about HIV and AIDS, *available at* <http://www.cdc.gov/hiv/topics/basic/index.htm> (last visited Aug. 7, 2012).

About half of people with HIV develop AIDS within ten years of getting HIV. How long it takes for HIV to develop into AIDS is different for each person. Medical treatments can slow down how fast HIV weakens your body.³ As HIV gets worse and becomes AIDS, people become sick with serious illnesses and infections.

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

In 2008, it was estimated that about 1,073,128 people in the United States had been diagnosed with AIDS.⁴ The estimated rate of confirmed AIDS in State and Federal prisons was more than two times higher than in the general population.⁵ In 2007, it was estimated that about 2,675 prisoners in New York State—excluding New York City—were HIV positive, and 3,964 prisoners had AIDS.⁶

HIV is most commonly spread by having unprotected anal, vaginal, or oral sex with a person with HIV; sharing needles or injection equipment with a drug user who has HIV; from an HIV-infected mother to her baby, before or during birth or through breast-feeding;⁷ and through unsanitary tattooing or body piercing procedures.⁸

You cannot get HIV by working with or being around someone who has HIV, or by sharing a cell with another prisoner who is HIV positive. You also cannot get HIV from sweat, spit, tears, clothes, drinking fountains, telephones, toilet seats, or through everyday activities like sharing a meal. HIV is also not transmitted through insect bites or stings, donating blood, or through closed-mouth kissing (although there is a very small chance of getting it from open-mouthed or “French” kissing with someone who is HIV positive because of possible blood contact through open wounds, warts, etc.).⁹

If you are currently HIV negative, you can help avoid getting HIV by taking the following steps:

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

Taking these precautions can help protect you from contracting the HIV infection.

(a) Women and HIV/AIDS

Symptoms of HIV are often different for women than for men. Because these symptoms are typically not associated with HIV, many women go undiagnosed until the virus progresses to AIDS.¹⁰ Early signs for a woman with HIV include gynecological disorders, especially pelvic inflammatory disease (“PID”), infections causing abnormal pap smears (cervical dysplasia), and chronic yeast infections.¹¹ HIV-positive women also have a higher risk of developing cervical cancer.¹² If you are HIV positive, getting a complete gynecological

3. Div. of HIV/AIDS Prevention, U.S. Dep’t of Health & Human Servs., How long does it take for HIV to cause AIDS?, *available at* <http://www.cdc.gov/hiv/resources/qa/definitions.htm> (last visited Aug. 7, 2012).

4. Div. of HIV/AIDS Prevention, U.S. Dep’t of Health & Human Servs., Basic Statistics, *available at* <http://www.cdc.gov/hiv/topics/surveillance/basic.htm#aidsdiagnoses> (last visited Aug. 7, 2012).

5. Office of Justice Programs, U.S. Dep’t of Justice, HIV in Prisons, 2007-2008, Publ’n No. NCJ 228307, *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/hivp08.pdf> (last visited Aug. 7, 2012).

6. Bureau of HIV/AIDS Epidemiology, N.Y. Dep’t of Health, New York State HIV/AIDS Surveillance Annual Report: For Cases Diagnosed Through December 2007, at 46 (May 2009), *available at* http://www.health.state.ny.us/diseases/aids/statistics/annual/2007/2007-12_annual_surveillance_report.pdf (last visited Aug. 7, 2012).

7. Div. of HIV/AIDS Prevention, U.S. Dep’t of Health & Human Servs., How is HIV Passed from One Person to Another?, *available at* <http://www.cdc.gov/hiv/resources/qa/transmission.htm> (last visited Aug. 7, 2012).

8. Div. of HIV/AIDS Prevention, U.S. Dep’t of Health & Human Servs., Can I Get HIV From Getting a Tattoo or Through Body Piercing?, *available at* <http://www.cdc.gov/hiv/resources/qa/transmission.htm> (last visited Aug. 7, 2012).

9. Div. of HIV/AIDS Prevention, U.S. Dep’t of Health & Human Servs., HIV and AIDS: Are You at Risk?, *available at* <http://www.cdc.gov/hiv/resources/brochures/at-risk.htm> (last visited Aug. 7, 2012).

10. See Louise G. Trubek & Elizabeth A. Hoffman, *Vital Issues in National Health Care Reform: Searching for a Balance in Universal Health Care Reform: Protection for the Disenfranchised Consumer*, 43 DePaul L. Rev. 1081, 1087 (1994).

11. Div. of HIV/AIDS Prevention, U.S. Dep’t of Health & Human Servs., HIV/AIDS and Women, *available at* http://www.cdc.gov/hiv/topics/women/overview_partner.htm (last visited Aug. 7, 2012).

12. Nat’l Cancer Inst., What You Need to Know About: Cervical Cancer: Risk Factors, *available at* <http://www.cancer.gov/cancertopics/wyntk/cervix/page4> (last visited Aug. 7, 2012).ev

exam, including an inspection of the cervix (colposcopy) and a pap smear every six months, is important to detect any problems early. If you believe you may be infected with HIV or AIDS, try to get tested.

Appendix A includes several organizations and sources of information about HIV and AIDS. *If you are HIV positive, it is important that you be tested for tuberculosis*, which is a very contagious and serious disease, because HIV-positive people have a much higher risk of getting tuberculosis.¹³

2. Tuberculosis

Tuberculosis (“TB”) is a disease caused by bacteria that are spread through the air. When you breathe in the bacteria, they usually settle in and attack your lungs,¹⁴ but the bacteria can also move to and attack other parts of your body.¹⁵ Outside of prison, TB does not spread that easily, but in prison, TB spreads much more easily because of overcrowding and poor ventilation. People born outside the United States (especially in Latin America, the Caribbean, Africa, Asia, Eastern Europe, or Russia) are more likely to have been infected with the bacteria.¹⁶ People who have spent time in places where TB is common, like homeless shelters, drug treatment centers, health care clinics, jails, and prisons, are also more likely to have TB infection.¹⁷

It is important to know that being infected with the TB bacteria is *not* the same as having TB disease. If you have TB infection (“latent TB”), you will have no symptoms and you cannot spread TB to others. But if you do not get medical treatment, your TB infection can develop into TB disease (“active TB”).¹⁸ If you have active TB, you can have symptoms like a bad cough lasting more than three weeks, pain in your chest, coughing up blood or phlegm, weakness or fatigue, weight loss, no appetite, chills, fever, or night sweating.¹⁹

TB is particularly dangerous for HIV-positive people because of their weakened immune systems. In fact, TB is one of the leading causes of death for HIV-positive people.²⁰ Although ten to fifteen million Americans have latent TB,²¹ only about five to ten percent develop active TB disease during their lives.²² But, people with both HIV and TB bacteria are much more likely to develop active TB than HIV-negative people.²³

Be sure to consult other sources and prison medical professionals if you think you have TB. Active TB disease can be treated and cured if you get medical care, take prescription medication, and follow doctor’s orders.²⁴

13. Div. of Tuberculosis Elimination, U.S. Dep’t of Health & Human Servs., TB and HIV Coinfection, *available at* <http://www.cdc.gov/tb/topic/TBHIVcoinfection/default.htm> (last visited Aug. 11, 2012).

14. Div. of Tuberculosis Elimination, U.S. Dep’t of Health & Human Servs., Basic TB Facts, *available at* <http://www.cdc.gov/tb/topic/basics/default.htm> (last visited Aug. 11, 2012).

15. Div. of Tuberculosis Elimination, U.S. Dep’t of Health & Human Servs., Basic TB Facts, *available at* <http://www.cdc.gov/tb/topic/basics/default.htm> (last visited Aug. 11, 2012).

16. Ctrs. for Disease Control & Prevention, Travelers’ Health-Yellow Book, Chapter 3: Infectious Diseases Related to Travel: Tuberculosis, *available at* <http://wwwnc.cdc.gov/travel/yellowbook/2012/chapter-3-infectious-diseases-related-to-travel/tuberculosis.htm> (last visited Aug. 11, 2012).

17. Ctrs. for Disease Control & Prevention, Travelers’ Health-Yellow Book, Chapter 3: Infectious Diseases Related to Travel: Tuberculosis, *available at* <http://wwwnc.cdc.gov/travel/yellowbook/2012/chapter-3-infectious-diseases-related-to-travel/tuberculosis.htm> (last visited Aug. 11, 2012).

18. Div. of Tuberculosis Elimination, U.S. Dep’t of Health & Human Servs., Basic TB Facts, *available at* <http://www.cdc.gov/tb/topic/basics/default.htm> (last visited Aug. 11, 2012).

19. Div. of Tuberculosis Elimination, U.S. Dep’t of Health & Human Servs., Basic TB Facts: Signs and Symptoms of TB Disease, *available at* <http://www.cdc.gov/tb/topic/basics/signsandSYMPTOMS.htm> (last visited Aug. 11, 2012).

20. Div. of Tuberculosis Elimination, U.S. Dep’t of Health & Human Servs., TB and HIV Coinfection, *available at* <http://www.cdc.gov/tb/topic/TBHIVcoinfection/default.htm> (last visited Aug. 11, 2012).

21. Div. of Tuberculosis Elimination, U.S. Dep’t of Health & Human Servs., Fact Sheet – Trends in Tuberculosis (2010), *available at* <http://www.cdc.gov/tb/publications/factsheets/statistics/TBTrends.htm> (last visited Aug. 11, 2012).

22. Div. of Tuberculosis Elimination, U.S. Dep’t of Health & Human Servs., Fact Sheet – The Difference Between Latent TB Infection and Active TB Disease (2011), *available at* <http://www.cdc.gov/tb/publications/factsheets/general/LTBIandActiveTB.htm> (last visited Aug. 11, 2012).

23. Div. of Tuberculosis Elimination, U.S. Dep’t of Health & Human Servs., TB and HIV Coinfection, *available at* <http://www.cdc.gov/tb/topic/TBHIVcoinfection/default.htm> (last visited Aug. 11, 2012).

24. Div. of Tuberculosis Elimination, U.S. Dep’t of Health & Human Servs., Tuberculosis (TB): Treatment, *available at* <http://www.cdc.gov/tb/topic/treatment/default.htm> (last visited Aug. 11, 2012).

3. Hepatitis B and Hepatitis C

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

(a) Hepatitis B

In 2007, there were about 43,000 new hepatitis B infections in the United States.²⁵ About 2,000 to 4,000 people die each year from hepatitis B.²⁶ The hepatitis B virus, like HIV, is spread by having sex with infected persons without a condom, through sharing needles (“works”) when shooting drugs, through needle sticks or sharp exposures on the job, or from an infected mother to her baby during birth.²⁷ You can avoid getting hepatitis B by taking the same precautions as you would for HIV.

People who have hepatitis B often do not have any symptoms, but can still spread the virus to other people.²⁸ If you do have symptoms, you may develop yellow eyes and skin, tiredness, loss of appetite, dark urine, abdominal pains, and nausea. There are vaccines to protect you from hepatitis B, but once you get hepatitis B, there is no cure. You should still get medical attention, however, because there are medical treatments to help your symptoms.²⁹ If you have hepatitis B, you should get tested for HIV and hepatitis C.

(b) Hepatitis C

Hepatitis C virus (“HCV”) causes hepatitis C. In 2007, there were an estimated 17,000 new hepatitis C virus infections in the United States, and there were about 3.2 million chronically or permanently infected persons.³⁰ Almost 80% of infected persons do not show any signs or symptoms of hepatitis C. Many people infected with hepatitis C may not show any symptoms for twenty or thirty years. Hepatitis C symptoms include yellow skin, dark urine, fatigue, abdominal pain, and loss of appetite.³¹ Most people (around 70%) with chronic HCV infection have some liver damage. If you have hepatitis C, you should not drink alcohol because alcohol can make your liver damage worse.³²

While few people outside of prison have HCV, a very high percentage of prisoners are infected with HCV.³³ To avoid getting hepatitis C, you should:

- (1) Never shoot drugs (if you cannot stop, never reuse or share syringes, water, or “works”);
- (2) Never share toothbrushes, razors, or other personal care items;
- (3) Avoid getting a tattoo or body piercing if there is a chance that someone else’s blood is on the tools or the artist or piercer does not follow good health practices;³⁴
- (4) Avoid having unprotected sex.

Though the risk of spreading hepatitis C through sexual intercourse is low, it is spread through direct contact with infected blood.³⁵ If you have hepatitis C, you should be tested for HIV and hepatitis B.

25. Div. of Viral Hepatitis, U.S. Dep’t of Health & Human Servs., Hepatitis B FAQs for the Public, *available at* <http://www.cdc.gov/hepatitis/B/bFAQ.htm#statistics> (last visited Aug. 11, 2012).

26. Div. of Viral Hepatitis, U.S. Dep’t of Health & Human Servs., Hepatitis B FAQs for the Public, *available at* <http://www.cdc.gov/hepatitis/B/bFAQ.htm> (last visited Aug. 11, 2012).

27. Div. of Viral Hepatitis, U.S. Dep’t of Health & Human Servs., Hepatitis B FAQs for the Public, *available at* <http://www.cdc.gov/hepatitis/B/bFAQ.htm> (last visited Aug. 11, 2012).

28. Div. of Viral Hepatitis, U.S. Dep’t of Health & Human Servs., Hepatitis B FAQs for the Public, *available at* <http://www.cdc.gov/hepatitis/B/bFAQ.htm> (last visited Aug. 11, 2012).

29. Div. of Viral Hepatitis, U.S. Dep’t of Health & Human Servs., Hepatitis B FAQs for the Public, *available at* <http://www.cdc.gov/hepatitis/B/bFAQ.htm> (last visited Aug. 11, 2012).

30. Div. of Viral Hepatitis, U.S. Dep’t of Health & Human Servs., Hepatitis C FAQs for the Public, *available at* <http://www.cdc.gov/hepatitis/C/cFAQ.htm> (last visited Aug. 11, 2012).

31. Div. of Viral Hepatitis, U.S. Dep’t of Health & Human Servs., Hepatitis C FAQs for the Public, *available at* <http://www.cdc.gov/hepatitis/C/cFAQ.htm> (last visited Aug. 11, 2012).

32. Div. of Viral Hepatitis, U.S. Dep’t of Health & Human Servs., Hepatitis C FAQs for the Public, *available at* <http://www.cdc.gov/hepatitis/C/cFAQ.htm> (last visited Aug. 11, 2012).

33. Div. of Viral Hepatitis, U.S. Dep’t of Health & Human Servs., Viral Hepatitis Specific Settings: Correctional Facilities and Viral Hepatitis, *available at* <http://www.cdc.gov/hepatitis/Settings/Corrections.htm> (last visited Aug. 11, 2012).

34. Div. of Viral Hepatitis, U.S. Dep’t of Health & Human Servs., Hepatitis C General Information (2010), *available at* <http://www.cdc.gov/hepatitis/HCV/PDFs/HepCGeneralFactSheet.pdf> (last visited Aug. 11, 2012).

35. Div. of Viral Hepatitis, U.S. Dep’t of Health & Human Servs., Hepatitis C General Information (2010),

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

Staph is a kind of bacteria that can cause various infections, including everything from minor skin problems to serious, fatal infections.³⁶ Methicillin-resistant *Staphylococcus aureus*, or “MRSA,” is a kind of staph not easily treatable with the antibiotics that normally cure a staph infection.³⁷ Many people carry staph bacteria in their nasal passages without getting sick.³⁸ The illness can develop if the bacteria enter the skin, often through a scratch, scrape or another minor wound. Most cases of MRSA happen in healthcare settings like hospitals, but MRSA is also more likely to spread in crowded living conditions, including in dormitories, athletic facilities, and correctional facilities.³⁹

The first symptom of MRSA is usually a skin infection easily mistaken for a pimple, boil or insect bite.⁴⁰ The infection may be painful, swollen, red or produce pus.⁴¹ It can develop into a large abscess or blister.⁴² MRSA is usually treatable, either by draining the wound or taking antibiotics.⁴³ Do not drain the wound yourself, since this can cause the infection to spread.⁴⁴ The infection may return even after treatment.⁴⁵

MRSA and other staph infections can be spread to other people through direct physical contact or, less commonly, through contact with an infected surface or object.⁴⁶ You can reduce the risk of infection by keeping wounds clean, dry and covered.⁴⁷ It is also important to keep shared surfaces clean, wash your hands often (especially after touching a wound), and avoid sharing personal items like razors and clothing.⁴⁸ If you suspect you have MRSA, it is especially important to seek treatment if you have HIV or another immune system problem, because a MRSA infection may lead to more serious problems.⁴⁹

C. Constitutional Rights In A Prison Setting

The rest of this Chapter discusses your rights to treatment for and protection from infectious diseases in prison. It also explains when and how a correctional facility can limit your rights to treatment and protection. This Part explains the general legal standard that courts use to determine if a prison policy is constitutionally valid. Knowing the rule will help you better understand the court decisions in this Chapter.

available at <http://www.cdc.gov/hepatitis/HCV/PDFs/HepCGeneralFactSheet.pdf> (last visited Aug. 11, 2012).

36. Div. of Healthcare Quality Promotion, U.S. Dep’t of Health and Human Servs., Definition of MRSA, available at <http://www.cdc.gov/mrsa/definition/index.html> (last visited Aug. 11, 2012).

37. Div. of Healthcare Quality Promotion, U.S. Dep’t of Health and Human Servs., Definition of MRSA, available at <http://www.cdc.gov/mrsa/definition/index.html> (last visited Aug. 11, 2012).

38. Div. of Healthcare Quality Promotion, U.S. Dep’t of Health and Human Servs., Definition of MRSA, available at <http://www.cdc.gov/mrsa/definition/index.html> (last visited Aug. 11, 2012).

39. Div. of Healthcare Quality Promotion, U.S. Dep’t of Health and Human Servs., Causes of MRSA Infections, available at <http://www.cdc.gov/mrsa/causes/index.html> (last visited Aug. 11, 2012).

40. Tara Parker-Pope, MRSA Warning Signs and Preventive Measures, N.Y. Times, Oct. 27, 2007 at B4, available at <http://www.nytimes.com/2007/10/27/nyregion/27mrsa.html> (last visited Aug. 11, 2012).

41. Div. of Healthcare Quality Promotion, U.S. Dep’t of Health and Human Servs., Symptoms of MRSA, available at <http://www.cdc.gov/mrsa/symptoms/index.html> (last visited Aug. 11, 2012).

42. Tara Parker-Pope, MRSA Warning Signs and Preventive Measures, N.Y. Times, Oct. 27, 2007 at B4, available at <http://www.nytimes.com/2007/10/27/nyregion/27mrsa.html> (last visited Aug. 11, 2012).

43. Div. of Healthcare Quality Promotion, U.S. Dep’t of Health and Human Servs., Treatment of MRSA Infections, available at <http://www.cdc.gov/mrsa/treatment/index.html> (last visited Aug. 11, 2012).

44. Tara Parker-Pope, MRSA Warning Signs and Preventive Measures, N.Y. Times, Oct. 27, 2007 at B4, available at <http://www.nytimes.com/2007/10/27/nyregion/27mrsa.html> (last visited Aug. 11, 2012).

45. Div. of Healthcare Quality Promotion, U.S. Dep’t of Health and Human Servs., Treatment of MRSA Infections, available at <http://www.cdc.gov/mrsa/treatment/index.html> (last visited Aug. 11, 2012).

46. Federal Bureau of Prisons, Clinical Practice Guidelines, Management of Methicillin-Resistant *Staphylococcus aureus* (MRSA) Infections, at 29 (2012), available at <http://www.bop.gov/news/PDFs/mrsa.pdf> (last visited Aug. 11, 2012).

47. Div. of Healthcare Quality Promotion, U.S. Dep’t of Health and Human Servs., Personal Prevention of MRSA Skin Infections, available at <http://www.cdc.gov/mrsa/prevent/personal.html> (last visited Aug. 11, 2012).

48. Div. of Healthcare Quality Promotion, U.S. Dep’t of Health and Human Servs., Personal Prevention of MRSA Skin Infections, available at <http://www.cdc.gov/mrsa/prevent/personal.html> (last visited Aug. 11, 2012).

49. Divya Ahuja, MD, and Helmut Albrecht, MD, HIV and Community-Acquired MRSA, Journal Watch HIV/AIDS Clinical Care (2009), available at <http://aids-clinical-care.jwatch.org/cgi/content/full/2009/209/1> (last visited Aug. 11, 2012).

In general, correctional facilities can limit your constitutional rights if the prison's actions are "reasonably related to a legitimate penological (that is, prison-related) interest."⁵⁰ To decide if a prison policy has a legitimate penological interest, courts look at four factors:

- (1) The existence of a valid, rational connection between the prison policy and a legitimate state interest;
- (2) The existence of alternative means of exercising the right being limited;
- (3) The impact granting the right will have on correction officers, other prisoners, or the allocation of prison resources; and
- (4) Whether the prison policy or regulation is an exaggerated response to prison concerns.⁵¹

These four factors are often referred to as the *Turner* standard, since the Supreme Court first stated this standard in *Turner v. Safley*.⁵²

So, if you think a prison policy illegally violates your constitutional rights, you may want to argue that there is no legitimate penological interest which justifies the violation, or at least, that the interest is not "reasonably related" to the actions or policy of the prison officials. You can also try to argue that there are other ways of accomplishing the same governmental goal without compromising your constitutional rights.

D. Legal Rights Concerning Testing For Infectious Diseases

1. Involuntary Testing

Mandatory testing policies vary widely among states. States may also have different policies for different diseases, so a state may require prisoners to take a TB test but not an HIV test, for example. If you are outside New York State, you should check your state's laws to find out what its testing policies are. Courts generally allow prisons to test prisoners for infectious diseases, even without a prisoner's consent, because courts find that the prevention of disease is a legitimate state interest.⁵³

(a) HIV Testing

In New York State prisons, you normally cannot be tested for HIV without your consent (you must voluntarily agree to be tested).⁵⁴ But, if you are convicted of certain sex offenses, you can be tested for HIV against your will if the victim requests that you be tested.⁵⁵ You will learn your test results and the results will also be sent to the victim, and possibly to the victim's immediate family, guardian, physicians, attorneys, and medical or mental health providers. Contacts of the victim may also be notified if there was a risk of HIV transmission.⁵⁶ Your test results cannot be used against you in a civil or criminal proceeding related to the events that were the basis of your conviction.⁵⁷

Federal prisons, unlike New York state prisons, can require a prisoner to undergo HIV testing, although federal prisons do not test all prisoners. If you have a sentence of six months or more, and if medical personnel think you might be infected with HIV, they may require you to take an HIV test.⁵⁸ If you refuse the test, you might receive an incident report for failing to follow an order.⁵⁹ Also, if you refuse testing, you may not be able to file a claim for failure to receive adequate medical care.⁶⁰ Additionally, federal prisons

50. *Turner v. Safley*, 482 U.S. 78, 87, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 77–78 (1987) (holding that prison systems' regulations of prisoner marriages and prisoner-to-prisoner correspondence must meet a "reasonable relationship" standard).

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

52. *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).

53. *See, e.g., Rossi v. Portuondo*, 277 A.D.2d 526, 527, 714 N.Y.S.2d 816, 817 (3d Dept. 2000).

54. N.Y. Pub. Health Law § 2781(1) (Consol. 2010) (stating consent must be "written" and "informed" from a person who is capable of consenting; if the person is incapable, someone authorized by law may consent for the person).

55. N.Y. Crim. Proc. Law § 390.15(1)(a) (Consol. 2010) (stating that the sex offense must be an act of "sexual intercourse," "oral sexual conduct," or "anal sexual conduct" as defined by N.Y. Penal Law § 130.00).

56. N.Y. Crim. Proc. Law § 390.15(6)(a)(ii) (Consol. 2010).

57. N.Y. Crim. Proc. Law § 390.15(6)(a)(ii) (Consol. 2010).

58. 28 C.F.R. § 549.12(a)(1)(2012).

59. 28 C.F.R. § 549.12(a)(3) (2012). *See* Chapter 18 of the *JLM*, "Your Rights at Prison Disciplinary Hearings," for more information about the consequences of prison incident reports.

60. *Walker v. Peters*, 989 F. Supp. 971, 975 (N.D. Ill. 1997) (finding that deprivation of medication cannot be considered deliberate indifference unless prisoner has received a positive HIV test first). *See* Chapter 23 of the *JLM*,

conduct mandatory random testing once a year. If you test positive, the prison cannot subject you to disciplinary proceedings based solely on your results, though you may be punished if you have performed an act to transmit the disease.⁶¹ Also, federal prisons test prisoners being considered for release, parole, good conduct time release, furlough, or placement in a community-based program. Refusal to be tested may result in an incident report for refusing an order.⁶² If you test positive, the prison cannot deny you participation in activities and programs just because of the result.⁶³

Outside of New York, many states have mandatory HIV testing when you enter prison,⁶⁴ during custody, and/or upon your release.⁶⁵ Despite challenges on the basis of the Eighth Amendment's prohibition against cruel and unusual punishment, the Fourth Amendment's prohibition on unreasonable searches and seizures, the right to privacy, and the Equal Protection Clause of the Fourteenth Amendment, courts tend to uphold involuntary testing on the grounds that it is reasonably related to a legitimate penological interest.⁶⁶

(b) TB Testing

While HIV cannot be passed from person to person by casual contact, TB is spread through the air. So, prison TB testing policies often differ from prison HIV testing policies. In New York State, Department of Correctional Services ("DOCS") policy requires all prisoners entering prison to be tested for tuberculosis. The TB screening includes a chest x-ray and a skin test, where a small amount of purified protein derivative ("PPD") is injected beneath your skin and observed for a reaction. After the initial test, you will be re-tested yearly. If you refuse testing, medical personnel will counsel you as to the benefits of the test. If you still refuse, then you will be placed in medical keeplock (also known as "tuberculin (TB) hold") for up to a year until you have received three negative chest x-rays or you agree to be tested. While in TB hold, you are only allowed one hour of solitary exercise per day and three showers a week. You lose your telephone privileges but can receive visits from lawyers.⁶⁷

Courts have generally upheld the New York State DOCS TB testing policy against challenges claiming violation of the Fourth Amendment protection against unreasonable searches or the Eighth Amendment prohibition against cruel and unusual punishment because they consider the policy to be reasonably related to preventing the spread of tuberculosis in correctional facilities.⁶⁸ Additionally, some courts have upheld

"Your Right to Adequate Medical Care," for more information on the deliberate indifference standard.

61. 28 C.F.R. § 549.13(c) (2012).

62. 28 C.F.R. § 549.12(a)(1) (2012).

63. See 28 C.F.R. § 549.13(b) (2012) (stating that prisoners may be limited in programming if they have an infectious disease which can be transferred through casual conduct, possibly showing that limitations in programming are not allowed based on a prisoner's disease which cannot be passed on through casual conduct (like HIV)). See also 42 U.S.C. § 2000cc-1 (2000) (stating generally that the government shall not impose *substantial burdens* on the religious activity of prisoners unless the government can show that such burdens further a compelling governmental interest using the least restrictive means possible). Various circuits have their own tests for *substantial burden*. This is limited to federally funded programs available to institutionalized persons. See also 42 U.S.C. § 2000d-4a (2002) (defining "program or activity" as "all of the operations of a department, agency, special purpose district, or other instrumentality in a state or local government"). Note that this only applies to religious activity, which means that this law does not prevent you from being excluded from a nonreligious activity if you test positive for HIV. Also, you may still be excluded from religious activities if the government can show a compelling interest in doing so.

64. Alabama, Georgia, Idaho, and Missouri are among the states that mandate testing of prisoners entering the prison system. See Ala. Code § 22-11A-17 (2012) (subjecting all persons sentenced to confinement or imprisonment for more than 30 consecutive days to mandatory testing); Ga. Code Ann. § 42-5-52.1(c) (2012); Idaho Code § 39-604(1) (2012); Mo. Rev. Stat. § 191.659 (2012).

65. Alabama, Idaho, and Missouri are among the states that test upon release. See Ala. Code § 22-11A-17(a) (2012); Idaho Code § 39-604(1) (2012); Mo. Rev. Stat. § 191.659 (2012).

66. See, e.g., *Dunn v. White*, 880 F.2d 1188, 1196-98 (10th Cir. 1989) (finding no 1st, 4th, or 14th Amendment constitutional violations when prisoner alleged he was threatened with disciplinary segregation if he failed to submit to the HIV blood test even though he claimed his religious beliefs did not allow the test).

67. Div. of Health Servs., N.Y. Dep't of Corr. Servs., Health Services Policy Manual, § 1.18, at 6 (June 21, 2004).

68. See *Lee v. Frederick* 519 F. Supp. 2d 320, 327 (W.D.N.Y. 2007) (finding that prisoner's 8th Amendment rights were not violated when he was placed on TB hold because, while plaintiff did suffer some loss of his freedom of movement, he did not present evidence that he suffered a serious deprivation of his rights or that defendants acted with the required state of mind, which is unnecessary and wanton (intentional) infliction of pain); *Delisser v. Goord*, 2003 U.S. Dist. LEXIS 488, at *4, *16, *18-19, *23 (N.D.N.Y. Jan. 15, 2003) (*unpublished*) (holding that prisoner, who was placed in TB hold for a total of 52 days for refusing to submit to PPD test and then for refusing to take TB medication,

mandatory TB testing or confinement in TB hold even if the test is against the prisoner's religious beliefs.⁶⁹ However, DOCS TB policy states that “[a]ccommodations for those with religious objections to tuberculin skin test may be made if they can be done without putting the health of other inmates and staff at significant risk.”⁷⁰ According to the policy, if you refuse the PPD test on religious grounds, you are placed in TB hold while the legitimacy of your objection is determined. If the Chief Medical Officer determines that you sincerely hold a religious belief that prohibits PPD testing, he may request that you take a blood test and chest x-ray instead of the skin test. You will remain in TB hold until the results of the blood test, chest x-ray, and physical examination indicate that you do not have latent TB.⁷¹

If the TB test is against your religious beliefs and you want to challenge the policy as a violation of your First Amendment right to free exercise of religion, you should try to show how the policy, as applied to your particular circumstances, does not make sense.⁷² If you have submitted to the test in the past or are willing to undergo a chest x-ray, you might strengthen your chances of succeeding.⁷³ You may also be able to argue that being placed on TB hold is a violation of your Eighth Amendment right to be free from cruel and unusual punishment. Especially if the ventilation system does not somehow prevent the air that circulates in your cell from reaching other prisoners or staff, you might also be able to argue that the keeplock policy does not make sense as applied to you since it does not help protect others' safety.⁷⁴

did not suffer a violation of his 8th or 14th Amendment rights); *Word v. Croce*, 169 F. Supp. 2d 219, 222, 225 (S.D.N.Y. 2001) (finding that where plaintiff alleged violations of the 4th Amendment because she was put on TB hold, her claims were more appropriately brought under the 8th Amendment, and also finding that the TB hold was not a violation of her Constitutional rights); *Davidson v. Kelly*, 1997 U.S. App. LEXIS 33796, at *4–5, *8 (2d Cir. Nov. 24, 1997) (*unpublished*) (placing a prisoner in TB hold for three days until he agreed to be tested for TB did not violate the prisoner's 8th Amendment rights because it furthered a legitimate penological (prison-related) interest); *Johnson v. Keane*, 1994 U.S. Dist. LEXIS 1228, at *3 (S.D.N.Y. Feb. 9, 1994) (*unpublished*) (holding that the 4th Amendment rights of prisoner, who was confined to his cell after refusing a PPD test on the grounds that he might contract AIDS or be otherwise harmed, were not violated).

69. See, e.g., *Rossi v. Portuondo*, 277 A.D.2d 526, 527, 714 N.Y.S.2d 816, 817 (3d Dept. 2000) (holding that giving prisoners the option of testing or being placed in medical confinement is “reasonably related” to the “legitimate penological interest” of preventing the spread of the disease; therefore, the testing policy did not violate prisoner's 1st Amendment right to free exercise of religion).

70. Div. of Health Servs., N.Y. Dep't of Corr. Servs., Health Services Policy Manual, § 1.18, at 25 (June 21, 2004).

71. Div. of Health Servs., N.Y. Dep't of Corr. Servs., Health Services Policy Manual, § 1.18, at 25 (June 21, 2004).

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

73. See *Selah v. Goord*, 255 F. Supp. 2d 42, 55 (N.D.N.Y. 2003) (holding DOCS TB policy as applied to petitioner was irrational since he had been tested while incarcerated); *Reynolds v. Goord*, 103 F. Supp. 2d 316, 337 (S.D.N.Y. 2000) (holding that Rastafarian prisoner who expected to be in tuberculin hold for a year after refusing a PPD test showed a clear and substantial likelihood of proving at trial that the prison policy as applied violated his 1st Amendment rights).

74. *Jolly v. Coughlin*, 76 F.3d 468, 480 (2d Cir. 1996) (finding a substantial likelihood of an 8th Amendment violation when New York State prison officials placed a prisoner in “medical keeplock” for three-and-a-half years, after the prisoner refused to undergo a TB test for religious reasons). In *Jolly*, the court considered these facts: (1) prisoners who refused to be tested were placed in medical keeplock; (2) medical keeplock did not involve “respiratory isolation” and thus did not reduce the risks of infection; (3) prisoners were allowed to leave their cells only once each week for a 10-minute shower and could leave for meetings with counsel; and (4) plaintiff suffered headaches, hair loss, rashes, and difficulty standing or walking due to his confinement. *Jolly v. Coughlin*, 76 F.3d 468, 472 (2d Cir. 1996). Although the

If you are in a federal prison, you must undergo a PPD test and possibly a chest x-ray when you enter the facility.⁷⁵ If you refuse both tests, the prison will conduct them without your consent.⁷⁶ Refusing to be tested may result in an incident report, although you will not be placed in medical isolation unless there is a clinical indication for such measures.⁷⁷

(c) Hepatitis B and Hepatitis C

New York State does not require HCV testing for all prisoners, but does test all prisoners who are determined to be at high risk.⁷⁸ You are considered to be at high risk of HBV or HCV if you have a history of the following: HIV infection, intravenous drug use, intranasal cocaine use, sexually-transmitted diseases, blood transfusions before July 1992, hemodialysis, infusion of clotting factor before 1987, tattoos or body piercing with non-sterile equipment, solid organ transplants, or symptoms of hepatitis.

In New York State, during your initial health screening, you will be offered a hepatitis B vaccine if you are not currently infected but are at high risk, unless your medical history suggests otherwise. You are considered at high risk if you are eighteen years old or younger and not immune; you have had more than one sex partner in six months; you recently had a sexually-transmitted disease; you are male and have had sex with other men; you inject drugs; you have been exposed to blood or blood-contaminated products; you have had household contact with persons suffering from chronic hepatitis B infection; you are a hemodialysis patient; you take clotting factor concentrates (you are a hemophiliac); or you have chronic hepatitis C and are not immune. The vaccine consists of three doses over six months.⁷⁹

If you are in a federal prison, you will be screened to determine if you are likely to be HBV- or HCV-infected. Similar to the federal prison system's TB policy, refusal to submit to the test will result in an incident report for failure to follow an order.

(d) MRSA

The Federal Bureau of Prisons recommends that all prisoners should be checked for skin infections at their initial intake screening and also after returning from a hospitalization.⁸⁰ Prisoners at high risk for MRSA infections (including those with HIV, diabetes, or open wounds) are supposed to be screened at all routine medical examinations.⁸¹

portion of *Jolly* addressing RFRA violations is no longer good law for state prisoners (see footnote 72), it is still good law for both state and federal prisoners for arguments based on 8th Amendment violations.

75. Fed. Bureau of Prisons, U.S. Dep't of Justice, Program Statement P6190.03, Infectious Disease Management, at 9 (June 28, 2005), available at http://www.bop.gov/policy/progstat/6190_003.pdf; see also *Washington v. Cambra*, 165 F.3d 920, 1998 U.S. App. LEXIS 30072 (9th Cir. 1998) (*unpublished table decision*) (holding that the policy of conducting TB tests was reasonably related to the legitimate penological goal of detecting and containing TB).

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

77. Fed. Bureau of Prisons, U.S. Dep't of Justice, Program Statement P6190.03, Infectious Disease Management, at 8 (June 28, 2005), available at http://www.bop.gov/policy/progstat/6190_003.pdf (last visited Sept. 27, 2012)

78. See Div. of Health Servs., N.Y. Dep't of Corr. Servs., Health Services Policy Manual: Health Appraisal, § 1.19 at 2 (Feb. 20, 2004); Memorandum from Lester N. Wright, Departure Comm'r/Chief Med. Officer N.Y. Dep't of Corr. Servs., on Revised Hepatitis C Primary Care Practice Guidelines to Facility Health Servs. 1 (Mar. 25, 2003).

79. See Div. of Health Servs., N.Y. Dep't of Corr. Servs., Health Services Policy Manual, § 1.19 (Feb. 20, 2004) (outlining the procedure for a prisoner's initial health appraisal upon entry); Div. of Health Servs., N.Y. Dep't of Corr. Servs., Health Services Policy Manual: Standing Orders for Immunizations, § 1.54 (May 11, 2004) (specifying under what circumstances the vaccine should be offered).

80. See Fed. Bureau of Prisons, Clinical Practice Guidelines, Management of Methicillin-Resistant *Staphylococcus aureus* (MRSA) Infections 2 (2012), available at <http://www.bop.gov/news/PDFs/mrsa.pdf> (last visited Aug. 12, 2012).

81. See Fed. Bureau of Prisons, Clinical Practice Guidelines, Management of Methicillin-Resistant *Staphylococcus aureus* (MRSA) Infections 2 (2012), available at <http://www.bop.gov/news/PDFs/mrsa.pdf> (last visited Aug. 12, 2012).

2. Right to Testing upon Request

(a) HIV Testing

Many states provide HIV tests for prisoners upon request. If you are denied a test, you might consider challenging the denial as a violation of the correctional facility's own policy. In New York State prisons, you will be offered a test when you first enter the facility. Also, anonymous testing (where you do not include your identity) is available through the Criminal Justice Initiative ("CJI").⁸²

If you are a federal prisoner, you can request HIV testing, but only once per year.⁸³ More than one federal court does not recognize a constitutional right to HIV testing, especially if you cannot allege specific exposure to HIV.⁸⁴ But, even in those courts, you may have an Eighth Amendment claim if you belong to a high-risk group and are denied an HIV test, since such a denial would prevent you from getting proper medical care. Additionally, if you meet the prison's specified criteria for HIV testing and are still refused a test, you may also have a claim.⁸⁵ You should check to see how the courts in your jurisdiction have decided this issue.

(b) Hepatitis B

If you are in a federal prison, you can request a hepatitis B test after consulting with a Bureau of Prisons' health care provider. However, you can only ask to be tested once per year.⁸⁶

(c) MRSA

If you have a skin infection that may be caused by MRSA, the wound may be tested if your doctor feels it is necessary to determine the proper treatment.⁸⁷

3. Consequences of Testing Positive for HIV in New York

States have different rules about what happens after a prisoner tests positive for HIV. In New York, in order to track HIV/AIDS better and to increase prevention of HIV infection, the state assembly adopted the HIV Reporting and Partner Notification (HIVRPN) law, which became effective in 2000.⁸⁸ This law requires doctors and other medical providers (including the laboratories doing the tests) to report to the Department of Health the names of people infected with HIV, HIV-related illness, or AIDS.⁸⁹ The information is supposed

82. The Criminal Justice Initiative is a project funded by the New York Department of Health's AIDS Institute, in which community-based organizations go into prisons and provide tests, counseling, peer education, and discharge planning. N.Y. Dep't. of Health, Prevention and Support Services, *available at* <http://www.health.state.ny.us/diseases/aids/about/prevsup.htm#cji> (last visited Aug. 12, 2012).

83. 28 C.F.R. § 549.12(a)(4) (2012).

84. *See* St. Hilaire v. Lewis, No. 93-15129, 1994 U.S. App. LEXIS 14867, at *10 (9th Cir. June 7, 1994) (*unpublished*) (finding no constitutional violation for failure to provide an HIV test because prisoner was not a member of a high-risk group and had no alleged exposure to HIV); Doe v. Wigginton, 21 F.3d 733, 738-39 (6th Cir. 1994) (finding no 8th Amendment violation where a prisoner was refused an HIV test because the state policy required an HIV test if a prisoner "provides a presumptive history of exposure" and the prisoner did not provide such information).

85. *See* Doe v. Wigginton, 21 F.3d 733, 739-40 (6th Cir. 1994) (holding the prison did not violate the 8th or 14th Amendments for refusing to test for HIV on request because the prison could reasonably limit the testing based on a prisoner's history, medical symptoms, prior drug use, or sexual activity). It is possible the court would have allowed Doe's claim to prevail if he had given officials information indicating that he met the criteria for testing and was still refused a test.

86. 28 C.F.R. § 549.12(a)(4) (2012) (providing that a prisoner may request to be tested only once per year, unless more testing is determined to be necessary by the Bureau).

87. *See generally* Fed. Bureau of Prisons, U.S. Dept. of Justice, Program Statement P6190.03, Infectious Disease Management, at 3 (June 28, 2005), *available at* http://www.bop.gov/policy/progstat/6190_003.pdf (last visited Aug. 12, 2012).

88. N.Y. Comp. Codes R. & Regs. tit. 10, §§ 63.1-63.11 (2012) 4049-4064. *See also* N.Y. Dept. of Health, HIV Reporting & Partner Notification: What You Need to Know about the Law (2010), *available at* http://www.health.ny.gov/diseases/aids/regulations/reporting_and_notification/about_the_law.htm#quest1 (last visited Aug. 13, 2012).

89. N.Y. Comp. Codes R. & Regs. tit. 10, § 63.4(a)(1) (2012) 4053. *See also* N.Y. Dept. of Health, HIV Reporting and Partner Notification: What You Need to Know about the Law (2010), *available at* http://www.health.ny.gov/diseases/aids/regulations/reporting_and_notification/about_the_law.htm#quest1 (last visited Aug. 13, 2012); New York City Dept. of Health and Mental Hygiene: HIV Reporting/Partner Notification Law (2012),

to remain confidential.⁹⁰ However, New York regulations allow for HIV status to be revealed to employees or agents of the Division of Probation and Correctional Alternatives, Division of Parole, Commission of Correction, or any local probation department. Disclosure of HIV status is only allowed to the extent that the individuals who receive such information are authorized to access records containing such information to carry out their functions, powers, and duties.⁹¹ If you are diagnosed with an HIV-related illness, your medical care provider will ask for the names of your spouse, sexual partners, and/or needle-sharing partners.⁹² If you provide those names, those individuals will receive notice they are at risk of being infected with HIV,⁹³ and they will be offered counseling and HIV testing.⁹⁴ Your name will not be given to them.⁹⁵ You have the right to refuse to give that information at no legal penalty (civil or criminal).⁹⁶

E. Legal Rights and Prevention of Infectious Diseases

1. Prevention and Prison Policy

The government has a duty to provide medical care to the people it incarcerates.⁹⁷ This duty may also include protecting prisoners from infectious diseases, such as tuberculosis (“TB”).⁹⁸ But, it is also very important to take the necessary precautions to protect yourself and others from disease. If you have anal, vaginal, or oral sex, it is extremely important to use latex condoms in order to protect yourself against HIV infection and other sexually-transmitted diseases. This is particularly vital in the prison system, where a higher proportion of the population is HIV-positive. Very few jails or prisons provide condoms for prisoners. A few jails in Los Angeles, New York City, Philadelphia, San Francisco, and Washington, D.C. supply condoms on a limited basis, and Mississippi and Vermont offer condoms to prisoners.⁹⁹ In some prisons, condoms may be considered contraband, so make sure to check whether your prison considers condoms contraband.¹⁰⁰

<http://www.nyc.gov/html/doh/html/ah/ahn1.shtml> (last visited Aug. 13, 2012).

90. N.Y. Comp. Codes R. & Regs. tit. 10, § 63.6 (2012) 4055–4059. *See also* N.Y. Dept. of Health, HIV Reporting and Partner Notification: What You Need to Know about the Law (2010), *available at* http://www.health.ny.gov/diseases/aids/regulations/reporting_and_notification/about_the_law.htm#quest1 (last visited Aug. 13, 2012). This brochure emphasizes that this information is confidential:

Under the law, identifying information about people with HIV infection is ONLY to be used to help the Health Department track the epidemic and for partner notification. The Health Department will NOT disclose this information to other government or private agencies like the United States Citizenship and Services (USCIS), police, welfare, insurance companies or landlords.

91. N.Y. Comp. Codes R. & Regs. tit. 10, § 63.6(a)(13) (2012).

92. N.Y. Comp. Codes R. & Regs. tit. 10, § 63.8(a)(3) (2012).

93. N.Y. Comp. Codes R. & Regs. tit. 10, § 63.8(a)(3) (2012).

94. N.Y. Comp. Codes R. & Regs. tit. 10, § 63.8(g) (2012).

95. N.Y. Comp. Codes R. & Regs. tit. 10, §§ 63.6, 63.8(a)(3) (2012).

96. N.Y. Dept. of Health, HIV Reporting and Partner Notification, N.Y. Dept. of Health, HIV Reporting and Partner Notification: What You Need to Know about the Law (2010), *available at* http://www.health.ny.gov/diseases/aids/regulations/reporting_and_notification/about_the_law.htm#quest1 (last visited Aug. 13, 2012).

97. *See Estelle v. Gamble*, 429 U.S. 97, 103, 97 S. Ct. 285, 290, 50 L. Ed. 2d 251, 259 (1976) (confirming “the government’s obligation to provide medical care for those whom it is punishing by incarceration”). *See* Chapter 23 of the *JLM*, “Your Right to Adequate Medical Care,” for more information on a prison’s duty to provide medical care and what you can do if you are not receiving proper care.

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

99. Beth Shuster, *Sheriff Approves Handout of Condoms to Gay Inmates*, L.A. Times, Nov. 30, 2001, at A38.

100. *See, e.g.*, Karen Cropsey, Gloria Eldridge and Melanie Spector, The American Psychological Association (APA) HIV Office for Psychology Education (HOPE) Training Resource Package, HIV, Mental Health, and Prisons 15, (2006), *available at* <http://www.apa.org/pi/aids/programs/hope/training/index.aspx> (last visited Aug. 12, 2012); Amy Wooten, *House Rejects Prison Condom Bill*, Windy City Times, Mar. 21, 2007, *available at* <http://www.windycitymediagroup.com/gay/lesbian/news/ARTICLE.php?AID=14325> (last visited Aug. 12, 2012); Rebecca Nerenberg, *Spotlight: Condoms in Correctional Settings*, HEPP News, Jan. 2002, *available at*

Prisons have some duty to prevent MRSA's spread once they know infection is present within the prison. As a prisoner, you have limited options to enforce this duty. An Eighth Amendment claim for failing to protect a prisoner from contracting MRSA would have to show the prison's "deliberate indifference" to the prisoner's serious medical needs.¹⁰¹ Courts generally hold that prisons do not have to take every possible measure to prevent MRSA's spread. As long as they take reasonable steps, you cannot make a constitutional claim by showing the prison could have done more.¹⁰²

2. Segregation of Prisoners with Infectious Diseases

(a) Mandatory Segregation

(i) Mandatory Segregation of Prisoners with TB

Prisons may want to segregate (separate) prisoners with infectious diseases from other prisoners to prevent the disease's spread. This type of segregation is often mandatory and involves separate housing. New York law allows prison officials to separate prisoners if a "contagious disease" becomes widespread.¹⁰³ But, New York law also states that all who are "sick shall receive all necessary care and medical assistance," and that all such prisoners should be transferred back to the general population as soon as possible.¹⁰⁴

Because TB can be spread through the air, the law often treats people with TB differently. Prisons *can* usually isolate prisoners who are suffering from TB to prevent the spread of a "contagious disease."¹⁰⁵ New York City law even allows non-incarcerated persons infected with TB to be detained in a hospital in certain circumstances.¹⁰⁶ DOCS TB policy requires prisoners with contagious TB to be placed in respiratory isolation. While in respiratory isolation, you are only allowed to leave the area for certain medical treatment and you will have to wear a surgical mask.¹⁰⁷

(ii) Mandatory Segregation of Prisoners with HIV

Because HIV does not spread as easily as TB, New York state prisons¹⁰⁸ and federal prisons¹⁰⁹ do not determine housing or program assignments based upon HIV status alone. New York prisons are not allowed

<http://www.thebody.com/content/art13017.html> (last visited Aug. 12, 2012).

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

102. See *Lopez v. McGrath*, No. C 04-4782 MHP, 2007 WL 1577893, at *8, 2007 U.S. Dist. LEXIS 39409 at *24–25, (N.D. Cal. May 31, 2007) (stating that while taking more hygienic measures would have reduced the risk of infection, there is no evidence they were necessary to reduce risk to the plaintiff to acceptable levels); *Walker v. Floyd County*, No. 4:07-CV-0014-SEB-WGH, 2007 WL 2237622, at *9, 2007 U.S. Dist. LEXIS 56134 at *25–27 (S.D. Ind. July 31, 2007) (holding that a showing that there were additional measures a prison could have taken to stop MRSA's spread is not enough to demonstrate a constitutional violation).

103. N.Y. Correct. Law § 141 (McKinney 2012).

104. N.Y. Correct. Law § 141 (McKinney 2012).

105. See *Washington v. Cambra*, 1998 U.S. App. LEXIS 30072, at *3 (9th Cir 1998) (*unpublished*) (holding that a policy of testing prisoners twice for TB is reasonably related to the legitimate penological goal of detecting and containing TB and the second test did not violate the prisoner's rights under the 8th or 14th Amendments); *Davidson v. Kelly*, 1997 U.S. App. LEXIS 33796, at *4 (2d Cir. Nov. 24, 1997) (*unpublished*) (holding that placing a prisoner in TB hold for three days until he agreed to be tested for TB did not violate the prisoner's 8th Amendment rights because it furthered a legitimate penological interest); *McCormick v. Stalder*, 105 F.3d 1059, 1061–62 (5th Cir. 1997) (holding that prison policy requiring TB patients to be medicated or isolated was reasonably related to legitimate penological interests); *Dunn v. Zenk*, 2007 U.S. Dist. LEXIS 73891, at *9 (N.D. Ga. 2007) (holding that states have a legitimate penological interest in controlling the spread of tuberculosis so the involuntary administration of a TB test does not offend the Constitution); *Delisser v. Goord*, 2003 U.S. Dist. LEXIS 488, at *16, *18–19, *23 (N.D.N.Y. Jan. 15, 2003) (*unpublished*) (holding that prisoner, who was placed in TB hold for a total of 93 days for refusing to submit to PPD test and then for refusing to take TB medication, did not suffer a violation of his 8th or 14th Amendment rights).

106. See 24 RCNY Health Code § 11.47(d)(1) (2007) (authorizing "the removal to and/or detention in a hospital or other treatment facility for appropriate examination for tuberculosis of a person who has active tuberculosis or who is suspected of having active tuberculosis and who is unable or unwilling voluntarily to submit to such examination by a physician or by the Department"); *City of New York v. Doe*, 205 A.D.2d 469, 469, 614 N.Y.S.2d 8, 9 (1st Dept. 1994) (holding that a patient could be detained pursuant to New York City Health Code § 11.47 where there was no less restrictive way to treat patient's TB infection).

107. Div. of Health Servs., New York Dept. of Corr. Services, Health Services Policy Manual: Tuberculosis, § 1.18 at 10–11 (June 21, 2004).

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

to automatically segregate HIV-positive prisoners. New York state courts have found that mandatory segregation violates your right to privacy—specifically, your right to medical confidentiality—because housing in an AIDS unit tells other prisoners and staff that you are HIV-positive.¹¹⁰ If you are a federal prisoner who has HIV or AIDS, the prison can only separate you if prison officials have reasonable evidence that you pose a health risk.¹¹¹ For more information on confidentiality issues, see Part F of this Chapter, and for information regarding discriminatory treatment based on your health status, see Part H of this Chapter.

Although New York prisons may not automatically segregate HIV-positive prisoners, some states require that all HIV-infected prisoners live separately. Many courts outside of New York have upheld prisons' decisions to segregate HIV-positive prisoners. Courts generally view segregation as a reasonable means to limit other prisoner's exposure to HIV, and courts consider preventing the spread of HIV to be a legitimate interest of prisons.¹¹² Additionally, at least one federal court of appeals found that there is a high risk of transmitting HIV in prison. The prison in question did not present evidence of actual HIV transmission, but the court thought that the mere presence of high-risk behavior—like intravenous drug use, sex, and violent exchanges—was enough to establish a significant risk of transmitting HIV.¹¹³ The court also rejected the prisoners' suggestions to either hire more corrections officers or to identify prisoners who were both HIV-positive and also likely to engage in high-risk conduct. The court found that these two suggestions were unreasonable and created an "undue hardship" on the prison facility.¹¹⁴ The court's ruling might make it more difficult to argue that your segregation is unconstitutional.

(iii) Mandatory Segregation of Prisoners with MRSA

Prisons may segregate prisoners who have active MRSA infections to prevent the spread of the infection to others through contact. The Federal Bureau of Prisons generally recommends, however, that prisoners do not need to be housed separately if they have MRSA wounds that are either not draining or that can be easily covered with bandages.¹¹⁵ As the infection becomes more serious or develops into MRSA pneumonia, separate housing is recommended or required.¹¹⁶ A prison may have the right to threaten you with solitary confinement if you refuse to accept the prison's prescribed treatment for your MRSA infection.¹¹⁷

(iv) Segregation Requested by Prisoners

If you are afraid of contracting an infectious disease, read Part B of this Chapter to get a sense of the steps that you can take to protect yourself. In general, prisoners who are afraid of getting infectious diseases from other prisoners have not been able to successfully sue prison officials. Some prisoners have tried to get prisons to segregate other prisoners who are infected with a communicable disease, but these

109. 28 C.F.R. § 549.13(c) (2012) ("Except as provided for in disciplinary policy, no special or separate housing units may be established for HIV-positive inmates."). However, as a federal prisoner, you can be placed in controlled housing if there is reasonable evidence that you will pose a health risk to others. 28 C.F.R. § 541.61 (2012).

110. See *Nolley v. Erie*, 776 F. Supp. 715, 733–36 (W.D.N.Y. 1991) (holding that segregating HIV prisoners violated constitutional and statutory rights to privacy because HIV status was improperly disclosed to non-medical personnel); *Doe v. Coughlin*, 697 F. Supp. 1234, 1240–41 (N.D.N.Y. 1988) (holding that involuntary segregation of prisoners with HIV or AIDS violates prisoners' right to privacy).

111. 28 C.F.R. § 541.61 (2012).

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

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

114. *Onishea v. Hopper*, 171 F.3d 1289, 1302–04 (11th Cir. 1999) (finding that the cost of special programs to reduce the risk of HIV transmission would be too high).

115. See Fed. Bureau of Prisons, Clinical Practice Guidelines, Management of Methicillin-Resistant *Staphylococcus aureus* (MRSA) Infections 35 (2012), available at <http://www.bop.gov/news/PDFs/mrsa.pdf>.

116. See Fed. Bureau of Prisons, Clinical Practice Guidelines, Management of Methicillin-Resistant *Staphylococcus aureus* (MRSA) Infections 35 (2012), available at <http://www.bop.gov/news/PDFs/mrsa.pdf>.

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

prisoners have been generally unsuccessful. Prisoners who already are infected have also been unsuccessful when they request that the prison give them a single cell or vaccinate other prisoners so that they do not spread their diseases.¹¹⁸ Courts will generally support a prison's decision not to segregate prisoners with HIV-related illnesses.¹¹⁹

Although prisons may have a legal responsibility to protect prisoners from exposure to communicable diseases,¹²⁰ to win a lawsuit against prison officials for exposing you to infectious diseases, you must prove that: (1) there was a specific and significant risk of infection, and (2) prison officials were aware of that risk but disregarded it.¹²¹ In order to win such a lawsuit, you must show that there is a significant possibility that you will contract the virus or disease. For example, some courts have held that this standard is met when prisoners are housed with people who have known MRSA infections. In order to meet the standard, however, the infected prisoner must have open wounds that are not being adequately covered or cleaned and that are likely to infect other prisoners.¹²² You will not win if you only have a general fear of getting the virus.

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

F. Legal Rights and Confidentiality

Under the U.S. Constitution, you have a right to privacy (a "privacy interest") regarding the disclosure of personal matters.¹²³ For information about your medical privacy, please see Part E(2) of Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care."

118. *Johnson v. Horn*, 782 A.2d 1073, 1076–77 (Pa. Commw. Ct. 2001) (refusing to give court order forcing prison officials to assign prisoner to a single cell so he would not spread hepatitis C to other prisoners).

119. *See Glick v. Henderson*, 855 F.2d 536, 539–40 (8th Cir. 1988) (holding that prisoner's fear of contracting HIV either through sharing work assignments with an HIV-infected prisoner or through eating food that might have been prepared by an HIV-infected prisoner, was not sufficient to justify an order to segregate HIV-infected prisoners); *Deutsch v. Fed. Bureau of Prisons*, 737 F. Supp. 261, 267–68 (S.D.N.Y. 1990), *aff'd*, 930 F.2d 909 (2d Cir. 1991) (holding that prisoner did not have the right to have another HIV-positive prisoner segregated unless the prisoner poses a known health risk).

120. *See Hutto v. Finney*, 437 U.S. 678, 682–88, 98 S. Ct 2565, 2569–2572, 57 L. Ed. 2d 522, 529–533 (1978) (finding prison conditions unconstitutional under the 8th Amendment where, among other concerns, prisoners in "punitive isolation" were crowded into cells, and some had infectious conditions such as hepatitis and venereal diseases); *Lareau v. Manson*, 651 F.2d 96, 109 (2d Cir. 1981) (finding that prison's failure to adequately screen incoming prisoners violated the due process and 8th Amendment rights of other prisoners) [overruled in part]; *Smith v. Sullivan*, 553 F.2d 373, 380 (5th Cir. 1977) (stating that leaving persons with communicable or contagious diseases, such as scabies or gonorrhea, without medical attention for over a month and in the midst of other prisoners violated the required standard of adequate medical services).

121. *See Massick v. N. Cent. Corr. Facility*, 136 F.3d 580, 581 (8th Cir. 1998) (holding that there was no 8th Amendment violation when prison officials placed the plaintiff in a cell with an HIV-positive prisoner, who had open bleeding wounds, without warning the plaintiff of his cellmate's HIV status; the court found no constitutional violation, because the risk of plaintiff contracting HIV was small and because prison officials acted reasonably by granting plaintiff's request to change cellmates); *Billman v. Ind. Dep't of Corr.*, 56 F.3d 785, 788–89 (7th Cir. 1995) (holding that prison officials who knowingly and without warning assigned a prisoner to share a cell with an HIV-positive prisoner with a known propensity to rape, constitutes an 8th Amendment violation due to the official's "deliberate indifference" to the "fear and humiliation inflicted by the rape and the fear of contracting the AIDS virus"); *DeGidio v. Pung*, 920 F.2d 525, 532–33 (8th Cir. 1990) (holding that prison officials' pattern of reckless or negligent responses to TB outbreaks was sufficient to constitute deliberate indifference, violating the 8th Amendment).

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

123. *See Whalen v. Roe*, 429 U.S. 589, 599–600, 97 S. Ct. 869, 876, 51 L. Ed. 2d 64, 73 (1977) (finding that the U.S. Constitution protects your right to make personal decisions about the disclosure of your personal information) (non-prison case); *O'Connor v. Pierson*, 426 F.3d 187, 201 (2d Cir. 2005) ("Medical information in general, and information about a person's psychiatric health and substance-abuse history in particular, is information of the most intimate kind.") (non-prison case).

Prisoners with infectious diseases generally have a limited right to keep information about their medical condition confidential. Some courts have held that the right to medical confidentiality also applies to an individual's HIV status.¹²⁴ But, other courts have held that there is no constitutional right to privacy regarding HIV status.¹²⁵ If you are in federal prison, your HIV test results, if positive, must be disclosed to the prison's employees.¹²⁶

In New York state, your HIV-related information cannot be disclosed to anyone other than you and certain individuals or institutions who are authorized to know by law.¹²⁷ Individuals who are authorized to receive your HIV information include health care providers (when knowledge is necessary to provide you with adequate care),¹²⁸ employees of the Division of Parole,¹²⁹ employees of the Division of Probation and Correctional Alternatives or local probation department,¹³⁰ the medical director of the local correctional facility,¹³¹ or an employee or agent of the Commission of Correction.¹³² These authorized individuals are allowed to access your HIV information so far as they need the information to carry out their duties and functions.¹³³

In New York, prisoners have won lawsuits that found statutory and constitutional rights violations when their HIV status was improperly disclosed. In particular, it is not allowed for a prison official to disclose your HIV status to other prisoners or non-medical personnel.¹³⁴ The courts seem to permit disclosure of your HIV status only if such disclosure is reasonably related to legitimate prison interests, like protecting prisoners or corrections officers from infection. But, unnecessary disclosure of such information for humor or gossip violates your constitutional rights.¹³⁵

In other jurisdictions, courts are divided about medical privacy. Some courts find that a prisoner's right to medical privacy is not that strong.¹³⁶ Other courts protect medical privacy rights for prisoners and people

124. See *Doe v. Delie*, 257 F.3d 309, 315–17 (3d Cir. 2001) (finding prisoners have a right to medical privacy and that the right is “particularly strong” regarding one’s HIV status); *Doe v. New York*, 15 F.3d 264, 267 (2d Cir. 1994) (“Individuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition.”).

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

126. 28 C.F.R. § 549.14 (2012).

127. N.Y. Pub. Health Law § 2782 (McKinney 2012). State agencies authorized to obtain confidential HIV-related information should have regulations to prevent discrimination, prohibit unauthorized disclosure, and establish rules for determining who should receive the information and when. N.Y. Pub. Health Law § 2786(2)(a) (McKinney 2012).

128. N.Y. Pub. Health Law § 2782(1)(d) (McKinney 2012).

129. N.Y. Pub. Health Law § 2782(1)(l) (McKinney 2012).

130. N.Y. Pub. Health Law § 2782(1)(m) (McKinney 2012).

131. N.Y. Pub. Health Law § 2782(1)(n) (McKinney 2012).

132. N.Y. Pub. Health Law § 2782(1)(o) (McKinney 2012).

133. N.Y. Pub. Health Law §§ 2782(1)(l)–(o) (McKinney 2012).

134. See *Lipinski v. Skinner*, 781 F. Supp. 131, 140 (N.D.N.Y. 1991) (allowing prisoner to force protected media sources to give testimony in connection with lawsuit against law enforcement officials and prison officials when they disclosed his HIV status to a newspaper); *V. v. New York*, 150 Misc. 2d 156, 157–58, 566 N.Y.S.2d 987, 988–89 (N.Y. Ct. Cl. 1991) (holding that a prisoner stated a proper claim for relief when he accused his prison of improperly revealing his HIV information); *Doe v. Coughlin*, 697 F. Supp. 1234, 1240–41 (N.D.N.Y. 1988) (temporarily forbidding a plan to segregate AIDS prisoners, because it would disclose their AIDS status and therefore violate their right to privacy). *But see Cordero v. Coughlin*, 607 F. Supp. 9, 11 (S.D.N.Y. 1984) (holding that a plan which segregated prisoners with AIDS did not violate the prisoners’ 1st Amendment right to privacy, because the right to privacy is limited by the prison’s needs and by the prisoners’ confinement).

135. See *Powell v. Schriver*, 175 F.3d 107, 112–13 (2d Cir. 1999) (holding that a prison official does not violate a prisoner’s right to medical privacy, if the official’s actions are reasonably related to legitimate prison interests, a prison official does violate a prisoner’s medical privacy if he discloses a prisoner’s medical information as gossip or a joke); see also *Baez v. Rapping*, 680 F. Supp. 112, 115 (S.D.N.Y. 1988) (holding that prison officials did not violate a prisoner’s right to confidentiality when they warned other officials to avoid contact with prisoner’s body fluids). *But see Nolley v. Erie*, 776 F. Supp. 715, 725–28 (W.D.N.Y. 1991) (holding that a policy of putting red stickers on HIV-positive prisoners’ possessions, and therefore revealing prisoners’ HIV status, violated privacy rights under New York law).

136. See *Anderson v. Romero*, 72 F.3d 518, 523–24 (7th Cir. 1995) (holding that prisoners do not have a constitutional right to the confidentiality of their HIV status, especially in light of the fact that HIV-positive prisoners could be identified when segregated from the rest of the prison population); *Doe v. Wigginton*, 21 F.3d 733, 740 (6th Cir. 1994) (holding that the prisoner’s right to privacy was not violated when a corrections officer opened his file in the presence of other witnesses after the prisoner refused to answer questions about his medical condition); *Adams v. Drew*,

who are arrested.¹³⁷ But now that the Prison Litigation Reform Act (PLRA) has been passed, similar cases brought today might turn out differently. For more information on the PLRA, see Chapter 14 of the *JLM*. It is important to remember that the PLRA requires a showing of *physical injury*, not just mental or emotional injury, to recover monetary damages. Thus, to be successful in a lawsuit, you would probably have to prove that the prison official's actions physically injured you. Some courts may require you to show the harm is likely to occur again to get injunctions (orders requiring officials to stop or change a policy).¹³⁸

G. Legal Rights and Medical Treatment

1. Right to Medical Treatment

If you are denied medical treatment for an infectious disease, you may have a claim that the prison violated your rights under the Eighth Amendment. The Eighth Amendment protects you from cruel and unusual punishment. To win an Eighth Amendment claim, you must prove that prison officials showed "deliberate indifference" to your "serious medical needs."¹³⁹ It is important to remember that courts do not think that every claim of inadequate medical care is bad enough to be a constitutional violation.¹⁴⁰ But a few courts have held that a denial of prescribed AIDS or hepatitis C medical treatment does violate a prisoner's constitutional rights.¹⁴¹ See Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care," for more information on how to bring an Eighth Amendment claim for failure to provide adequate medical treatment.

Courts generally do *not* believe prisoners have a constitutional right to a private doctor or experimental medication.¹⁴² You may still be able to get experimental drugs, but you will probably not have an Eighth Amendment claim against your facility if it does not prescribe them for you. But some prisons have participated in clinical trials for anti-retroviral therapy for AIDS. To take part in such trials, you must first get approval from the Institutional Review Board of the testing site and your prison's medical department.¹⁴³

If you believe that your health is suffering because you are being wrongfully denied medication, you will probably have to show that the medical community agrees that this medication will help your condition.

906 F. Supp. 1050, 1055–58 (E.D. Va. 1995) (stating that prison officials' unintentional disclosure of prisoner's HIV status to another prisoner did not violate right to privacy).

137. See *A.L.A. v. W. Valley City*, 26 F.3d 989, 990–91 (10th Cir. 1994) (stating that an arrestee brought a valid claim against the police for disclosing that he was HIV-positive to his family and strangers, even though it was later found that the arrestee was not HIV-positive).

138. *Davis v. District of Columbia*, 158 F.3d 1342, 1346–47 (D.C. Cir. 1998) (holding that an HIV-positive prisoner could not obtain an injunction against prison officials for the unauthorized disclosure of his medical files because he could not show a threat that it might happen again).

139. *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998) (describing the standard for bringing an 8th Amendment claim for failure to receive proper medical care) (citing *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976)). HIV and hepatitis are generally considered "serious medical needs." *Brown v. Johnson*, 387 F.3d 1344, 1351 (11th Cir. 2004).

140. See *Smith v. Carpenter*, 316 F.3d 178, 184, 186–87 (2d Cir. 2003) (citing *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976)) (holding that brief interruptions of HIV medications, with no noticeable bad effects, was not a denial of serious medical needs. However, the court also noted that a showing of increased risk, even without noticable symptoms, might be serious enough to be denial of medical care).

141. See *Montgomery v. Pinchak*, 294 F.3d 492, 500 (3d Cir. 2002) (finding HIV-positive prisoner's claim regarding violation of his right to adequate medical treatment had merit and holding that because HIV is a life-threatening disease if left untreated, the prisoner had met the serious medical need prong of *Estelle v. Gamble*). *But see Johnson v. Wright*, 412 F.3d 398 (2d Cir. 2005) (finding that although a facility's refusal to give a prisoner the medication most prisoners received for hepatitis C because he had used illegal drugs constituted deliberate indifference, there was medical reason for denying the prison therapy); *Niemiec v. Maloney*, 448 F. Supp. 2d 270 (9th Cir. 2006) (finding that the denial of a medicine subsequent to a failed drug test does not violate Due Process under the 14th Amendment, especially given that a decision to deny the medicine to active drug users is in accord with medical custom).

142. See *Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir. 1998) ("[M]ere disagreement over the proper treatment does not create a constitutional claim."); *McKenna v. Wright*, 01 Civ. 6571 (WK), 2002 U.S. Dist. LEXIS 3489, at *21 (S.D.N.Y. Mar. 4, 2002) (*unpublished*) (dismissing plaintiff's claim on the basis that the doctor's treatment decision was his medical judgment and consistent with current medical literature); *Carter v. Cash*, No. 92 Civ. 5526 (JG), 1995 U.S. Dist. LEXIS 22209, at *2–3 (E.D.N.Y. May 31, 1995) (*unpublished*) (finding that prisoner was not entitled to medication of his choice if doctor decided, based on his professional judgment, that it would not be in the prisoner's best interest).

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

Otherwise, the court may see your claim as a simple disagreement between you and your doctor.¹⁴⁴ If you want to bring a claim about medical treatment or medication that was denied to you sometime in the past, a court may look back to see what the accepted medical practices were at that time.¹⁴⁵

If you got medical treatment but you think that a prison doctor incorrectly diagnosed your condition, it will be hard to bring a successful case against the prison officials. In the past, courts have dismissed cases for different reasons. The reasons include because the prisoner could not prove that the prison officials had personal involvement.¹⁴⁶ In other cases, the prisoner could not show any physical harm, or the prisoner could not show that his needs were ignored.¹⁴⁷

If you have hepatitis C and prison officials determine that you should receive a certain treatment for a certain length of time, and you are then denied that treatment, you may have a claim under the Eighth Amendment. The first requirements to bring a claim will be met if you can say that the removal from the prescribed treatment is risking your life by not treating your disease.¹⁴⁸ You do *not* have to also claim that you have suffered a separate harm in addition to your disease in order to bring your claim.¹⁴⁹ Meeting these requirements allows you to begin your case, but does *not* mean that you will win. You will still need to show that there was “deliberate indifference” to your medical needs.¹⁵⁰

This does not change the rule that courts do not like to question doctors’ medical decisions. If you have received treatment for hepatitis C but think you should have been given different treatment,¹⁵¹ or if your doctors said you do not have a condition requiring any treatment, this rule will *not* allow you to bring suit.¹⁵²

2. Right to Refuse Medical Treatment

Some people, for a variety of reasons, choose to refuse medical treatment. Competent people—people who can think and understand well enough to make medical decisions for themselves—have the right to refuse treatment, even if it means they will die as a result.¹⁵³ However, your right to refuse treatment is limited as

144. See *Perkins v. Kansas Dep’t of Corrs.*, 165 F.3d 803, 811 (10th Cir. 1999) (upholding the denial of protease inhibitor to prisoner with HIV because other treatment was provided); *Loch v. County of Bucks*, No. 03-CV-4833, 2006 WL 2559296, at *3, 2006 U.S. Dist. LEXIS 62620, at *10–11 (E.D. Pa. Sept. 1, 2006), available at <http://www.paed.uscourts.gov/documents/opinions/06D1114P.pdf> at 5 (last visited Aug. 14, 2012) (holding that a prisoner who had been treated for conditions including MRSA did not assert a constitutional violation simply because they claim the treatment they received was inadequate); *Matthews v. Crosby*, No. 3-06-CV-38, 2006 U.S. Dist. LEXIS 35049, at *7 (N.D. Fla. May 31, 2006) (holding that a complete denial of available treatment, but not a dispute over the care received, could be a constitutional violation).

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

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

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

148. See *Erickson v. Pardus*, 551 U.S. 89, 93, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081, 1085 (2007) (holding that the pleading requirements of Federal Rule of Civil Procedure 8(a)(2) were met by statements that a prisoner with hepatitis C had been removed from his prescribed course of treatment and denied all treatment for his disease due to suspicion of drug use).

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

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

151. See *Loukas v. Mich. Dep’t of Corr.*, No. 2-07-CV-142, 2008 U.S. Dist. LEXIS 14724, at *2 (W.D. Mich. Feb. 27, 2008) (holding that a prisoner who has received medical care, but just questions whether the treatment he has been receiving is adequate, does not have an 8th Amendment claim).

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

153. For New York law, see N.Y. Pub. Health Law §§ 2960–79 (McKinney 2007) (“Orders Not to Resuscitate”) (regulating right of “adult with capacity” to direct issuance of orders not to resuscitate); N.Y. Pub. Health

a prisoner.¹⁵⁴ Most courts have held that prisons can treat TB-infected prisoners without their consent.¹⁵⁵ Courts balance your interest in refusing treatment with the prison's "legitimate penological interest" in preventing the spread of disease. Courts will also consider whether the prison's actions are reasonably related to the prison's interests. If you do not have a disease that is transmitted through air, the prison will have a weaker argument for forcing you to take medication than if you have a disease such as TB that is easily spread. See Part C of Chapter 29 of the *JLM*, "Special Issues for Prisoners with Mental Illness," for more information about your right to refuse medical treatment.

H. Discriminatory Treatment and Infectious Diseases

1. Constitutional Rights

The Fourteenth Amendment may protect you from being discriminated against for having an infectious disease. For example, your rights under the Equal Protection Clause of the Fourteenth Amendment prohibit discrimination by the state that is not rationally related to a legitimate purpose.¹⁵⁶ The Due Process Clause of the Fourteenth Amendment forbids the prison facility from taking away your life, liberty, or property without due process of law.¹⁵⁷ The Eighth Amendment protects you from "cruel and unusual punishment."¹⁵⁸ Keep in mind, however, that the courts balance these constitutional rights against legitimate penological interests,¹⁵⁹ which may allow prison officials to lawfully infringe upon your rights. Prison policies are valid if they are reasonably related to a legitimate penological interest; however, the prison is required to use the least restrictive means of achieving the goals of the policy.¹⁶⁰

If you bring a suit challenging a prison practice under the Fourteenth Amendment's Due Process Clause, you must prove you were entitled to something the prison took away.¹⁶¹ Any entitlement must be created by

Law §§ 2980–94 (McKinney 2007) ("Health Care Agents and Proxies") (allowing appointment of agents to make important health care decisions including the refusal of life-saving treatment for the appointer); *Quill v. Koppell*, 870 F. Supp. 78, 84 (S.D.N.Y. 1994) ("It is established under New York law that a competent person may refuse medical treatment, even if the withdrawal of such treatment will result in death."). See also *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996) (holding that physicians can prescribe death-inducing drugs for mentally competent patients who wish to end their lives during the end stages of terminal illness. This case could help the argument that a competent person may refuse medical treatment, even if such refusal will result in death).

154. See *Washington v. Harper*, 494 U.S. 210, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990) (recognizing 14th Amendment right to refuse medical treatment, using *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), to balance prisoner's rights against the state's duty to treat mentally ill prisoners and protect the safety of prisoners and correction officers, and finding the state did not deprive right to refuse treatment without due process).

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

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

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

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

159. See *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987) (analyzing whether a prison regulations that burden fundamental rights are "reasonably related" to legitimate penological objectives).

160. See *Turner v. Safley*, 482 U.S. 78, 91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 80 (1987) ("But if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." This means if a prisoner can point to a different procedure not requiring more money or time, the alternative can be used as evidence that the challenged policy is not reasonable); *Perkins v. Kan. Dep't of Corr.*, 165 F.3d 803, 810–11, (10th Cir. 1999) (holding HIV-positive prisoner could claim a constitutional violation for being forced to wear a face mask whenever he left his cell and noting that wearing such a mask could become a humiliating form of branding that violated the 8th Amendment's prohibition of punishing individuals for a physical condition). *But see Parker v. Proffit*, Civ. A. No. 94-00815-R, 1995 U.S. Dist. LEXIS 15941, at *19–21 (W.D. Va. Oct. 27, 1995) (*unpublished*) (stating that making an HIV-positive prisoner wear a mask and protective clothing may have caused some embarrassment, but the practice did not rise to a constitutional violation of the 8th Amendment prohibition on cruel and unusual punishment).

161. See *Anderson v. Romero*, 72 F.3d 518, 527 (7th Cir. 1995) (ruling that a state statute making prisons provide "barber facilities" gave the plaintiff an entitlement to a haircut, and keeping plaintiff from this entitlement because of

state law. If you think you are entitled to something, you should first determine whether or not a state statute or regulation gives you a right to that entitlement. Also know that prison officials *can* treat prisoners with infectious diseases differently from other prisoners if they have legitimate penological interests in doing so.¹⁶² But, the reasons must be rational and not purely discriminatory.

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

2. Statutory Rights

Certain laws protect you from forms of discrimination based on disabilities, including HIV status. The Federal Rehabilitation Act of 1973 ("FRA") prohibits discrimination, or denial of programs or benefits based on disability, by a federal, state, or local government agency, or any recipient of federal funding.¹⁶³ Similarly, the Americans with Disabilities Act ("ADA") prohibits public and private entities from discriminating, excluding, or denying services, programs, or activities to a person with a disability.¹⁶⁴ These laws recognize TB and HIV infection as a form of disability because they are physical impairments limiting major life activities.¹⁶⁵ Also, in *Bragdon v. Abbott*, the Supreme Court clearly stated that under the ADA, "HIV infection satisfies the . . . definition of a physical impairment during every stage of the disease."¹⁶⁶

Although HIV is viewed as a disability according to the FRA and the ADA, your rights are limited to some extent if: (1) your HIV infection poses a significant risk to the health or safety of others; or (2) it would be an undue hardship on the prison facility to accommodate your needs.¹⁶⁷ Also, the U.S. Supreme Court has decided that individuals cannot recover monetary damages from the state for its failure to comply with the ADA.¹⁶⁸ However, you can still seek injunctive relief, which means that you can file a claim in which you ask the court to require the state to end practices that violate the ADA.¹⁶⁹

his HIV status deprived him of his property and liberty rights under the 14th Amendment's Due Process Clause).

162. See *Laureano v. Vega*, 92 Civ. 6056 (LMM), 1994 U.S. Dist. LEXIS 2107, at *23–24 (S.D.N.Y. Feb. 25, 1994) (*unpublished*), *aff'd*, 40 F.3d 1237 (2d Cir. 1994) (rejecting prisoner's claim that he had received difficult work assignments because of his HIV status; holding that he had failed to establish any retaliatory motive by prison officials and that there is no right to a particular prison job); *Farmer v. Moritsugu*, 742 F. Supp. 525, 528 (W.D. Wis. 1990) (finding that prison had legitimate interest in maintaining security and order and therefore refusal of HIV-infected prisoner's request for food service job was not denial of equal protection); *Doe v. Coughlin*, 71 N.Y.2d 48, 54, 56, 60, 518 N.E.2d 536, 540, 541, 544, 523 N.Y.S.2d 782, 786, 787, 790 (N.Y. 1987) (upholding prison officials' refusal to allow a prisoner with AIDS to participate in a Family Reunion Program and holding that prisoner's privacy rights and his rights under the Due Process Clause and the Equal Protection Clause had not been violated, reasoning that there is no right to marital relations and that the prison officials had a rational basis to believe that such visits would help the spread of a disease). Note, however, the New York State Department of Corrections' official policy does not currently deny participation in the Family Reunion Program based solely on the HIV status of the prisoner. Instead, there is a special review of each prisoner's application because of potential health risks to the visitor. N.Y. Comp. Codes R. & Regs. tit. 7 §§ 220.2–220.9 (2012).

163. 29 U.S.C. § 701(a)–(c) (2012).

164. 42 U.S.C. § 12132 (2012).

165. 28 C.F.R. § 35.104(4)(1)(ii) (2012) ("The phrase physical or mental impairment includes, but is not limited to, such contagious and non-contagious diseases and conditions as . . . HIV disease (whether symptomatic or asymptomatic), tuberculosis . . ."); 42 U.S.C. § 12102(2) (2012) ("The term 'disability' means . . . a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such impairment; or being regarded as having such an impairment.").

166. *Bragdon v. Abbott*, 524 U.S. 624, 637, 118 S. Ct. 2196, 2204, 141 L. Ed. 2d 540, 556–57 (1998). This case was about a dentist's refusal to examine an HIV-infected patient in his office. Though the facts did not involve prisoners, the legal principle is the same regarding HIV infection as a disability. For a lower court decision finding an HIV-positive prisoner disabled under the FRA and ADA, see, e.g., *Dean v. Knowles*, 912 F. Supp. 519, 521 (S.D. Fla. 1996).

167. See *Onishea v. Hopper*, 171 F.3d 1289, 1297–99 (11th Cir. 1999) (holding any amount of risk through a "specific and theoretically sound means of possible transmission" is a significant risk, and allowing segregation of HIV-positive prisoners).

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

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

If you are suing for violation of your statutory rights, you should cite both the FRA and the ADA, since the remedies, procedures, and rights are the same under both laws.¹⁷⁰ The only difference is the FRA only applies to public (government) entities while the ADA can support a claim against both private and public entities. You should also check the law of your state and city since sometimes states and localities enact additional laws to protect people with communicable diseases, like HIV or hepatitis, from discrimination. In New York State, the Executive Law prohibits discrimination in several settings against people who carry the disease.¹⁷¹ If you are suing in New York, you should review New York law to see if it applies to your circumstances.

Most prison facilities are controlled and financed by federal, state, or local governments, so the ADA and FRA usually apply to prison facilities. Furthermore, the U.S. Supreme Court has stated the ADA and FRA prohibit discrimination in the prison system.¹⁷² This means prison facilities cannot exclude or deny prisoners “benefits of the services, programs, or activities of a public entity” or subject them to discrimination.¹⁷³ Benefits include recreational activities, medical services, and educational and vocational programs.¹⁷⁴

However, when a court evaluates a prison policy, it will consider whether the restriction is reasonably related to a legitimate penological interest.¹⁷⁵ When a prison is defending a policy, it only has to show that the possibility of a risk exists; it does not have to demonstrate that the risk has actually occurred. Examples of interests cited by prison authorities include prison safety and undue financial or administrative burden.¹⁷⁶

I. Sentencing Persons With Infectious Diseases

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

If your case is in New York State and you have a terminal illness, you may: (1) ask for lower bail; (2) ask to be released on your own recognizance; or (3) make a *Clayton* motion to have your case dismissed “in the interest of justice” (under New York Criminal Procedure Law § 210.40 and § 210.45).¹⁷⁷ The court will look at

170. 42 U.S.C. § 12133 (2012) (“The remedies, procedures, and rights set forth in [29 U.S.C. § 794(a)] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of [42 U.S.C. § 12132].”).

171. See N.Y. Exec. Law § 296 (McKinney 2012).

172. Pa. Dep’t of Corr. v. Yeskey, 524 U.S. 206, 213, 118 S. Ct. 1952, 1956, 141 L. Ed. 2d 215, 221 (1998) (“[T]he plain text of Title II of the ADA unambiguously extends to state prison inmates . . .”).

173. 42 U.S.C. § 12132 (2012).

174. Pa. Dep’t of Corr. v. Yeskey, 524 U.S. 206, 210, 118 S. Ct. 1952, 1955, 141 L. Ed. 2d 215, 219 (1998) (stating that “[m]odern prisons provide inmates with many recreational “activities,” medical “services,” and educational and vocational “programs,” all of which at least theoretically “benefit” the prisoners).

175. See *Gates v. Rowland*, 39 F.3d 1439, 1448 (9th Cir. 1994) (finding a legitimate penological interest allowed prison to discriminate against HIV-positive prisoners by denying them food service jobs). In *Gates* the prison claimed that although the medical risk of infecting other prisoners through food service is admittedly small, the perception of a risk by other prisoners could be threatening and could lead to violence. Thus, the prison interest was not in preventing the spread of HIV so much as promoting prison safety, a typical prison interest. See also *Onishea v. Hopper*, 126 F.3d 1323, 1336 (11th Cir. 1999) (the FRA “mandates judicial consideration of interests particular to the prison system”).

176. *Bullock v. Gomez*, 929 F. Supp. 1299, 1305–08 (C.D. Cal. 1996) (finding the California Men’s Colony possibly violated the ADA and the FRA when it prohibited HIV-infected prisoners from visiting their spouses in a family visiting program permitting prisoners to visit immediate family members in private conditions for relatively extended periods of time, including overnight stays; stating that the discrimination may be justified under the standard in *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261–62, 96 L. Ed. 2d 64, 79 (1987), as a legitimate penological interest if accommodating HIV-prisoners proved to be an undue financial or administrative burden, or if the concerns of other prisoners could lead to prison violence; and noting that proof of previous prison violence is not required to prove a legitimate penological interest).

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

the evidence of guilt, the seriousness of the offense, your character, and your criminal record.¹⁷⁸ To support a request for dismissal, try to provide medical documentation that imprisonment would worsen your health.

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

If you are facing sentencing in federal court, judges consider the sentencing guidelines on an advisory basis.¹⁷⁹ The court may impose a lesser sentence (“downward departure”) if mitigating circumstances exist.¹⁸⁰ The U.S. Sentencing Commission Guidelines Manual states, “an extraordinary physical impairment may be a reason to depart downward; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.”¹⁸¹ Courts usually do not reduce sentences unless the defendant’s AIDS is serious enough to be an “extraordinary physical impairment.”¹⁸² Some courts only consider the defendant’s health at the time of sentencing, even if the disease will likely worsen in prison.¹⁸³

Most courts require you to be very sick before dismissing an indictment or reducing your sentence. But one federal district court did grant a downward departure to an HIV-positive defendant in stable condition. The court thought that the defendant believed his good health was a result of his special regimen of strict diet, regular exercise, acupuncture, and a combination of vitamins and natural supplements under the close supervision of a medical professional.¹⁸⁴ In this case the judge was not worried about whether the treatment actually contributed to the defendant’s good health. The judge thought that since the defendant believed his regimen was effective, he would suffer emotional harm if he had to change treatments in prison.¹⁸⁵

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

J. Life After Imprisonment: Planning for Your Release

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

If you are about to be paroled or released, you should get a confidential HIV test before leaving prison. Getting a test can be more difficult or expensive outside of prison. If you do have HIV/AIDS or hepatitis, you should continue to be careful to avoid infecting other people. Before release, you should also try to contact local agencies and organizations for help transitioning from prison to community life. You can contact the public health department in your area for free brochures. Appendix A lists other helpful agencies.

judge’s discretion).

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

179. *United States v. Booker*, 543 U.S. 220, 245, 125 S. Ct. 738, 756–57, 160 L. Ed. 2d 621, 651 (2005) (holding that the sentencing guidelines are not binding on federal judges).

180. U.S. Sentencing Guidelines Manual, 18 U.S.C. Appx. § 5H1.4 (2011).

181. U.S. Sentencing Guidelines Manual, 18 U.S.C. Appx. § 5H1.4 (2011).

182. See 16 A.L.R. Fed. 2d 113 (2007).

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

184. *United States v. Blarke*, 7 F. Supp. 2d 192, 212 (E.D.N.Y. 1998).

185. *United States v. Blarke*, 7 F. Supp. 2d 192, 212 (E.D.N.Y. 1998).

K. Conclusion

If you have AIDS, TB, hepatitis B or C, MRSA or another infectious disease, people may treat you differently due to ignorance and fear. Protect yourself by becoming aware of the facts of the disease and your legal rights. As a prisoner, you may find information and support is not always readily available. But many of the organizations in Appendix A of this Chapter work with prisoners and may be able help you.

APPENDIX A

RESOURCES FOR INFORMATION, COUNSELING, AND SUPPORT

Below is a list of organizations that may serve as a resource for information, counseling, and support if you are a prisoner suffering from Hepatitis, HIV, and AIDS. The JLM makes no endorsement or recommendation of any of the organizations and does not guarantee that they will be able to help you.

National Hepatitis B Organization

Hepatitis B Foundation

3805 Old Easton Rd.

Doylestown, PA 18902

Phone: (215) 489-4900

Fax: (215) 489-4920

Email: contact@hepb.org

Hepatitis B Foundation provides information and support for people with Hepatitis B and supports research for a cure. It also offers online support group.

National AIDS Organizations

AIDS in Prison Project's Hotline

Phone: (718) 378-7022 (in English, en Español)

Hours: Tuesday, Thursday 3:00 pm to 8:00 pm Eastern Time (ET).

HIV/AIDS hotline for prisoners. All collect calls accepted.

Center for Disease Control National AIDS Hotline (CDC-INFO)

Centers for Disease Control and Prevention, 1600 Clifton Rd, Atlanta, GA 30333

Phone: (800) CDC-INFO (232-4636) (24 hours, in English, en Español)

TTY (for callers with hearing impairments): (888) 232-6348 (24 hours)

Center for Disease Control National Prevention Information Network (CDC-NPIN)

Phone: (800) 458-5231

TTY (for callers with hearing impairments): (800) 243-7012 (M-F 9am-6pm ET)

HIV/AIDS Treatment Information Service (ATIS)

P.O. Box 6303

Rockville, MD 20849

Toll free: 1-800-448-0440 (M-F 12pm-5pm ET)

<http://www.aidsinfo.nih.gov/>

Free literature, including U.S. guidelines on HIV treatment from the Department of Health and Human Services (DHHS).

HIV/AIDS/HCV Education Project

ACLU NATIONAL PRISONER PROJECT

915 15th St. NW, 7th Floor

Washington D.C. 20005

<http://www.aclu.org/hiv/index.html>

Referrals to city and state programs nationwide. Resource center, including free copies of PLAY IT SAFER, a booklet on STIs (sexually transmitted infections), and HIV/AIDS magazines.

National HCV Prison Coalition

Hepatitis C Awareness Project

Phyllis Beck, Director

PO Box 41803

Eugene, OR 97404

Phone: (541) 607.5725

Email: hepinfo@hepeducation.org

<http://www.hcvinprison.org/>

Education, advocacy and support for prisoners with hepatitis C and HIV co-infection.

National Minority AIDS Counsel

Prison Initiative

1931 13th Street NW

Washington, DC 20009-4432

Phone: (202) 483-NMAC (6622)

www.nmac.org/index/prison-initiative

E-mail: info@nmac.org

The Prison Initiative is a project of NMAC, which helps community and faith-based organizations, correctional facilities and health departments evaluate, improve and implement effective discharge planning for HIV positive prisoners and former prisoners.

National Native American AIDS Prevention Center

720 S. Colorado Blvd., Suite 650-S

Denver, CO 80246

Phone: (720) 382-2244

Fax: (720) 382-2248

Automated fax info: 1-800-283-6880

Hours: Monday–Friday 9:00 am to 5:00 pm

<http://www.nnaapc.org/>

E-mail: information@nnaapc.org

The National Native American AIDS Prevention Center (NNAAPC) offers a variety of programs to help promote education about HIV/AIDS, support prevention efforts, and help foster healthy attitudes about sexuality and sexual health in the Native community.

AIDS Organizations in New York

AIDS Related Community Services

40 Sawmill River Road
Hawthorne, NY 10523
Phone: (914) 345-8888
Fax: (915) 785 8299

Counseling, education, food, and pantry. Other locations available in Westchester, Rockland, Dutchess, Putnam, Ulster, and Sullivan counties.

American Foundation for AIDS Research

120 Wall Street, 13th Floor
New York, NY 10005-3902
Phone: (212) 806-1600
Toll-free: (800) 392-6327
Fax: (212) 806-1601

This group is a non-profit organization that supports AIDS research, HIV prevention, treatment education, and the advocacy of AIDS-related public policy.

Asian Pacific Islander Coalition on HIV/AIDS

400 Broadway
New York, NY 10013
Phone: (212) 334-7940
(866) 274-2429 (Infoline)

This group is a non-profit organization providing HIV/AIDS-related services, education, and research to Asian and Pacific Islander Communities in New York City. Services include HIV testing, STI screening and treatment, acupuncture, and more.

Correctional Association of New York

2090 Adam Clayton Powell, Suite 200
New York, NY 10027
Phone: (212) 254-5700

This organization provides advocacy, research, information, and referral to prisoners and parolees living with HIV.

Gay Men's Health Crisis

446 W. 33rd Street
New York, NY 10011-2601
Phone: (212) 367-1000

Toll free: (800) 243-7692 (Hotline) (in English, en Español) (Weds. 10am–2pm; Fri. 10am–6pm)

Assists prisoners with obtaining public benefits when on parole, and publishes a variety of informational brochures. It provides legal services to anyone who is HIV-positive. It also provides referrals and serves women and children.

HIV Law Project

15 Maiden Lane, 18th Floor
New York, NY 10038
Phone: (212) 577-3001 (in English, en Español)

This organization provides legal advocacy. However, it only deals with civil law cases, not criminal law. It provides free civil legal services primarily related to entitlements, housing, immigration (including permanency planning), and family law. It serves residents of Manhattan and the Bronx, and homeless people in all five boroughs. Collect calls are accepted.

Hispanic AIDS Forum, Inc.

Manhattan Office:

213 West 35th Street #1202

New York, NY 10010

Phone: (212) 868-6230 (in English, en Español)

Fax: (212) 868-6237

Bronx Office:

975 Kelly Street, Suite 402

Bronx, NY 10459

Phone: (718) 328-4188 (in English, en Español)

Fax: (718) 328-2888

The Hispanic AIDS Forum is New York's largest Latino-run AIDS outreach organization. It has a bilingual staff and provides seminars, outreach programs, case management services, counseling and other support, and referrals to other organizations.

Latino Commission on AIDS

24 West 25th Street, 9th Floor

New York, NY 10010

Phone: (212) 675-3288

Fax: (212) 675-3466

A grass-roots organization working in collaboration with the AIDS in Prison Project.

Legal Action Center (LAC)

225 Varick Street, 4th Floor

New York, NY 10014

Phone: (212) 243-1313

Toll-free: (800) 223-4044

This organization provides legal services for ex-offenders with HIV, such as help with housing and employment discrimination.

New York AIDS Coalition (NYAC)

400 Broadway, 2nd Floor

New York, NY 10013

Phone: (212) 629-3075

Brings together community-based HIV/AIDS organizations and their supporters to work for increased funding and fair policies for people living with HIV/AIDS in New York State.

The Osborne Association AIDS in Prison Project

809 Westchester Avenue

Bronx, NY 10455

Phone: (718) 842-0500

Email: info@osborneny.org

AIDS in Prison Project Hotline (718) 378-7022 (T,W,R, 3–8 p.m.; collect calls accepted)

www.osborneny.org

Provides information, counseling, education, placement in service organizations, and medical advocacy for New York prisoners.

Prisoners' Rights Project of the Legal Aid Society

199 Water Street
New York, NY 10038
Phone: (212) 577-3300
Fax: (212) 509 8433

Provides services to prisoners only. It also helps prisoners in New York City and New York State with medical concerns and brutality cases.

Prisoners Legal Services of New York (PLSNY)

Albany Location:
41 State Street, Suite M112
Albany, NY 12207

Prisons served: Arthurkill, Bayview, Beacon, Bedford Hills, Mt. McGregor, Summit Shock, CNYPC, Coxsackie, Downstate, Eastern, Edgecombe, Fishkill, Fulton, Great Meadow, Greene, Greenhaven, Hale Creek, Hudson, Lincoln, Marcy, Midstate, Mid-Orange, Mohawk, Oneida, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Wallkill, Walsh, Washington, Woodbourne.

Buffalo Location:
237 Main St., Suite 1535
Buffalo, NY 14203

Prisons served: Albion, Attica, Buffalo, Collins, Gowanda, Groveland, Lakeview, Livingston, Orleans, Rochester, Wende, Wyoming.

Ithaca Location:
102 Prospect St.
Ithaca, NY 14850

Prisons served: Auburn, Butler, Camp Georgetown, Monterey Shock, Camp Pharsalia, Cape Vincent, Cayuga, Elmira, Five Points, Southport, Watertown, Willard.

Plattsburgh Location:
121 Bridge Street, Suite 202
Plattsburgh, NY 12901

Prisons served: Adirondack, Altona, Bare Hill, Camp Gabriels, Chateaugay, Clinton, Franklin, Gouverneur, Lyon Mountain, Moriah Shock, Ogdensburg, Riverview, Upstate.

(Due to the large number of inquiries, PLSNY does not accept telephone calls from prisoners and their family members).

PLSNY is a non-profit legal services organization providing civil legal services to indigent prisoners in New York State correctional facilities in cases where no other counsel is available.

Women's Prison Association

Reentry Unit
110 2nd Avenue
New York, NY 10003
Phone: General Info: (646) 292-7740
Reentry Services: (718) 637-6877
Fax: (646) 292-7763

*WPA **Reentry Services** include a full array of prison, jail, and community-based assistance aimed at helping women become full participants in community life following incarceration or other criminal justice involvement.*

AIDS Organizations in California

San Francisco AIDS Foundation

1035 Market St, Ste 400

San Francisco CA 94103

Phone: (415) 487-8000

Fax: (415) 487-8079

<http://www.sfaf.org>

Provides vital services and programs designed to improve the quality of life for people living with HIV/AIDS and to reduce the number of new infections that occur each year.

Center for Health Justice

900 Avila Street, Ste. 301

Los Angeles, CA 90012

Phone: (213) 229-0985

Fax: (213) 229-0986

Email: info@healthjustice.net

<http://www.healthjustice.net>

Provides HIV legal and education information inside and outside correctional facilities.

Project Inform's National HIV/AIDS Treatment Hotline

273 Ninth Street

San Francisco, CA 94103

Toll free: 1-800-822-7422

Hours: Monday-Friday, 10am-4pm Pacific Time (PT).

Nightline: 1-800-628-9240

Hours: 5pm-5am every day.

Provides legal and educational information for those with HIV/AIDS. Will mail out materials to prisoners and accepts collect calls from correctional institutions.

AIDS Project Los Angeles

611 South Kingsley Drive

Los Angeles, CA 90005

Phone: (213) 201-1600

<http://www.apla.org/>

AIDS Organizations in Illinois

Illinois AIDS Hotline

Toll-free: (800) 243-2437 (in English, en Español)

Hours: daily 8am-10pm Central Time (CT).

Up-to-date information on HIV transmission, HIV counseling and testing sites. Offers information and support resources, risk reduction. Bilingual.

AIDS Organizations in Pennsylvania

Lewisburg Prison Project

434 Market Street #307

Lewisburg, PA 17837

Phone: (570) 523-1104

Fax: (570) 523-3944

Email: prisonproject@dejazzd.com

Non-profit organization that provides legal and other assistance to prisoners in Central Pennsylvania for non-criminal issues. Counsels and assists prisoners who encounter treatment they perceive as illegal or unfair, including medical treatment.

Pennsylvania AIDS Hotline

Toll-free: (800) 662-6080

Up-to-date information on HIV transmission, HIV counseling and testing sites. Offers information and support resources, risk reduction.

AIDS Organizations in Texas

AIDS Arms

351 West Jefferson Blvd. #300

Dallas, Texas 75208

Phone: (214) 521-5191

Fax: (214) 528-5879

TDD: (214) 231-0151

www.aidsarms.org

Assists individuals in accessing the healthcare, resources, and support necessary to successfully manage the challenges of living with HIV/AIDS. Assists prisoners in obtaining information regarding HIV/AIDS and other STIs.

Urban League of Greater Dallas

4315 South Lancaster Road

Dallas, Texas 75216

Phone: (214) 915-4600

www.dallasurbanleague.com

Referral for anonymous and confidential HIV testing, prevention counseling, individual ongoing counseling (not prevention counseling), health education/risk reduction, HIV prevention education, STI prevention education, street outreach, peer education, HIV early intervention, hepatitis education/counseling, TB testing, substance abuse intervention, support groups, peer counseling, financial education/entitlement assistance, emergency financial assistance, clothing assistance, computer technology training, G.E.D. classes, employment programs, brochures, videos.

AIDS Foundation Houston

3202 Wesleyan Street

Houston, Texas 77027

Phone: (713) 623-6796

Email: info@AFHouston.org

www.aidshelp.org

Special Prison Initiative Program. Prevention counseling, health education/risk reduction, HIV prevention education, STI prevention education, street outreach, peer education, case management for HIV/AIDS, hepatitis education/counseling, hotline/telephone counseling, peer counseling, food pantry, nutrition services, volunteer services, HOPWA, emergency financial assistance, clothing assistance, housing programs.