

---

## **AIDS/HIV+ INMATES: A NEW STANDARD TO HOUSE INFECTED INMATES BASED ON OBJECTIVE, PROACTIVE CRITERIA THAT BALANCES THE NEEDS OF THE INFECTED INMATE WHILE PROTECTING NON- INFECTED INMATES AND PRISON STAFF**

---

The acquired immune deficiency syndrome (“AIDS”) / human immunodeficiency virus (“HIV”) (“AIDS/HIV” or “AIDS/HIV+”) is a worldwide epidemic that as of 2008 has infected over 33,400,000 people.<sup>1</sup> The United States is not immune from the spread of AIDS/HIV+.<sup>2</sup> For example, in 2004 there were 38,685 cases of AIDS/HIV+ reported in thirty-three states.<sup>3</sup> By the end of 2006, it was estimated that over one million adults and adolescents in the United States were living with the HIV infection.<sup>4</sup> In fact, the Center for Disease Control (CDC) estimated that in 2006 approximately 56,300 people were newly infected with HIV.<sup>5</sup> The CDC reported that in 2006 there were 540,972 people in the U.S. living

---

1. UNAIDS, OUTLOOK REPORT 2010 (2010), *available at* [http://data.unaids.org/pub/Outlook/2010/20100713\\_outlook\\_report\\_web\\_en.pdf](http://data.unaids.org/pub/Outlook/2010/20100713_outlook_report_web_en.pdf); *see also* Mary McLean Jordan, *Care to Prevent HIV Infection in Prison: A Moral Right Recognized by Canada, While the United States Lags Behind*, 37 U. MIAMI INTER-AM. L. REV. 319, 319-20 (2006) (“HIV/AIDS is a global epidemic. Since the epidemic began, over 60 million people have been infected causing over 20 million deaths.”) (citing JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS (UNAIDS POLICY POSITION PAPER: INTENSIFYING PREVENTION 7 (2005)), *available at* [http:// data.unaids.org/publications/irc-pub06/jc1165-intensif\\_hiv-newstyle\\_en.pdf](http://data.unaids.org/publications/irc-pub06/jc1165-intensif_hiv-newstyle_en.pdf)).

2. *See* Ann E. Stanley, *May I Ask You A Personal Question? The Right to Privacy and HIV Testing in the European Community and the United States*, 65 FORDHAM L. REV. 2775, 2775 (1997) (stating that AIDS/HIV has affected millions of individuals worldwide).

3. 16 CENTERS FOR DISEASE CONTROL AND PREVENTION, HIV/AIDS SURVEILLANCE REPORT, 2004 10 (2005), *available at* <http://www.cdc.gov/hiv/surveillance/resources/reports/2004report/pdf/2004SurveillanceReport.pdf>.

4. CENTERS FOR DISEASE CONTROL AND PREVENTION, HIV PREVALENCE ESTIMATES-UNITED STATES, 2006, MMWR 1073-76 (2008), *available at* <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5739a2.htm>.

5. H. Irene Hall, et al., *Estimation of HIV Incidence in the United States*, 300 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 520, 520 (2008).

with AIDS or were HIV+, and the rate of infection increased in 2007 to 571,378.<sup>6</sup> The CDC also determined that as of 2009 there were 1,108, 611 people diagnosed with AIDS in the United States.<sup>7</sup>

In 2010, the White House developed and distributed a National AIDS/HIV Strategy for the United States (“Strategy”).<sup>8</sup> President Obama stated, in a presidential address he gave regarding the Strategy, that:

Thirty years ago, the first cases of human immunodeficiency virus (HIV) garnered the world’s attention. Since then, over 575,000 Americans have lost their lives to AIDS and more than 56,000 people in the United States become infected with HIV each year. Currently, there are more than 1.1 million Americans living with HIV. Moreover, almost half of all Americans know someone living with HIV.<sup>9</sup>

However, even more staggering is the infection rate in the prison systems throughout the United States.<sup>10</sup>

The presence of AIDS/HIV+ inmates in prisons “continues to be a major issue in correctional institutions.”<sup>11</sup> AIDS/HIV+ infected inmates will often be the most victimized and stigmatized group in prison.<sup>12</sup> As stated in a United Nations Office on Drugs and Crime report:

---

6. CENTERS FOR DISEASE CONTROL AND PREVENTION, HIV/AIDS SURVEILLANCE REPORT: CASES OF HIV INFECTION AND AIDS IN THE UNITED STATES AND DEPENDANT AREAS, 2007 21 (2007), available at <http://www.cdc.gov/hiv/surveillance/resources/reports/2007report/pdf/2007SurveillanceReport.pdf>.

7. CENTERS FOR DISEASE CONTROL AND PREVENTION, BASIC STATISTICS, available at <http://www.cdc.gov/hiv/topics/surveillance/basic.htm#hivest> (citing CENTERS FOR DISEASE CONTROL AND PREVENTION, HIV PREVALENCE ESTIMATES-UNITED STATES, 2006, MMWR 1073-76 (2009)).

8. THE WHITE HOUSE, NATIONAL HIV/AIDS STRATEGY FOR THE UNITED STATES (2010).

9. *Id.*

10. See William B. Aldenberg, *Bursting at the Seams: An Analysis of Compassionate-Release Statutes and the Current Problem of HIV and AIDS in U.S. Prisons and Jails*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 541, 543 (1998) (stating that as of 1995 there were over 1.6 million AIDS/HIV prisoners in federal, state, and local jails); John D. Kraemer, *Screening of Prisoners for HIV: Public Health, Legal, and Ethical Implications*, 13 MICH. ST. U. J. MED. & L. 187, 190 (2009) (stating that “[t]he prevalence of HIV/AIDS is about five times higher among jail and prison populations than the general public”); see also Laura M. Maruschak, U.S. Dep’t of Justice, *HIV in Prisons 2006*, Bureau of Justice Bulletin, 1-2 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/hivp06.pdf> (stating “[a]t year end 2006, 1.6% of male inmates and 2.4% of female inmates in state and federal prisons were known to be HIV positive or to have confirmed AIDS”).

11. James F. Horner, Jr., *Constitutional Issues Surrounding the Mass Testing and Segregation of HIV-Infected Inmates*, 23 MEM. ST. U. L. REV. 369, 370 (1993) (stating that AIDS is of grave concern because of the high concentration of at risk individuals and the unsafe activities that take place in prison by inmates, such as unsafe sex and drug usage).

12. UNITED NATIONS OFFICE ON DRUGS AND CRIME, HIV/AIDS PREVENTION, CARE, TREATMENT AND SUPPORT IN PRISON SETTINGS: A FRAMEWORK FOR AN EFFECTIVE NATIONAL RESPONSE 12 (2006).

Inside of prisons, people living with HIV/AIDS are often the most vulnerable and stigmatized segment of the prison population. Fear of HIV/AIDS often places HIV-positive prisoners at increased risk of social isolation, violence, and human rights abuses from both prisoners and prison staff. This fear is often driven by misinformation about HIV transmission, and the false belief that HIV infection may be spread by casual contact.<sup>13</sup>

Unfortunately, the statistics regarding the number of prisoners infected with AIDS/HIV+ is limited and difficult to determine.<sup>14</sup> But, analysis of available data indicates that the number of infected inmates in federal, state, and large city prisons and jails is slowly increasing.<sup>15</sup> For example, in November of 1990, there were 6,985 AIDS cases reported in federal, state, and large city prisons and jails;<sup>16</sup> this is a twenty-nine percent increase in the number of AIDS cases reported in 1989.<sup>17</sup>

In 2003, it was reported that there were 22,028 infected inmates in the United States,<sup>18</sup> and in only three years that number increased to 22,480.<sup>19</sup> Although by the end of 2008 the number of infected inmates dipped slightly to 21,987,<sup>20</sup> estimates for 2010 puts the number of infected inmates at over 22,000,<sup>21</sup> which accounts for approximately 1.5% of all prisoners.<sup>22</sup> Perhaps even more troubling is that “each year since 1991, the rate of confirmed AIDS cases has been higher among prisoners than in the general population.”<sup>23</sup>

---

13. *Id.*

14. Deborah S. Chang & Patricia E. McCooey, *Out of the Dark Ages and into the Nineties: Prisons' Responses to Inmates with AIDS*, 23 CONN. L. REV. 1001, 1011 (1991) (finding that the statistics related only to inmates with AIDS and followed the Centers for Disease Control's definitions).

15. *Id.* at 1010.

16. *Id.*

17. *Id.*

18. Kari Larsen, *Deliberately Indifferent: Government Response to HIV in U.S. Prisons*, 24 J. CONTEMP. HEALTH L. & POL'Y 251, 251 (2008).

19. Press Release, Department of Justice, Office of Justice Programs, HIV/AIDS Cases Among State and Federal Prison Inmates Fell for the Sixth Straight Year During 2005 (Sept. 27, 2007), available at [http://www.ojp.usdoj.gov/newsroom/pressreleases/2007/BJS07087\\_F.htm](http://www.ojp.usdoj.gov/newsroom/pressreleases/2007/BJS07087_F.htm).

20. Laura M. Maruschak & Randy Beavers, *HIV in Prison, 2007-08*, Bureau of Justice Statistics Bulletin 1 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/hivp08.pdf>.

21. See HUMAN RIGHTS WATCH, SENTENCED TO STIGMA: SEGREGATION OF HIV-POSITIVE PRISONERS IN ALABAMA AND SOUTH CAROLINA 10 (2010), available at <http://www.aclu.org/files/assets/health0410webwcover.pdf>.

22. See Maruschak & Beavers, *supra* note 20.

23. See Department of Justice, Office of Justice Programs, *supra* note 19; see also Jin Hee Lee, *Chapter 22: AIDS in Prison*, 31 COLUM. HUM. RTS L. REV. 355, 357 (2000) (“The rate of confirmed AIDS within the U.S. prison population is particularly high - more than five times higher than the rate of the general population.”) (quoting Laura M. Maruschak, U.S. Dept of

### A. AIDS/HIV in Prison

There are several activities that occur in prison that facilitates the spread of AIDS/HIV, such as sexual activity and intravenous drug use.<sup>24</sup> However, it is difficult to determine how many prisoners contract the disease within the confines of the prison.<sup>25</sup> This is partly due to prisoners keeping their HIV status private because “unnecessary disclosure of such information can lead to avoidable, and often devastating, repercussions.”<sup>26</sup>

The prison system has been dealing with prisoners infected with AIDS/HIV+ for over twenty years.<sup>27</sup> Two decades ago a debate started as to whether prisoners with AIDS/HIV+ should be housed with other prisoners, or segregated and given their own area to occupy.<sup>28</sup> Unfortunately, there is no standardized policy guiding administrators of jails and prisons on how to house AIDS/HIV infected prisoners, and the debate over segregating HIV infected inmates continues to be a modern day issue.<sup>29</sup>

For example, as of the writing of this Comment, the United States Department of Justice (DOJ) is preparing to sue South Carolina prison officials over the state’s policy of segregating all AIDS/HIV+ prisoners

---

Justice, HIV in Prisons 1997, Bureau of Justice Statistics Bulletin 4 (1999); Christopher Quinn, *The Right to Refuse Medical Treatment or to Direct the Course of Medical Treatment: Where Should Inmate Autonomy Begin and End?*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 453, 467 (2009) (stating that the HIV rate in prison has been estimated to be ten times higher than in society which can, in turn, lead to a higher rate of HIV transmission); Anne S. De Groot et al., *Setting the Standard for Care: HIV Risk Exposures and Clinical Manifestations of HIV in Incarcerated Massachusetts Women*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 353, 353 (1998) (stating that, in prison “women are disproportionately affected by [HIV]”).

24. Richard D. Vetstein, *Rape and AIDS in Prison: On a Collision Course to a New Death Penalty*, 30 SUFFOLK U. L. REV. 863, 865 (1997) (stating that anal intercourse and intravenous drug use, two methods that spread HIV, is omnipresent through prisons); *see also* Larsen, *supra* note 18 at 265-71.

25. Chang & McCooley, *supra* note 14, at 1011 (stating that the number of AIDS cases reported by correctional facilities can be misleading and can only be estimated).

26. Karen E. Zuck, *HIV and Medical Privacy: Government Infringement on Prisoners’ Constitutional Rights*, 9 U. PA. J. CONST. L. 1277, 1278 (2007).

27. Chang & McCooley, *supra* note 14, at 1004 (stating that the AIDS disease was first diagnosed in 1981 and the prison system has been struggling with this issue ever since); *see also* HUMAN RIGHTS WATCH, *supra* note 21, at 13 (“When HIV first appeared in prison populations, prison policies were very restrictive. HIV-positive prisoners were placed in isolation and had no access to programs, work or activities.”).

28. *See* Chang & McCooley, *supra* note 14, at 1001-02, 1004.

29. *See* HUMAN RIGHTS WATCH, *supra* note 21, at 39 (“Segregation is inconsistent with the position taken by leading correctional health experts in the United States. The National Commission on Correctional Health Care (NCCHC) ‘endorses the concept that medical management of HIV-positive prisoners and correctional staff should parallel that offered to individuals in the noncorrectional community.’” (quoting NAT’L COMM’N ON CORR. HEALTH CARE, Position Statement, *Administrative Management of HIV in Correctional Institutions* (revised Oct. 9, 2005), [http://www.ncchc.org/resources/statements/admin\\_hiv2005.html](http://www.ncchc.org/resources/statements/admin_hiv2005.html))).

from other inmates.<sup>30</sup> According to the DOJ, a policy of segregation creates a situation where infected inmates suffer disparate treatment from other inmates without AIDS/HIV.<sup>31</sup> Although the infected inmates perform activities with other, non-infected inmates, such as work, school, and religious programs, the infected inmates eat and sleep separately.<sup>32</sup> In response to the DOJ's claims, the state's Department of Corrections refused to acquiesce and has argued that a policy of segregating AIDS/HIV+ inmates is in the best interest of the inmates and employees.<sup>33</sup>

The prospect of housing infected prisoners with non-infected prisoners raises grave concerns regarding safety, spread of disease, and liability for the prison system.<sup>34</sup> Prison officials are obligated to provide a safe prison environment, which includes protecting prisoners from contracting AIDS.<sup>35</sup> Although AIDS/HIV cannot be spread through normal everyday contact, it can be spread through sexual activities and intravenous drug use, both of which are common in prison.<sup>36</sup> Additionally, there have been reports of severe beatings, stabbings, and rapes in prison, all of which could lead to the transmission of bodily fluids, thus facilitating the spread of AIDS/HIV.<sup>37</sup>

As a result, prison officials are forced to balance protecting the constitutional rights of AIDS/HIV+ inmates with protecting prison officials and other inmates from exposure.<sup>38</sup> Unfortunately, there is no universally defined standard that provides guidance to prison officials on how to segregate prisoners with AIDS/HIV+.<sup>39</sup> This lack of guidance creates a

---

30. Meg Kinnard, *SC Prisons Brace for Lawsuit Over HIV Inmates*, ASSOCIATED PRESS (Sept. 21, 2010), <http://abcnews.go.com/US/wireStory?id=11692834>.

31. *Id.*

32. *Id.*

33. *See id.* ("South Carolina prison officials say they have no plans to stop segregating HIV-positive inmates despite the threat of a lawsuit by the U.S. Justice Department.").

34. *See* Ayesha Khan, *The Application of Section 504 of the Rehabilitation Act to the Segregation of HIV-Positive Inmates*, 65 WASH. L. REV. 839, 839-40 (1990).

35. D. Stuart Sowder, *AIDS in Prison: Judicial Indifference to the AIDS Epidemic in Correctional Facilities Threatens the Constitutionality of Incarceration*, 37 N.Y.L. SCH. L. REV. 663, 675 (1992).

36. *Id.* at 666-67 ("The transmission of HIV in prisons primarily occurs in one of two ways: exchanging bodily fluids during sexual conduct or sharing needles during intravenous drug use. These two behaviors are documented as being the highest-risk behaviors for HIV transmission." (citing Urvashi Vaid, *Prisons, in AIDS AND THE LAW* 235, 237-38 (Harlon L. Dalton et al. eds., 1987))).

37. *See* Larsen, *supra* note 18, at 255-58, 260.

38. *Id.* at 252; *see also* Doe v. Coughlin, 697 F. Supp. 1234, 1234-35 (N.D.N.Y. 1988); Simeon Goldstein, *Prisoners with AIDS: Constitutional and Statutory Rights Implicated in Family Visitation Programs*, 31 B.C. L. REV. 967, 971 (1990).

39. Khan, *supra* note 34, at 848-49.

conflict between maintaining the inmate's right to privacy and the need for such information by the other prisoners and the prison staff.<sup>40</sup> In fact, there are many constitutional issues that are involved when segregating prisoners, including the right to privacy, due process, and cruel and unusual punishment.<sup>41</sup>

Prisoners who are HIV+ can either be automatically segregated from non-infected inmates, or placed into the general population and segregated after they are proven to be a danger to the other inmates.<sup>42</sup> A proactive approach would be to automatically segregate prisoners who are infected with AIDS/ HIV+.<sup>43</sup> Those in favor of automatic segregation argue that placing AIDS infected inmates into the general population puts non-infected inmates at risk.<sup>44</sup>

Those against segregation argue that a blanket policy of segregating AIDS/HIV+ prisoners deprives those inmates of the opportunities provided by the prison facility and violates the prisoners' constitutional rights.<sup>45</sup> For example, in *Gates v. Rowland*, HIV+ inmates challenged a prison policy of segregating infected inmates because it denied them access to jobs and other programs available to non-infected inmates.<sup>46</sup> Whereas a policy of blanket segregation affirmatively removes infected inmates from the general population, a reactive approach is where infected inmates are segregated only after endangering other inmates with the transmission of HIV.<sup>47</sup>

This Comment argues that the segregation of AIDS/HIV+ infected prisoners should be based on objective criteria relating to the prisoner's past crimes, statements, and violent actions. Based on these three criteria, those

---

40. Larsen, *supra* note 18, at 281 (stating that when analyzing if a balance has been struck between an inmate's privacy rights and the interest of the prison staff, the court may analyze: 1) whether the segregation was related to the legitimate goal of reducing the transmission of HIV, 2) if reintegration of segregated prisoners would create a threat of violence to the HIV+ inmates, and 3) if reasonable alternatives were rejected).

41. *Id.* at 279-80, 288, 293.

42. See Phyllis G. Donaldson, *Management of Seropositive AIDS Inmates in the Population: The Michigan Approach*, 36 WAYNE L. REV. 1589, 1593-94 (1990).

43. See, e.g., Larsen, *supra* note 18, at 268 (stating that by 1985, thirty five states had policies of automatically segregating prisoners who were HIV+).

44. *Id.* (stating that when AIDS first appeared in prisons, several prisons created policies of segregating all HIV+ prisoners in an attempt to prevent the spread of AIDS/HIV).

45. Zuck, *supra* note 26, at 1287-88 (stating that although there have been several constitutional challenges to segregating HIV infected prisoners, they have, for the most part, been unsuccessful).

46. 39 F.3d 1439, 1445 (9th Cir. 1994) (involving HIV+ inmates who complained about the prison's blanket policy that prevented HIV infected inmates from participating in the prison's food service programs).

47. See Donaldson, *supra* note 42.

who are likely to infect others such as guards or other prisoners should be segregated upon reception to the facility. Likewise, those who are not likely to infect others should be allowed to remain in the general population. Section I describes the four stages of progression from the initial HIV infection to AIDS. Section II describes how the California prison system houses inmates with AIDS/HIV+. Section III analyzes how prison systems throughout the country have traditionally housed prisoners. Section IV reviews the most common ways AIDS/HIV is spread in the prison environment. Section V examines the segregation of prisoners who have AIDS or are HIV+. Section VI evaluates why prisoners with AIDS/HIV+ are regarded as having a disability. Section VII scrutinizes the different constitutional arguments for both segregating and not segregating infected prisoners. Section VIII proposes an alternative objective standard that prison officials can use to segregate prisoners infected with AIDS/HIV where the segregation of infected inmates is based on objective criteria, such as the types of past crimes committed by the inmate, statements made by the inmate of a desire to infect others, and the inmate's proclivity towards violence.<sup>48</sup>

#### I. AIDS/HIV: THE DISEASE

The CDC has recognized AIDS as a disease since 1981.<sup>49</sup> HIV affects a person by destroying certain blood cells, specifically CD4+T cells, which are crucial to helping the body's immune system.<sup>50</sup> The progression from the initial HIV infection to AIDS can be broken down into four stages: 1) primary infection, 2) asymptomatic stage, 3) symptomatic stage, and 4) progression from HIV to AIDS.<sup>51</sup> According to the CDC, over time the HIV virus will always develop into the full blown AIDS disease.<sup>52</sup>

---

48. For this Comment, the basis for segregation should depend on the infected inmate's criminal record, statements made by the inmate of intentions to spread the disease to others, and the inmate's proclivity towards violence. However, it is not proposed that these are the only criteria. Prison officials should still have the ability to augment the proposed standard with additional objective criteria. For example, the proposed standard would not prevent a prison official from segregating an infected inmate who consensually has sex with other prisoners, thus spreading the disease. If a prison official faced such a situation, the official should be able to add "promiscuity" to the three criteria offered here in order to segregate that prisoner. Additionally, if an AIDS/HIV+ inmate is sick, or in need of medical attention, they would automatically be housed in a medical facility.

49. Shawn Marie Boyne, *Women in Prison with AIDS: An Assault on the Constitution?*, 64 S. CAL. L. REV. 741, 753 (1991).

50. *Basic Information About HIV and AIDS*, CTR. FOR DISEASE CONTROL AND PREVENTION (last visited Aug. 18, 2011), <http://www.cdc.gov/hiv/topics/basic/index.htm>.

51. *The Different Stages of HIV Infection*, AVERT <http://www.avert.org/stages-hiv-aids.htm> (last visited Aug. 14, 2011); see also Armen H. Merjian, *AIDS, Welfare, and Title II of the*

The first stage is referred to as the Primary HIV infection Stage in which an acute syndrome occurs after the initial HIV infection.<sup>53</sup> This stage will last a few weeks and is usually accompanied by a short flu-like illness.<sup>54</sup> At this point the immune system is attacked and the person suffers from a decline in white blood cells.<sup>55</sup> Since there is a large quantity of HIV in the peripheral blood, the immune system responds by producing HIV antibodies and cytotoxic lymphocytes.<sup>56</sup>

The second stage is called the Clinically Asymptomatic Stage.<sup>57</sup> This stage will last for approximately ten years and the infected person is free from major symptoms.<sup>58</sup> However, infected people in this stage may have swollen glands,<sup>59</sup> or suffer from fatigue and fevers.<sup>60</sup> Although the level of HIV in the peripheral blood drops, people are still infectious.<sup>61</sup>

The third stage is the Symptomatic HIV Infection stage,<sup>62</sup> or Advanced HIV disease.<sup>63</sup> By this time the immune system has been severely damaged by HIV.<sup>64</sup> With this weakened immune system, the body is unable to withstand certain opportunistic diseases and cancers.<sup>65</sup> It is also during this stage that many diseases and infections can occur throughout the body.<sup>66</sup> Although the infections, or even cancer, can be treated, the HIV virus continues to erode the immune system.<sup>67</sup>

The last stage is called the Progression from HIV to AIDS Stage,<sup>68</sup> or Late Stage HIV disease.<sup>69</sup> Here, the immune system is even more damaged

---

*Americans with Disabilities Act*, 16 YALE L. & POL'Y REV. 373, 377 (1998) (describing the progression of HIV to AIDS).

52. See *Basic Information About HIV and AIDS*, *supra* note 50.

53. THE AIDS KNOWLEDGE BASE, 181 (P.T. Cohen et al. eds, 3d. ed., Lippincott, Williams, Wilkins 1999).

54. *The Different Stages of HIV Infection*, *supra* note 51.

55. THE AIDS KNOWLEDGE BASE, *supra* note 53.

56. *The Different Stages of HIV Infection*, *supra* note 51.

57. *Id.*

58. THE AIDS KNOWLEDGE BASE, *supra* note 53, at 182.

59. *The Different Stages of HIV Infection*, *supra* note 51.

60. THE AIDS KNOWLEDGE BASE, *supra* note 53, at 182.

61. *The Different Stages of HIV Infection*, *supra* note 51.

62. *Id.*

63. THE AIDS KNOWLEDGE BASE, *supra* note 53, at 183.

64. *The Different Stages of HIV Infection*, *supra* note 51.

65. THE AIDS KNOWLEDGE BASE, *supra* note 53, at 183.

66. *The Different Stages of HIV Infection*, *supra* note 51.

67. *Id.*

68. *Id.*

69. THE AIDS KNOWLEDGE BASE, *supra* note 53, at 183; see also JEFFREY HUBER, HIV/AIDS COMMUNITY INFORMATION SERVICES: EXPERIENCES IN SERVING BOTH AT-RISK AND HIV-INFECTED POPULATIONS 24 (1996).



and illnesses become worse, eventually leading to an AIDS diagnosis.<sup>70</sup> At this point, it is common for diseases to appear, such as central nervous system toxoplasmosis, and cryptococcal meningitis.<sup>71</sup> Although there is medicine available to help AIDS victims live longer, there is no cure for AIDS.<sup>72</sup> Death eventually occurs due to extensive damage to vital organs, circulatory failure, and nervous system damage.<sup>73</sup>

## II. THE HOUSING OF AIDS/HIV+ INMATES IN CALIFORNIA PRISONS

Upon reception to a California prison, inmates are given a score based on pre-determined criteria and then assigned to a specific prison.<sup>74</sup> However, those infected with AIDS/HIV+ are automatically housed in the California Medical Facility.<sup>75</sup>

The California State Legislature has been explicit in the danger that AIDS/HIV presents in prison populations.<sup>76</sup> The state legislature has stated in the California Penal Code:

The spread of AIDS and hepatitis B and C within prison and jail populations presents a grave danger to inmates within those populations, law enforcement personnel, and other persons in contact with a prisoner infected with the HIV virus as well as hepatitis B and C, both during and after the prisoner's confinement. Law enforcement personnel and prisoners are particularly vulnerable to this danger, due to the high number of assaults, violent acts, and transmissions of bodily fluids that occur within correctional institutions.<sup>77</sup>

The state legislature also found that HIV has the potential to spread faster in a correctional facility than outside the facility.<sup>78</sup> In fact, the legislature stated in the Penal Code:

---

70. *The Different Stages of HIV Infection*, *supra* note 51.

71. THE AIDS KNOWLEDGE BASE, *supra* note 53, at 183.

72. *See Basic Information About HIV and AIDS*, *supra* note 50.

73. THE AIDS KNOWLEDGE BASE, *supra* note 53, at 183.

74. OPERATIONS MANUAL, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION OPERATIONS, §§ 61010.1-61010.15 (2011), *available at* [http://www.cdcr.ca.gov/Regulations/Adult\\_Operations/docs/DOM/Ch%206Printed%20Final%20DOM%202011.pdf](http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/DOM/Ch%206Printed%20Final%20DOM%202011.pdf).

75. California Medical Facility Mission Statement, CDCR PRISONS ADULT FACILITY LOCATOR, [http://www.cdcr.ca.gov/Facilities\\_Locator/CMF.html](http://www.cdcr.ca.gov/Facilities_Locator/CMF.html) (last visited Aug. 14, 2011).

76. *See, e.g.*, CAL. PENAL CODE § 7500(a) (West 2011) ("The public peace, health, and safety is endangered by the spread of the human immunodeficiency virus (HIV), acquired immunodeficiency syndrome (AIDS), and hepatitis B and C within state and local correctional institutions.").

77. *Id.* § 7500(b).

78. *Id.* § 7500(c).

HIV, as well as hepatitis B and C, have the potential of spreading more rapidly within the closed society of correctional institutions than outside these institutions. These major public health problems are compounded by the further potential of the rapid spread of communicable disease outside correctional institutions through contacts of an infected prisoner who is not treated and monitored upon his or her release, or by law enforcement employees who are unknowingly infected.<sup>79</sup>

Although there is no mandate for California prisons to test every inmate for AIDS/HIV status, prison officials can test inmates in certain situations,<sup>80</sup> and only in order to control the spread of the disease in their institutions.<sup>81</sup> Specifically, the state legislature stated:

Testing described in this title of individuals housed within state and local correctional facilities for evidence of infection by HIV and hepatitis B and C would help to provide a level of information necessary for effective disease control within these institutions and would help to preserve the health of public employees, inmates, and persons in custody, as well as that of the public at large.<sup>82</sup>

A. *Classification of Prisoners Upon Reception to a California Prison*

Prisoners come in every age, race, and background.<sup>83</sup> Some prisoners have committed heinous crimes and are considered repeat offenders, while others are non-violent and new to the prison system.<sup>84</sup> In California, the classification of prisoners starts at the Department of Corrections and Rehabilitation (CDCR) reception centers.<sup>85</sup>

Over a sixty day period, prisoners are given a medical examination, screened for disabilities and, after being evaluated on a number of criteria, they receive a score.<sup>86</sup> A counselor reviews the results and completes a

---

79. *Id.*

80. *See id.* § 7505 ("[T]his title shall serve as the authority for the HIV testing of prisoners in only those local facilities where the governing body has adopted a resolution affirming that it shall be operative in that city, county, or city and county.").

81. *Id.* § 7500(f).

82. *Id.*

83. Joan Petersilia, *California's Correctional Paradox of Excess and Deprivation*, 37 CRIME & JUST. A REV. OF RES. 207, 218 (2008).

84. *Id.* (finding that approximately sixty-one percent of offenders entering prison during any given year are parolees who had their parole revoked and the remaining thirty-nine percent are new convictions).

85. OPERATIONS MANUAL, *supra* note 74, § 61010.3.

86. *See id.* § 61010.8.2; *see also id.* § 61010.11.2 (describing background factors that are taken into consideration such as age, sentence, involvement with street gang activity, and mental illness); *id.* § 61010.11.4 (describing points for prior incarceration behavior such as inciting a disturbance, battery, and distribution of drugs); Petersilia, *supra* note 83, at 219.

score sheet.<sup>87</sup> Based on the score, the prisoner is assigned to a particular facility, but could be re-classified at the discretion and judgment of prison officials based on the safety of the inmate, prison personnel and the welfare of the institution.<sup>88</sup> An inmate's classification score is important because it affects where the prisoner will be housed, the chances to participate in work, and education opportunities.<sup>89</sup>

In California, the Director of Corrections has the authority to contract with public or private agencies, either within or outside California, for the housing of inmates infected with AIDS.<sup>90</sup> Title 15, section 1051 of the California Code of Regulations states that "[t]he facility administrator shall develop written policies and procedures which require that all inmates with suspected communicable diseases shall be segregated until a medical evaluation is completed."<sup>91</sup> In determining if an inmate requires segregation at the time of booking, the intake officer must inquire if the inmate has any communicable diseases.<sup>92</sup>

#### B. *The Housing of AIDS/HIV+ Prisoners*

If it is determined the inmate has AIDS/HIV+, then the housing of the inmate is dictated by the CDCR Operations Manual.<sup>93</sup> Inmates who have AIDS or are HIV+ are segregated from other non-infected prisoners.<sup>94</sup> As described on the CDCR website, the mission statement for the Central Medical Facility (CMF) states:

CMF houses a general acute care hospital, correctional treatment center (CTC), licensed elderly care unit, in-patient and out-patient psychiatric facilities, a hospice unit for terminally ill inmates, *housing and treatment*

---

87. See OPERATIONS MANUAL, *supra* note 74, § 61010.8.2.

88. See *id.* § 61010.8; see also *id.* § 61010.12 (stating the procedures to follow when a prison official disagrees with the destination of an inmate); Petersilia, *supra* note 83, at 219.

89. Petersilia, *supra* note 83, at 221 (stating that depending on which facility the prisoner is assigned, the facility may differ in areas such as the types of rehabilitation programs, and the influence of gangs).

90. CAL. PENAL CODE § 2692 (West 2011) ("The Director of Corrections may enter into contracts with public or private agencies located either within or outside of the state for the housing, care, and treatment of inmates afflicted with (AIDS) . . .").

91. CAL. CODE REGS. tit. 15, § 1051 (2011).

92. *Id.* ("To determine if such segregation shall be made in the absence of medically trained personnel at the time of intake into the facility, an inquiry shall be made of the person being booked as to whether or not he/she has or has had any communicable diseases, including but not limited to, tuberculosis, other airborne diseases, or other special medical problem identified by the health authority.").

93. See OPERATIONS MANUAL, *supra* note 74.

94. See Boyne, *supra* note 49, at 743 (reporting that in 1988 female prisoners who were HIV+ were housed in an AIDS unit which was segregated from the general prison population).

for inmates identified with AIDS/HIV, general population, and other special inmate housing. Additionally, the Department of Mental Health operates a licensed, acute care psychiatric hospital within CMF.<sup>95</sup>

In *People v. Chavez*, the California Court of Appeals stated that one reason for the construction of the CMF was for the housing and treatment of inmates infected with AIDS/HIV.<sup>96</sup> Additionally, California Penal Code section 6102 states:

The primary purpose of the medical facility shall be the receiving, segregation, confinement, treatment and care of males under the custody of the Department of Corrections or any agency thereof who are any of the following: (a) mentally disordered, (b) developmentally disabled, (c) addicted to the use of controlled substances, or (d) suffering from any other chronic disease or condition.<sup>97</sup>

Therefore, inmates who have AIDS or are HIV+ are either housed at the CMF upon booking or, if it is later determined that an inmate is infected, they can be transferred to the CMF for housing.<sup>98</sup> Since the practice of segregating AIDS/HIV+ inmates has been found to relate to a legitimate penological goal, specifically treating inmates with a medical condition, it has been held constitutional on several occasions.<sup>99</sup>

### III. THE HOUSING OF INMATES - IN GENERAL

Courts have given a great amount of deference to prison administrators so the administrators can operate their prison facility in the most efficient manner and achieve their penological goals.<sup>100</sup> Generally, prisoners are

---

95. *California Medical Facility*, CAL. DEP'T OF CORR. AND REHAB., [http://www.cdcr.ca.gov/Facilities\\_Locator/CMF.html](http://www.cdcr.ca.gov/Facilities_Locator/CMF.html) (last visited Aug. 21, 2011).

96. 73 Cal. Rptr. 3d 189, 199 (Ct. App. 2008) (finding that the CMF also acts as an acute care hospital, elderly care unit, psychiatric unit, hospice unit, and "housing and treatment for inmates identified with AIDS/HIV . . . and other special inmate housing"); see also CAL. PENAL CODE § 6100 (West 2011) ("There is hereby established an institution under the jurisdiction of the Department of Corrections to be known as the Medical Facility.").

97. § 6102.

98. See *Camarillo v. McCarthy*, 998 F.2d 638, 640 (9th Cir. 1993) (involving a challenge by an HIV+ inmate for being transferred from general population to a segregated HIV+ group).

99. *Id.*; see also *Moore v. Mabus*, 976 F.2d 268, 271 (5th Cir. 1992); *Muhammad v. Carlson*, 845 F.2d 175, 179 (8th Cir. 1988), cert. denied, 489 U.S. 1068 (1989); *Cordero v. Coughlin*, 607 F. Supp. 9, 10 (S.D.N.Y. 1984).

100. See *Jones v. N. Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977) (stating that courts must give appropriate deference to the decisions of prison officials due to the restrictive nature of confinement); see also *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) ("[P]roblems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.").

housed in one of two different ways. The first, and most common method, is to house prisoners in the general prison population.<sup>101</sup> The second method is to segregate prisoners based on a legitimate penological objective.<sup>102</sup>

#### A. General Population

Most prisoners are housed with other inmates in what is known as the general population.<sup>103</sup> This means that the prisoners who are housed in the general prison population eat, sleep, shower, and exercise together.<sup>104</sup> The prisoners housed in general population can include young and old, and non-violent offenders as well as violent offenders.<sup>105</sup> However, prison officials are allowed to change such housing status, or segregate inmates, for any number of reasons.<sup>106</sup>

#### B. Segregation

Prisoners can be segregated for any number of reasons so long as the reason is related to a legitimate prison policy.<sup>107</sup> Prison officials in most states have the authority to segregate prisoners based on disciplinary infractions, protection of prisoners, and to maintain the security of the prison facility.<sup>108</sup>

---

101. In re Barnes, 221 Cal. Rptr. 415, 416 (Ct. App. 1985) (describing general population inmates as those having general access throughout the facility, and distinguishing them from those inmates who are in special housing units).

102. See *Haverty v. Comm'r of Correction*, 776 N.E.2d 973, 990-91 (Mass. 2002) (finding that segregating prisoners should not have been permitted because the segregation did not clearly relate to a penological goal).

103. *Leslie v. Doyle*, 896 F. Supp. 771, 773 n.4 (N.D. Ill. 1995) (describing general population as being able to spend the day using the prison's facilities, having more opportunities to participate in exercise activities, eating with other prisoners, being able to attend movies and group religious services), *aff'd*, 125 F.3d 1132 (7th Cir. 1997).

104. See *id.*; see also *Haverty*, 776 N.E.2d at 980.

105. See *Leslie*, 896 F. Supp. at 773 n.4.

106. See *Haverty*, 776 N.E.2d at 990 (stating that prisoners can be segregated from the general population if officials deem it necessary in order to prevent injury or to maintain the safe operation of the prison).

107. See *Nesbit v. Dep't of Pub. Safety*, 283 F. App'x 531, 534 (9th Cir. 2008); see also, e.g., Andrew J. Theis, *The Gang's All Here: How the Supreme Court's Unanimous Holding in Wilkinson v. Austin Utilizes Supermax Facilities to Combat Prison Gangs and Other Security Threats*, 29 HAMLINE L. REV. 145, 150-51 (2006) (describing how the Ohio prison system uses a points system to determine the security risk of inmates and those who score high enough are automatically segregated).

108. See Joseph L. Gerken, *Does Lewis v. Casey Spell the End to Court-Ordered Improvement of Prison Law Libraries?*, 95 LAW LIBR. J. 491, 495 (2003); see also Jerry R. DeMaio, *If You Build it, They Will Come: The Threat of Overclassification in Wisconsin's Supermax Prison*, 2001 WIS. L. REV. 207, 209 (2001) (stating that segregation consists of extended periods of

However, in *Doe v. Coughlin*, such authority was at issue when an HIV+ inmate challenged the New York Department of Correctional Services' mandatory segregation policy for inmates infected with AIDS/HIV+. <sup>109</sup> The inmate claimed that by segregating HIV+ inmates, his right to privacy was violated because the segregation essentially disclosed his HIV status to the rest of the prison. <sup>110</sup> The court ruled that the inmate was entitled to relief and enjoined the prison officials from involuntarily segregating all HIV+ inmates. <sup>111</sup>

It has been well established that prison officials may segregate prisoners for the prisoner's own protection and to maintain the peace of the prison. <sup>112</sup> But the courts have been reluctant to allow segregation based solely on race. <sup>113</sup> For example, the Court in *Korematsu v. United States* stated that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and "[t]hat is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."<sup>114</sup> The Court found that "[p]ressing public necessity may sometimes justify the existence of such restrictions, [but] racial antagonism *never* can."<sup>115</sup>

### C. *Legitimate Reasons for Segregation*

The reasoning against racial segregation, as described in *Korematsu*, has been upheld by courts when reviewing the housing of minority inmates. <sup>116</sup> In *Washington v. Lee* the court ruled that a state penal system policy that housed prisoners based solely on race was unconstitutional and violated the Fourteenth Amendment. <sup>117</sup> However, courts have often given

---

incarceration where the prisoner is kept alone in his cell and has little contact with the rest of the prison population).

109. 697 F. Supp. 1234, 1235 (N.D.N.Y. 1998).

110. *Id.* at 1236.

111. *Id.* at 1243 (finding that those who were segregated would likely suffer "*irreparable harm*") (emphasis added).

112. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 344, 347 (1987) (holding that prison regulations did not violate a prisoner's First Amendment rights because the prison did so to maintain peace and order); *see also* *Madrid v. Gomez*, 889 F. Supp. 1146, 1271 (N.D. Cal. 1995) (stating that prison officials may segregate gang members so long as they are provided with the "quantum of procedural due process required by the Constitution").

113. *See, e.g., Korematsu v. United States*, 323 U.S. 214, 216 (1944).

114. *Id.*

115. *Id.* (emphasis added).

116. *See* *Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1966) (holding that prisoners are protected under the equal protection clause from statutes requiring prisons to segregate prisoners based on race). *aff'd*, 390 U.S. 333 (1968).

117. *See id.* at 333; *see also* *Johnson v. California*, 543 U.S. 499, 512-13 (2004) (finding that

prison officials a great amount of latitude in separating prisoners based on certain considerations such as gang affiliation,<sup>118</sup> age,<sup>119</sup> and gender.<sup>120</sup>

The courts have held that segregating prisoners can be constitutional for some purposes.<sup>121</sup> For example, the segregation of prisoners based on age (segregating juveniles from adults), and gender (segregating males from females) has been found to be constitutional.<sup>122</sup> Additionally, courts have generally found that the administrative segregation of prisoners is constitutional.<sup>123</sup> Administrative segregation is defined as segregating prisoners into separate areas, but it does not involve the deprivation of privileges other than what is necessary to protect inmates and staff.<sup>124</sup> As stated in *Nolley v. County of Erie*, “[t]he phrase ‘administrative segregation’ . . . appears to be something of a catchall: it may be used to protect the prisoner’s safety, to protect other inmates . . . or simply to await later classification or transfer” and, therefore, prisoners should “reasonably anticipate receiving [it] at some point in their incarceration.”<sup>125</sup>

#### D. Managing the Prison System

The majority in *O’Lone v. Estate of Shabazz* stated that courts have clearly left the decisions about how to operate a prison to those who are in

---

an unwritten policy of racially segregating prisoners was unconstitutional).

118. See *Madrid v. Gomez*, 889 F. Supp. 1146, 1280 (N.D. Cal. 1995); see also CAL.CODE REGS. tit. 15 § 3335(a) (West 2011).

119. See *Outing v. Bell*, 632 F.2d 1144, 1146 (4th Cir. 1980) (stating that it was not the intent of Congress to house adult offenders with youthful offenders).

120. CAL. PENAL CODE § 4110 (West 2011) (requiring that women prisoners assigned to an industrial farm be provided separate quarters); *Id.* § 4002(a) (“Persons committed on criminal process and detained for trial, persons convicted and under sentence, and persons committed upon civil process, shall not be kept or put in the same room, nor shall male and female prisoners, except husband and wife, sleep, dress or undress, bathe, or perform eliminatory functions in the same room.”); *Klinger v. Dep’t of Corr.*, 107 F.3d 609, 615 (8th Cir. 1997) (stating that male and female prisoners may be housed separately).

121. See *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1162 (9th Cir. 1997) (holding that a state action that neither utilizes suspect classifications nor implicates fundamental rights will violate substantive due process rights only where it is shown that the action is not “rationally related to a legitimate governmental purpose”).

122. See *Outing*, 632 F.2d at 1146; see also *Klinger*, 107 F.3d at 615.

123. See *Inmates of Sybil Brand Inst. for Women v. County of Los Angeles*, 181 Cal. Rptr. 599, 607 (Ct. App. 1982) (stating that prisoners can be subject to disciplinary segregation to ensure the safety of other prisoners and the staff of the facility).

124. § 4002(b) (“[A]dministrative segregation means separate and secure housing that does not involve any deprivation of privileges other than what is necessary to protect the inmates and staff.”).

125. 776 F. Supp. 715, 737 (W.D.N.Y. 1991).

charge of the facility.<sup>126</sup> In doing so, prison officials can limit the rights of inmates so long as such limitations are related to penological objectives.<sup>127</sup> But, Justice Brennan wrote a dissenting opinion and stated that, “I therefore would require prison officials to demonstrate that the restrictions they have imposed are necessary to further an important government interest, and that these restrictions are no greater than necessary to achieve prison objectives.”<sup>128</sup>

#### E. *The Reasonable Test Standard*

Prison regulations that infringe on a constitutional right are judged by using the “reasonable” test which is less restrictive than the strict scrutiny test normally applied to allegations of constitutional rights violations.<sup>129</sup> As stated in *Turner v. Safley*, in any case where it is alleged that a prison regulation infringes on a constitutional right, the court will analyze the regulation using the following four prong test: (1) whether there is a valid rational connection between the regulation and a legitimate government interest; (2) whether there are alternative means where the prisoner can assert their constitutional right; (3) whether an accommodation to the prisoner will impact the prison staff; and (4) whether the regulation is an “exaggerated response” to prison concerns.<sup>130</sup>

---

126. 482 U.S. 342, 349 (1987); *see also, e.g.*, *Griffin v. Vaughn*, 112 F.3d 703, 709 (3d Cir. 1997) (holding that administratively segregating a prisoner for fifteen months did not violate the Eighth Amendment); *Beverati v. Smith*, 120 F.3d 500 (4th Cir. 1997) (stating that confining inmates in administrative segregation does not create an atypical hardship that would implicate a liberty interest); *McCormick v. Stalder*, 105 F.3d 1059, 1061-62 (5th Cir. 1997) (holding that administratively segregating an inmate who had tuberculosis was not unconstitutional because it was related to legitimate penological interests). *But see* *Perkins v. Kansas Dep't of Corr.*, 165 F.3d 803, 810-11 (10th Cir. 1999) (holding that segregating HIV+ inmates in such a manner where it deprived them of outdoor exercise violated the Eighth Amendment); Gary H. Loeb, *Protecting the Right to Informational Privacy for HIV-Positive Prisoners*, 27 COLUM. J.L. & SOC. PROBS. 269, 272 (1994) (arguing that courts have deferred policy questions to prison officials because prison officials only have to show a rational relation between the regulation and the penological interest).

127. *See O'Lone*, 482 U.S. at 349; *see also* *Bell v. Wolfish*, 441 U.S. 520, 562 (1979) (“[S]olutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination.”).

128. *See O'Lone*, 482 U.S. at 354 (Brennan J., dissenting).

129. *Turner v. Safley*, 482 U.S. 78, 89 (1987) (reasoning that by subjecting the everyday judgment of prison officials to a strict scrutiny standard, it would hinder their ability to adopt solutions to problems they may face as the prison administrator).

130. *Id.* at 89-91.



## IV. TRANSMISSION OF AIDS/HIV AMONG PRISONERS

The HIV virus is commonly transmitted through bodily fluids such as semen, and blood.<sup>131</sup> It is well recognized that AIDS/HIV is spread from an infected person to a non-infected person through unprotected sex, sharing needles,<sup>132</sup> and the transmission of bodily fluids, such as blood.<sup>133</sup>

HIV cannot be transmitted from person to person through casual non-sexual contact, mosquito bites, animals, sweat, food, or inanimate objects such a telephone or a toilet seat.<sup>134</sup> It has been documented that in prison, AIDS/HIV is commonly spread from infected prisoners to non-infected prisoners through sex, drugs, tattooing, and violence.<sup>135</sup>

A. *Transmission Through Sex*

Sex between male prisoners occurs in prison basically in one of two ways.<sup>136</sup> The first way is when one prisoner forcibly rapes another prisoner.<sup>137</sup> As described in *Kane v. Winn*, prisoners face several problems

---

131. See Lee, *supra* note 23, at 358 (stating the three most common ways of transmitting HIV is through sexual intercourse, sharing needles, and through breast feeding from an HIV infected woman to her baby).

132. CENTERS FOR DISEASE CONTROL AND PREVENTION, DRUG-ASSOCIATED HIV TRANSMISSION CONTINUES IN THE UNITED STATES 1-2 (2002), available at <http://www.cdc.gov/hiv/resources/factsheets/PDF/idu.pdf> (stating it is estimated that intravenous drug use has caused approximately 36% of AIDS cases).

133. See Larsen, *supra* note 18, at 254; Lee, *supra* note 23, at 358; see also Harris v. Thigpen, 941 F.2d 1495, 1503 (11th Cir. 1991); Mary McLean Jordan, *Care to Prevent HIV Infection in Prison: A Moral Right Recognized by Canada, While the United States Lags Behind*, 37 U. MIAMI INTER-AM. L. REV. 319, 321-22 (2006).

134. U.S. Dep't of Health and Human Servs. *Understanding AIDS*, at 2, HHS-88-8404 (1988); Thigpen, 941 F.2d at 1503; Lee, *supra* note 23, at 358.

135. See Onishea v. Hopper, 171 F.3d 1289, 1295 (11th Cir. 1999) (stating that HIV can perpetually be spread in jail by sex, intravenous drug use, and bloodshed).

136. Kate Dolan et. al., *Evaluation of the Condom Distribution Program in New South Wales Prisons, Australia*, 32 J.L. MED. & ETHICS 124, 124 (2004); see also James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1, 9 (1999) (describing the sexual harassment and abuse of inmates).

137. See David M. Siegal, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter*, 44 STAN. L. REV. 1541, 1544 (1992); Tess M. S. Neal & Carl B. Clements, *Prison Rape and Psychological Sequelae: A Call for Research*, 16 PSYCHOL. PUB. POL'Y & L. 284, 284 (2010) (stating that rape in prison is a pervasive problem in the U.S. prison system); see also Philip Ellenbogen, *Beyond the Border: A Comparative Look at Prison Rape in the United States and Canada*, 42 COLUM. J.L. & SOC. PROBS. 335, 336 (2009) (stating sexual assaults and rapes are known to exist in the prison system); Darryl M. James, Comment, *Reforming Prison Litigation Reform: Reclaiming Equal Access to Justice for Incarcerated Persons in America*, 12 LOY. J. PUB. INT. L. 465, 471-72 (2011); Katherine Robb, *What We Don't Know Might Hurt Us: Subjective Knowledge and the Eighth Amendment's Deliberate Indifference Standard for Sexual Abuse in Prisons*, 65 N.Y.U. ANN. SURV. AM. L. 705, 705-07 (2010); Jerita

while in prison, one being inmate-on-inmate rape.<sup>138</sup> Many prisoners have reported being raped while in prison.<sup>139</sup> In fact, in *United States v. Bailey*, Justice Harry Blackman stated, “[a] youthful inmate can expect to be subjected to homosexual gang rape his first night in jail.”<sup>140</sup> Justice Blackman continued and stated, “[w]eaker inmates become the property of stronger prisoners or gangs, who sell the sexual services of the victim. Prison officials either are disinterested in stopping abuse of prisoners by other prisoners or are incapable of doing so, given the limited resources society allocates to the prison system. Prison officials often are merely indifferent to serious health and safety needs of prisoners as well.”<sup>141</sup>

The rape of a youthful offender, and prison staff indifference, was described in *Redmond v. Baxley*.<sup>142</sup> In *Redmond*, the plaintiff, a vulnerable eighteen year old diabetic inmate, was placed in a youthful offender section of the prison infirmary with little supervision.<sup>143</sup> During his first day, the plaintiff was approached twice by three other inmates requesting sex.<sup>144</sup> When the plaintiff reported this to the prison guard, the guard responded by “basically telling [him] to take care of himself.”<sup>145</sup> A few hours later, the plaintiff was forcibly raped by the three inmates, which injured the plaintiff.<sup>146</sup> When an inmate is raped, the chance of becoming infected is increased because “the violent nature of the attack frequently causes severe rectal bleeding which increase[s] the likelihood of transmission.”<sup>147</sup>

---

L. DeBrau, *Prison Rape: Have We Done Enough? A Deep Look into the Adequacy of the Prison Rape Elimination Act*, 50 HOW. L.J. 203, 205-07 (2006) (describing how rape can also be accomplished through coercion, pimping out a prisoner, and as a means for control and punishment).

138. 319 F. Supp. 2d 162, 188-90 (D. Mass. 2004) (finding that other problems prisoners confront include physical violence, overcrowding, and unhealthy and unsafe conditions).

139. See *LaMarca v. Turner*, 662 F. Supp. 647, 700-06 (S.D. Fla. 1987) (finding that five prisoners had been gang raped); *Wheeler v. Sullivan*, 599 F. Supp. 630, 652 (D. Del. 1984) (finding that a male prisoner was raped within twenty-four hours of arriving at prison). *But see* Neal & Clements, *supra* note 137, at 285 (stating that the number of prison rape victims may be underreported because of guilt, stigma, and fear of retaliation).

140. 444 U.S. 394, 421 (1980) (Blackmun J., dissenting).

141. *Id.*

142. 475 F. Supp. 1111, 1114 (E.D. Mich. 1979).

143. See *id.* (stating the closest prison officer or guard was in an office approximately half a football field away from the youthful offender section).

144. See *id.*

145. See *id.*

146. See *id.* (“As a result of this experience the plaintiff suffered some bodily injuries and drastic psychological problems.”).

147. See Larsen, *supra* note 18, at 257.

Another way sex occurs between prisoners is through consensual acts between two prisoners.<sup>148</sup> During a consensual sexual encounter there will still be an exchange of bodily fluids with little or no trauma.<sup>149</sup> However, no matter the manner in which the sexual conduct is performed, the sexual activity is typically performed without protection because prisoners do not have access to latex condoms.<sup>150</sup>

### B. *Transmission Through Drug Use*

The second common way that AIDS/HIV is spread in prison is through the use of intravenous drugs.<sup>151</sup> According to the CDC, sharing syringes and intravenous drug equipment is a well know means of HIV transmission.<sup>152</sup> Drug use in prison is common among inmates because it is a way prisoners can escape the harsh reality of prison life, boredom, and hopelessness.<sup>153</sup> The CDC recommends that if one is going to use intravenous drugs, they should use sterile needles, or at least clean used needles with bleach.<sup>154</sup> Since the possession of needles and/or bleach in prison is a violation of prison rules, those prisoners who use intravenous drugs usually wind up sharing dirty needles to get their next high.<sup>155</sup>

### C. *Transmission Through Tattooing*

The third common way that HIV is spread in prison is through amateur tattooing.<sup>156</sup> Similar to intravenous drug use, tattooing requires the use of a

---

148. Sowder, *supra* note 35, at 668 (stating that it is undisputed that consensual and forced homosexual sex takes place in most correctional facilities).

149. Larsen, *supra* note 18, at 258 (stating that consensual sex is also unsafe because there will be a transfer of bodily fluids between inmates and condoms are not available because they are considered contraband).

150. *Id.*

151. *Id.* at 259 (stating that many criminals continue to use drugs even after being placed in custody); see also HUMAN RIGHTS WATCH, *supra* note 21, at 10 (stating that intravenous drug usage is a key way in which the HIV virus is spread and that “[t]wenty percent of state prisoners in the US are held on drug-related charges . . . .”); Kate Abramson, Note, *Unfairly Condemned to Disease: The Argument for Needle-Exchange Programs in United States Prisons*, 16 GEO. J. ON POVERTY L. & POL’Y 695, 696 (2009) (stating that needle sharing in prison is a “significant source of HIV transmission”).

152. CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 132.

153. Ralf Jurgens, *Sentenced to Prison, Sentenced to Death? HIV and AIDS in Prison*, 5 CRIM. L.F. 763, 765 (1994) (book review).

154. See CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 132; see also Lee, *supra* note 23, at 361-62.

155. Larsen, *supra* note 18, at 260; see also Lee, *supra* note 23, at 361-62.

156. See Larsen, *supra* note 18, at 260; see also *Motzer v. Goord*, 709 N.Y.S.2d 670, 671-72 (App. Div. 2000) (finding a prisoner guilty of possession of tattooing instruments); HUMAN

needle or other makeshift needle-like instrument.<sup>157</sup> The needles used for tattooing are considered contraband and clean needles are not readily available.<sup>158</sup> The homemade tattooing machines and instruments are often crafted by the inmates and, when tattooing, the machine makes multiple incisions on the inmate, thus increasing the risk of transmission of HIV.<sup>159</sup>

#### D. Transmission Through Violence

Finally, violence between inmates can spread HIV.<sup>160</sup> It is not uncommon for fights to break out between prisoners which can result in cuts, bites, broken noses, and bleeding, all of which can increase the risk of transmission of HIV.<sup>161</sup> Although prison officials try to reduce the amount of violence among prisoners, it is still common to house multiple inmates in a cell which can contribute to physical assaults.<sup>162</sup>

#### V. THE SEGREGATION OF AIDS/HIV+ INMATES

There are different schemes in which AIDS/HIV+ prisoners can be housed.<sup>163</sup> The two most common ways to segregate infected prisoners are: 1) by using an overall blanket segregation policy,<sup>164</sup> and 2) only segregating certain infected inmates.<sup>165</sup>

---

RIGHTS WATCH, *supra* note 21, at 11 (“Tattooing is another common prison activity that poses a risk of HIV and hepatitis transmission from shared needles.”).

157. *Magar v. Parker*, 490 F.3d 816, 817 (10th Cir. 2007) (finding the prisoner possessed a tattoo gun and tattoo needles).

158. *Larsen*, *supra* note 18, at 260.

159. *Id.*

160. *Id.*

161. *See id.* at 260-61; *see also* James J. Stephan & Jennifer C. Karberg, *Census of State and Federal Corrections Facilities 2000*, BUREAU OF JUSTICE STATISTICS 9-10 (Aug. 24, 2003), <http://bjs.ojp.usdoj.gov/content/pub/pdf/csfcf00.pdf> (stating that in 2000, 34,355 inmate-on-inmate assaults were reported by prisoners in state and federal prisons).

162. *See Larsen*, *supra* note 18, at 260-61.

163. *Chang & McCooey*, *supra* note 14, at 1012.

164. *Larsen*, *supra* note 18, at 268-69 (finding that while segregating infected inmates is unnecessary, many prisons still choose to segregate infected).

165. *See, e.g., Chang & McCooey*, *supra* note 14, at 1002 (involving a prison where all inmates with AIDS were “sent to the maximum security prison and involuntarily segregated from the general prison population pursuant to the policy of the Department of Correction”).

### A. *Blanket Segregation*

The first way to segregate prisoners is by using a blanket segregation policy for AIDS/HIV+ inmates.<sup>166</sup> This would be accomplished by creating separate sleeping and living areas for the infected prisoners away from non-infected prisoners.<sup>167</sup> Although this policy was popular at the onset of the AIDS epidemic, it has lost favor over the years.<sup>168</sup>

There are arguments that segregating all prisoners who are HIV+ is beneficial.<sup>169</sup> Perhaps the main justification for segregating HIV+ inmates is to reduce the chances of transmitting the HIV infection to other prisoners.<sup>170</sup> Other justifications have been offered including reducing violence towards the infected prisoner<sup>171</sup> and helping infected individuals receive specialized medical treatment.<sup>172</sup> However, by segregating all HIV+ inmates, it could have the opposite effect and increase the rate of HIV exposure to other inmates.<sup>173</sup>

However, segregating all HIV+ inmates can be unfair and unwarranted.<sup>174</sup> For example, inmates who are segregated will not have access to the same facilities and programs offered by the prison.<sup>175</sup>

---

166. *Id.* at 1012.

167. Larsen, *supra* note 18, at 268; *see also* HUMAN RIGHTS WATCH, *supra* note 21, at 2 (“Segregation policies reflect outdated approaches to HIV that no longer have any rational basis in science or public policy.”).

168. HUMAN RIGHTS WATCH, *supra* note 21, at 2 (stating that in 1985, forty-six out of fifty-one state and federal prisons segregated HIV+ inmates, and that number fell to six of fifty-one in 1994).

169. *Harris v. Thigpen*, 941 F.2d 1495, 1516 (11th Cir. 1991) (stating that segregation may be justified if it reduces the rate of HIV infection and it promotes the internal prison security).

170. *See id.*; *see also* HUMAN RIGHTS WATCH, *supra* note 21, at 41 (reporting that in Alabama and South Carolina officials “claim that segregation is necessary to reduce the risk of HIV transmission within the prison”).

171. *Harris*, 941 F.2d at 1516.

172. Sowder, *supra* note 35, at 681. *But see* HUMAN RIGHTS WATCH, *supra* note 21, at 40 (“In the US, forty-seven other states and the federal Bureau of Prisons provide medical care to prisoners with HIV without segregating them from other prisoners. These include Florida and New York, the two states with the highest number of prisoners living with HIV.”).

173. Loeb, *supra* note 126, at 278 (stating that by segregating AIDS/HIV+ inmates it could lull the other inmates into believing that non-segregated inmates are not infected); *see also* HUMAN RIGHTS WATCH, *supra* note 21, at 43 (“Segregation may lead to a false sense of security among prisoners in the general population that HIV has been effectively removed, thereby increasing the likelihood of unsafe sexual, injection or tattooing behaviors.”).

174. *See* Howard Messing, *AIDS in Jail*, 11 N. ILL. U. L. REV. 297, 308 (1991) (stating that it is universally accepted that healthy HIV+ inmates pose little, or no, danger to other inmates); *see also* HUMAN RIGHTS WATCH, *supra* note 21, at 13 (stating that in the beginning of the AIDS/HIV epidemic, HIV+ inmates were placed in isolation and had no access to programs, work, or activities).

175. Chang & McCooey, *supra* note 14, at 1002 (finding that inmates with AIDS who were

Segregating inmates who are HIV+ also “creates a difficult and isolating environment for them.”<sup>176</sup> Additionally, by segregating HIV+ inmates and forcing them to live together it can create a “breeding ground” for other diseases that can easily be spread among the HIV+ inmates.<sup>177</sup> Finally, segregated prisoners may not have access to the same eating activities, educational and vocational programs, or church services.<sup>178</sup> For example, in *Baez v. Rapping*, an HIV+ inmate alleged that by being segregated he was denied access to the courts, law library, church, and recreation facilities.<sup>179</sup> Also in *Anderson v. Romero*, an HIV+ inmate claimed that because he was segregated, he was denied exercise yard privileges and access to haircuts.<sup>180</sup>

### B. Selective Segregation

The second method of segregating infected inmates is by only segregating certain infected inmates on a case by case basis.<sup>181</sup> The decision of whether to segregate certain AIDS/HIV+ inmates would be based on considerations such as the infected inmate’s medical condition, prison/prisoner security, and other individual needs of the inmate.<sup>182</sup> This scheme would not result in total segregation of all HIV+ inmates; segregation would be made on a case by case basis.<sup>183</sup>

---

segregated “had virtually no access to the dining room, barber shop, library, educational programs, vocational programs, church services, or gymnasium”).

176. *Id.* at 1015 (describing how inmates with AIDS were “[f]orced to endure extended periods of idleness, despair, and frustration”).

177. See Loeb, *supra* note 126, at 278 (stating that by forcing HIV+ inmates to live together it creates an environment where diseases, such as tuberculosis, can be easily spread from prisoner to prisoner); see also HUMAN RIGHTS WATCH, *supra* note 21, at 43 (“[S]egregation of HIV-positive prisoners is not recommended as a matter of public health. Prisons generally can be incubators for infectious disease, but close confinement of individuals with compromised immune systems may spread infection more rapidly through this more vulnerable population.”).

178. Chang & McCooey, *supra* note 14, at 1002; see also *Onishea v. Hopper*, 171 F.3d 1289, 1292 (11th Cir. 1999) (stating that inmates segregated due to being HIV+ may not be able to participate in programs including farm jobs, facility maintenance, and vocational training such as auto mechanics classes, construction trade classes, and barber jobs); Scott Burris, *Prisons, Law and Public Health: The Case for A Coordinated Response to Epidemic Disease Behind Bars*, 47 U. MIAMI L. REV. 291, 314 (1992) (finding that segregating HIV+ inmates deprives them of access to prison activities and programs, and identifies their HIV status to guards, staff, and other prisoners).

179. 680 F. Supp. 112, 114 (S.D.N.Y. 1988).

180. 72 F.3d 518, 520 (7th Cir. 1995).

181. See Chang & McCooey, *supra* note 14, at 1012; see also Larsen, *supra* note 18, at 268 (stating that by the year 2001, the trend had changed, and many prison systems had moved away from the practice of segregation, “in part due to the heightened understanding about transmission of the virus and the belief that isolation was not medically necessary”).

182. Chang & McCooey, *supra* note 14, at 1002.

183. See *id.* (stating that some HIV+ inmates would still be housed with HIV- inmates).

However, even under this scheme, some inmates have sued in court stating that failure to segregate AIDS/HIV+ inmates is unconstitutional.<sup>184</sup> For example, in *Glick v. Henderson* an HIV- inmate claimed he was subjected to a pervasive risk of contracting AIDS because: 1) he came in contact with sweat from other inmates while on a work detail, 2) he could be bitten by mosquitoes who had bitten other inmates, 3) a known homosexual inmate had sneezed on him, 4) an untested prison official had prepared his food, and 5) prison officials transferred prisoners cell to cell throughout the prison.<sup>185</sup> The inmate requested that the prison official be forced to segregate AIDS infected inmates from the general prison population.<sup>186</sup> However, the Eighth Circuit Court of Appeals ruled against the inmate because the possibility of transferring AIDS to a non-infected inmate was too remote.<sup>187</sup>

Then in 1993, in *Marcussen v. Brandstat*, prison officials in Iowa were sued for housing an HIV+ inmate with a non-infected inmate.<sup>188</sup> The non-infected inmate, Marcussen, argued that his constitutional rights were violated because the prison officials acted with deliberate indifference when they “assigned an HIV-positive inmate to Marcussen’s cell and allowed that inmate to use Marcussen’s toiletries, thus exposing Marcussen to possible infection with the HIV virus.”<sup>189</sup> The court stated that in order to prevail on his claim, Marcussen would have to fulfill the two requirements outlined in *Glick v. Henderson*, specifically that there was a pervasive harm to inmates of catching AIDS, and that prison officials acted with deliberate indifference.<sup>190</sup> The court found that Marcussen could not prove either requirement and granted the defendant’s motion for summary judgment.<sup>191</sup> The court also explicitly stated that failure to segregate HIV+ inmates from non-infected inmates does not violate an inmate’s constitutional rights.<sup>192</sup>

---

184. See, e.g., *Marcussen v. Brandstat*, 836 F. Supp. 624, 626 (N.D. Iowa 1993) (involving an HIV- inmate who sued prison officials for assigning an HIV+ inmate as his cellmate).

185. 855 F.2d 536, 539 (8th Cir. 1988).

186. See *id.* at 539.

187. *Id.*

188. 836 F. Supp. at 626.

189. See *id.* (alleging that the HIV+ inmate used his razor, cigarette roller, and drinking cup).

190. See 855 F.2d at 539-40.

191. See *Marcussen*, 836 F. Supp. at 627.

192. *Id.* at 628.

## VI. AIDS/HIV+ INFECTION AS A DISABILITY

It has been argued that discrimination based on HIV status violates the Americans with Disabilities Act of 1990 (ADA).<sup>193</sup> Section 302 of the ADA states, “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”<sup>194</sup> Furthermore, the statute defines disability as: “(1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment.”<sup>195</sup>

The issue of whether AIDS/HIV+ qualifies as a disability under the ADA was answered in *Abbott v. Bragdon*.<sup>196</sup> In this case the plaintiff had been infected with HIV for nine years and was in the asymptomatic phase.<sup>197</sup> The plaintiff had a dental appointment with the defendant and indicated on the patient health form that she was HIV+.<sup>198</sup> The dentist examined the plaintiff and found a cavity.<sup>199</sup> The defendant informed the plaintiff that he would not fill her cavity in the office, but would only treat her in a hospital setting, in which case she would have to pay for the use of the hospital facility.<sup>200</sup> The plaintiff then sued the defendant for violating the ADA.<sup>201</sup>

The court stated that the application of the ADA depends on whether an individual has a physical or mental impairment, and whether such impairment “substantially limits one or more of the major life activities of

---

193. See *Abbott v. Bragdon*, 912 F. Supp. 580, 595 (D. Me. 1995) (finding that a dentist’s refusal to treat an AIDS infected patient in his office violated the Americans with Disabilities Act) *aff’d*, 107 F.3d 934 (1st Cir. 1997) *vacated*, 524 U.S. 624 (1998); see also Merjian, *supra* note 51, at 374 (discussing the unequal provision of social welfare benefits and services to an AIDS recipient).

194. AMERICANS WITH DISABILITIES ACT OF 1990 § 320, 42 U.S.C. § 12182(a) (2006).

195. *Id.* § 12102(2).

196. See 912 F. Supp. at 580. *But see* Timothy D. Johnston, *Reproduction Is Not A Major Life Activity: Implications for HIV Infection As A Per Se Disability Under the Americans with Disabilities Act*, 85 CORNELL L. REV. 189, 193-94 (1999) (arguing the U.S. Supreme Court in *Bragdon* incorrectly decided whether a person who is HIV+ is disabled under the ADA because the Court focused on the act of reproduction when analyzing what constitutes a major life activity).

197. *Abbott*, 912 F. Supp. at 585.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*



such individual.”<sup>202</sup> On this issue, the court stated it was “persuaded that asymptomatic HIV constitutes a physical impairment for the purposes of the ADA.”<sup>203</sup> Additionally, the court found an abundant amount of authority to support the proposition that HIV is considered a disability under the ADA.<sup>204</sup>

After the District Court ruled in favor of the plaintiff, the defendant appealed to the Court of Appeals who affirmed the lower court’s ruling.<sup>205</sup> The U.S. Supreme Court then granted certiorari to review: 1) whether HIV infection is a disability under ADA at the asymptomatic stage, and 2) whether the Court of Appeals properly granted summary judgment.<sup>206</sup> The U.S. Supreme Court affirmed the holding that HIV infection was a disability under the ADA, but remanded the case stating that the lower court did not use the proper standard for assessing the risk.<sup>207</sup>

## VII. CONSTITUTIONAL ARGUMENTS

Section 1983 of Title 42 of the United States Code states that a person acting under the color of authority may be held liable under a civil cause of action if they deprive any individual of any right secured by the Constitution or federal law.<sup>208</sup> Therefore, prison officials could be held liable for violating a prisoner’s rights, but:

In order to state a cause of action under 42 U.S.C. § 1983, the Supreme Court requires only two elements: First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of the right acted under color of state law.<sup>209</sup>

---

202. *Id.* at 585.

203. *Id.*

204. *Id.*; see also *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994); *Austin v. Pennsylvania Dep’t of Corrs.*, 876 F. Supp. 1437, 1465 (E.D. Pa. 1995); *Glanz v. Vernick*, 756 F. Supp. 632, 635 (D. Mass. 1991).

205. See *Abbot v. Bragdon*, 107 F.3d 934, 934 (1st Cir. 1997), *vacated*, 524 U.S. 624 (1998).

206. *Bragdon v. Abbott*, 524 U.S. 624, 628 (1998).

207. See *id.* at 650 (stating that assessment of risk of infection must be made from the standpoint of a reasonable health care professional “without deferring to their individual judgments . . .”).

208. 42 U.S.C. § 1983 (2010) (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .”).

209. See *Wilson v. Vannatta*, 291 F. Supp.2d 811, 814 (N.D. Ind. 2003).

It has been well established and accepted that when someone is incarcerated it becomes necessary to limit some of their rights and privileges.<sup>210</sup> However, just because someone is incarcerated, they do not forfeit all of their constitutional protections.<sup>211</sup> As stated in *Turner v. Safley*, “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution.”<sup>212</sup> Inmates have made several constitutional arguments against segregating HIV+ inmates stating segregation violates the Eighth Amendment,<sup>213</sup> the Due Process Clause under the Fourteenth Amendment,<sup>214</sup> the Equal Protection Clause under the Fourteenth Amendment,<sup>215</sup> and the constitutional right to privacy.<sup>216</sup> When analyzing these challenges, the Supreme Court stated in *Turner v. Safley* that rather than using a strict or intermediate scrutiny to judge the prison’s actions, the courts will examine whether a prison official’s action is “reasonably related” to a legitimate penological interest.<sup>217</sup>

---

210. See *Price v. Johnston*, 334 U.S. 266, 285 (1948) (“Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.”); *Jones v. North Carolina Prisoners’ Labor Union*, 433 U.S. 119, 129 (1977) (“[T]his Court has repeatedly recognized the need for major restrictions on a prisoner’s rights.”).

211. See *Bell v. Wolfish*, 441 U.S. 520, 545 (1979) (stating convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison, and “[t]here is no iron curtain drawn between the Constitution and the prisons of this country.”) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974)); *Turner v. Safley*, 482 U.S. 78, 84 (1987); *Pell v. Procunier*, 417 U.S. 817, 824 (finding a prisoner does not forfeit the right to free exercise of religion); *Cruz v. Beto*, 405 U.S. 319, 322 (holding that a prisoner’s First Amendment right was violated when prison officials “denied [him] a reasonable opportunity of pursuing his faith”); *Meachum v. Fano*, 427 U.S. 215, 225 (1976) (“[A] convicted felon does not forfeit all constitutional protections by reason of his conviction and confinement in prison.”); *Walker v. Sumner*, 917 F.2d. 382, 385 (9th Cir. 1990) (“Prisoners, despite their conviction and confinement, do not forfeit all constitutional rights.”). *But see* Sarah E. Frink, *AIDS Behind Bars: Judicial Barriers to Prisoners’ Constitutional Claims*, 45 DRAKE L. REV. 527, 532 (1997) (stating that despite these court holdings, prisoner claims of constitutional violations have not fared well).

212. 482 U.S. at 84.

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

214. *Id.* amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law.”).

215. *Id.* (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

216. See, e.g., *Whalen v. Roe*, 429 U.S. 589, 596 (1977) (stating that although the right to privacy is not recognized in the Constitution, it has been judicially noticed).

217. 482 U.S. at 78 (stating that, in the past, strict scrutiny was used to resolve prisoners’ constitutional complaints, but when such complaints are brought before a court, “a lesser standard is appropriate whereby inquiry is made into whether a prison regulation that impinges on inmates’ constitutional rights is ‘reasonably related’ to legitimate penological interests”). *But see* Loeb, *supra* note 126, at 273 (arguing that a higher standard should be used when analyzing the disclosure of an inmate’s HIV related information).

### A. Eighth Amendment Violation

Inmates often challenge that a policy of segregating HIV+ inmates, and even the failure to segregate HIV+ prisoners, violates the Eighth Amendment against cruel and unusual punishment.<sup>218</sup> The courts have made it clear that segregating inmates for the control and management of a prison facility does not constitute cruel and unusual punishment.<sup>219</sup> Similarly, failing to segregate AIDS infected prisoners from the general prison population does not violate the Constitution.<sup>220</sup>

In deciding allegations of Eighth Amendment violations, courts determine if there has been cruel and unusual punishment by using the “deliberate indifference” standard.<sup>221</sup> As stated by the U.S. Supreme Court in *Farmer v. Brennan*, “[a] prison official may be held liable under the Eighth Amendment for acting with ‘deliberate indifference’ to inmate health or safety only if he knows that inmates face a substantial risk of

---

218. *See Goss v. Sullivan*, 839 F. Supp. 1532, 1534 (D. Wyo. 1993) (involving an inmate who was attacked by an HIV+ inmate and thereafter claimed the Director of the Department of Corrections violated his Eighth Amendment rights by failing “to protect the general prison population from the risk of contracting AIDS, by failing to inform the inmate population ‘as to which inmates pose a deadly threat,’ and by failing to ensure the health and well-being of the inmates”); *Deutsch v. Federal Bureau of Prisons*, 737 F. Supp. 261, 263 (S.D.N.Y. 1990) (involving an inmate who stated that being forced to share a cell with an HIV+ inmate violated the Eighth Amendment); *Nolley v. Cnty of Erie*, 776 F. Supp. 715, 717-18 (W.D.N.Y. 1991) (involving an HIV+ inmate who claimed her conditions of confinement violated the Eighth Amendment); *Harris v. Thigpen*, 941 F.2d 1495, 1501 (11th Cir. 1991) (involving an HIV+ inmate who sued stating his segregation violated the Eighth Amendment); *Feigley v. Fulcomer*, 720 F. Supp. 475, 476 (M.D. Pa. 1989) (involving an inmate who sued under the Eighth Amendment alleging the prison did not protect the inmates because the prison did not segregate HIV+ prisoners).

219. *In re Henderson*, 101 Cal. Rptr. 479, 484 (Ct. App. 1972) (stating a policy that allows for segregating inmates is “perfectly proper and lawful and its administration requires the highest degree of expertise in the discretionary function of balancing the security of the prison with fairness to the individuals confined”).

220. *Robbins v. Clarke*, 946 F.2d 1331, 1332 (8th Cir. 1991) (stating that failure to segregate HIV prisoners is not cruel and unusual punishment); *Johnson v. United States*, 816 F. Supp. 1519 (N.D. Ala. 1993) (stating that having a policy of not segregating prisoners with AIDS did not violate the Eighth Amendment); *Davis v. Stanley*, 740 F. Supp. 815, 817 (N.D. Ala. 1987) (rejecting the claim of an Eighth Amendment violation for housing an AIDS infected prisoner with a non-infected prisoner); *Welch v. Sheriff, Lubbock Cnty. Tex.*, 734 F. Supp. 465 (N.D. Tex. 1990) (stating the U.S. Constitution does not require HIV positive inmates to be segregated from the general population); *see Feigley*, 720 F. Supp. at 475 (holding that prison officials did not violate the Eighth Amendment by not segregating AIDS infected inmates).

221. *Johnson v. California*, 543 U.S. 499, 511 (2005) (stating that violations of the Eighth Amendment should be made “under the ‘deliberate indifference’ standard, rather than *Turner’s* ‘reasonably related’ standard); *see also Substantive Rights Retained by Prisoners*, 34 GEO. L.J. ANN. REV. CRIM. PROC. 915, 932 (2005) (“The Supreme Court has adopted the ‘deliberate indifference’ standard to determine whether officials display the requisite culpable state of mind with respect to conditions of confinement and medical care.”).

serious harm and disregards that risk by failing to take reasonable measures to abate it.”<sup>222</sup> Furthermore in *Marcussen v. Brandstat*, the court stated that “prison regulations prohibiting behavior by inmates that could result in exposure to the AIDS or HIV virus were adequate measures to protect the inmates [against infection].”<sup>223</sup> Although the “deliberate indifference” standard may be difficult to meet, not all cases of Eighth Amendment violations have failed.<sup>224</sup>

When determining whether the actions of prison officials violates a prisoner’s Eighth Amendment rights, the courts will use an objective and subjective test as described in *Wilson v. Seiter*.<sup>225</sup> The objective test analyzes if the treatment of the inmate is serious enough that it deprives the inmate of “the minimal civilized measures of life’s necessities.”<sup>226</sup> The subjective test analyzes if there is prison officials act with “deliberate indifference.”<sup>227</sup> Courts have found that the prison administrators has an

---

222. 511 U.S. 825, 825 (1994) (holding that a state official may be liable under the Eighth Amendment if the state official fails to protect an inmate from a known sexually violent predatory cellmate).

223. 836 F. Supp. 624, 628 (N.D. Iowa 1993); *see also* *Portee v. Tollison*, 753 F. Supp. 184, 187 (D.S.C. 1990) (holding the “South Carolina Department of Corrections practices and policies governing the admission of prisoners and the handling of prisoners with AIDS do not violate the Eighth Amendment’s prohibition against cruel and unusual punishment”), *aff’d*, 929 F.2d 694 (4th Cir. 1991).

224. *See* *Billman v. Ind. Dep’t of Corrs.*, 56 F.3d 785, 788-89 (7th Cir. 1995) (holding that the failure to protect an inmate from an HIV+ cellmate with a propensity for rape violates an inmate’s Eighth Amendment rights); *see also* *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976) (holding that if prison officials act with deliberate indifference to an inmate’s serious medical needs, then such actions would violate the Eighth Amendment).

225. 501 U.S. 294, 299 (1991); *see also* *Camarillo v. McCarthy*, 998 F.2d 638, 640 (9th Cir. 1993) (holding that a prison policy that segregated HIV+ inmates from the prison’s general population is not unconstitutional); *Substantive Rights Retained by Prisoners*, *supra* note 221, at 938 (stating that when analyzing Eighth Amendment claims, courts will consider objective and subjective components. The objective component looks at whether the act rises to a level sufficient enough to implicate the Eighth Amendment, and the subjective component determines if the official had a sufficiently culpable state of mind.); *Williams v. Benjamin*, 77 F.3d 756, 761 (4th Cir. 1996) (holding that “[E]ighth Amendment analysis necessitates inquiry as to whether the prison official acted with a sufficiently culpable state of mind (subjective component) and whether the deprivation suffered or injury inflicted on the inmate was sufficiently serious (objective component)”); *Brown v. Bargery*, 207 F.3d 863, 867 (6th Cir. 2000) (finding an Eighth Amendment claim required proving objective and subjective allegations); *Riley v. Olk-Long*, 282 F.3d 592, 595 (8th Cir. 2002) (ruling a female inmate’s claim that a guard raped her was allowed because the inmate satisfied both the objective and subjective components); *Freitas v. Ault*, 109 F.3d 1335, 1339 (8th Cir. 1997) (stating an inmate’s sexual harassment claim against prison officials could not proceed because the objective component was not satisfied).

226. *See* *Wilson*, 501 U.S. at 298 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

227. *See id.* at 301-03. *But see* *Doe v. Wigginton*, 21 F.3d 733, 738 (6th Cir. 1994) (stating that because the prison official did not act with deliberate indifference when failing to follow the prison’s policy of administering an AIDS test to a prisoner, there was not a violation of the Eighth

obligation to protect a prisoner's safety, and failure to do so, may rise to the level of an Eighth Amendment violation.<sup>228</sup>

However, it would be difficult to prove that the prison administration's failure to segregate AIDS/HIV+ inmates from non-infected inmates would rise to the level of an Eighth Amendment violation.<sup>229</sup> As stated in *Goss v. Sullivan*, "[a]llegations of a generalize[d] fear of contracting AIDS from allegedly aggressive HIV-positive inmates and conclusory allegations that prison officials were aware of such intentions" are insufficient to support an allegation that prison officials violated the Eighth Amendment.<sup>230</sup>

The courts have made it equally clear that not segregating HIV+ inmates does not violate a non-infected prisoner's Eighth Amendment rights.<sup>231</sup> For example, in *Goss v. Sullivan*, an inmate sued under the Eighth Amendment alleging that prison officials endangered the entire prison population by failing to segregate HIV+ inmates.<sup>232</sup> Although the plaintiff argued that the prison administration placed him in a life threatening situation by not segregating HIV+ inmates, the court ruled that failure to segregate HIV+ inmates did not violate the Eighth Amendment.<sup>233</sup> In dismissing the complaint, Chief Justice Johnston stated, "[a]llegations of a generalized fear of contracting AIDS . . . are insufficient to state a

---

Amendment).

228. *Berry v. City of Muskogee*, 900 F.2d 1489, 1493-97 (10th Cir. 1990) (holding that a prisoner's Eighth Amendment rights were violated when he was murdered while in custody); *Harris v. Maynard*, 843 F.2d 414, 416 (10th Cir. 1988) (holding that "wanton or obdurate disregard of or deliberate indifference to the prisoner's right to life as a condition of confinement is a substantive Constitutional deprivation whether it falls under the due process clause or the Eighth Amendment").

229. *See, e.g., Goss v. Sullivan*, 839 F. Supp. 1532, 1537 (D. Wyo. 1993) (stating allegations that prison officials were aware of the risk posed by an infected inmate, but failed to take any action were insufficient to show a deliberate indifference to the other inmates).

230. *Id.* at 1537.

231. *Robbins v. Clarke*, 946 F.2d 1331, 1334-35 (8th Cir. 1991) (dismissing a claim that "involuntary and unprotected exposure to HIV-positive prisoners is violative of his Eighth Amendment right against cruel and unusual punishment"); *see also* Kathleen Knepper, *Responsibility of Correctional Officials in Responding to the Incidence of the HIV Virus in Jails and Prisons*, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 45, 81-86 (1995).

232. 839 F. Supp. at 1534.

233. *Id.* at 1538 (finding that the plaintiff could not demonstrate "that the [prison administrator's] failure to segregate those inmates who have tested HIV-positive from the general inmate population, or that the failure to disclose which inmates have tested HIV-positive to the general prison population, are clearly established violations of the Eighth Amendment in this Circuit. . . . [A]lthough the law is clearly established that prison officials must protect inmates from others known to be violent risks, plaintiff has failed to establish that these individual defendants were aware of any propensity on the part of Inmate Fitzhugh to attempt to infect other inmates, or that any one of these individuals had any personal involvement whatsoever in the events . . .").

constitutionally inhumane condition of confinement or a culpable state of mind.”<sup>234</sup>

In *Deutsch v. Federal Bureau of Prisons*, an inmate sued claiming his Eighth Amendment rights were violated because the inmate, unknowingly, was required to share a cell with an inmate who was HIV+. <sup>235</sup> The plaintiff stated that if he knew his cellmate was HIV+, he would not have shared his personal items. <sup>236</sup> The court ruled that housing an HIV+ inmate with the plaintiff, without revealing his cellmate’s HIV status, did not violate the Eighth Amendment because the prison officials did not act with “deliberate indifference.”<sup>237</sup>

Finally, in *Nolley v. County of Erie*, an HIV+ inmate sued stating that segregation violated her rights under the Eighth Amendment. <sup>238</sup> The plaintiff was segregated in a five cell ward, consisting of two cells for prisoners with infectious diseases, and three cells for prisoners who were suicidal or with psychiatric problems. <sup>239</sup> The plaintiff alleged an Eighth Amendment violation because she was “housed with inmates who graphically described their horrible crimes, who were suicidal, who demonstrated severe psychiatric problems, and who were in a state of perpetual trauma.”<sup>240</sup> The court ruled that the conditions of confinement, “although deplorable, did not violate plaintiff’s Eighth Amendment rights.”<sup>241</sup>

#### B. Fourteenth Amendment Violation - Due Process

Another constitutional claim that has been made is that automatic segregation violates the prisoner’s right of due process under the Fourteenth Amendment. <sup>242</sup> Specifically, the claim usually states that by being segregated the prisoner is deprived of a “life, liberty, or property” interest

---

234. *Id.* at 1537.

235. 737 F. Supp. 261, 263-64 (S.D.N.Y. 1990) (alleging that he was forced to share a cell with an HIV+ cellmate, and that during the first three days he shared several of his personal belongings with his cellmate, but on the fourth day the plaintiff’s cellmate disclosed to him that he was HIV+).

236. *Id.* at 264.

237. *Id.* at 267 (“Deutsch has not presented the [c]ourt with any facts or allegations from which it might be inferred that the decision to house the cellmate with Deutsch without informing him of the HIV test results evidenced a deliberate indifference to his serious medical needs.”).

238. 776 F. Supp. 715, 717-18 (W.D.N.Y. 1991).

239. *Id.* at 721.

240. *Id.* at 739.

241. *Id.* at 743.

242. *Id.* at 736; *see also* Haines v. Kerner, 404 U.S. 519, 520 (1972) (involving an inmate who claimed he was denied due process in the steps leading to being assigned to solitary confinement).

without due process.<sup>243</sup> The courts have repeatedly stated that, a prisoner may not be deprived of life, liberty or property without due process of law.<sup>244</sup>

For example, in *Wolff v. McDonnell*, the Court held that due process must be afforded to inmates when they are placed in disciplinary cell confinement.<sup>245</sup> Additionally, in *Hughes v. Rowe*, the Court held that segregating a prisoner may violate due process if procedural protections were not justified by a perceived emergency situation.<sup>246</sup>

In 1983, the Supreme Court in *Hewitt v. Helms* recognized that whether a prisoner has a liberty interest is determined by the language of the applicable regulations.<sup>247</sup> However, in 1994, the Supreme Court held in *Sandin v. Conner* that the main issue of whether a prisoner had a protected liberty interest, protected by due process, depended on whether the conditions “impose[ ] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.”<sup>248</sup> Whereas prior to 1994 it was fairly easy for a prisoner to prove their liberty interest was violated, post 1994 an inmate must show that the violation constitutes an “atypical and significant hardship” when compared to ordinary prison life.<sup>249</sup>

As early as 1976, in *Montanye v. Haymes* the Supreme Court stated that “[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate’s treatment by prison authorities to judicial

---

243. *Nolley*, 776 F. Supp. at 717-18.

244. *In re Davis*, 599 P.2d 690, 699 (Cal. 1979); *Inmates of Sybil Brand Inst. for Women v. Cnty. of Los Angeles*, 181 Cal. Rptr. 599, 609 (Ct. App. 1982) (holding that such due process includes a hearing with advance notice, the opportunity for the inmate to present evidence, providing the inmate with written reasons for the segregation, and counsel if needed).

245. 418 U.S. 539, 556-57 (1974).

246. 449 U.S. 5, 11 (1977) (“Segregation of a prisoner without a prior hearing may violate due process if the postponement of procedural protections is not justified by apprehended emergency conditions.”).

247. 459 U.S. 460, 472 (1983), *overruled in part by Sandin v. Conner*, 515 U.S. 472 (1995).

248. 515 U.S. 472, 484 (1995); *see also* Michael Z. Goldman, *Sandin v. Conner and Intraprison Confinement: Ten Years of Confusion and Harm in Prisoner Litigation*, 45 B.C. L. REV. 423, 423-25 (2004).

249. *See Sandin*, 515 U.S. at 483; *see also* *Wilkinson v. Austin*, 545 U.S. 209, 210 (2005); *Estate of DiMarco v. Wyoming Dep’t of Corrs.*, 473 F.3d 1334, 1342 (10th Cir. 2007) (stating that some factors to analyze to determine if conditions impose an atypical and significant hardship include: 1) if segregation furthers a legitimate penological interest; 2) if the placement of the prisoner is extreme; 3) if the placement increases the duration of confinement; and 4) if the placement is indeterminate).

oversight.”<sup>250</sup> It has been held by the Supreme Court that a prisoner has “no general liberty interest in remaining in the general population.”<sup>251</sup>

The courts have routinely rejected due process claims based on an inmate’s HIV status.<sup>252</sup> For example, in *Muhammad v. Carlson*, the court ruled that the due process rights of an inmate infected with AIDS was not violated when the inmate was segregated in accordance with prison policies.<sup>253</sup>

But the power to segregate HIV+ inmates has not gone unrestrained.<sup>254</sup> For example, in *Vitek v. Jones*, the Supreme Court held that the involuntary transfer of an HIV+ inmate from a prison to a mental hospital was “not within the range of conditions of confinement to which a prison sentence subjects an individual” and upheld a lower court’s ruling that such transfer violated the Due Process Clause of the Fourteenth Amendment.<sup>255</sup>

Similarly, the court in *Nolley v. County of Erie* was faced with determining if automatically segregating HIV+ inmates violated the Due Process Clause of the Fourteenth Amendment.<sup>256</sup> The court in *Nolley* distinguished *Hewitt* from *Vitek* because the inmate in *Hewitt* was confined in the aftermath of a prison riot where prison officials were concerned about further violence.<sup>257</sup> However, in *Vitek* the inmate was involuntarily transferred from prison to the state mental hospital.<sup>258</sup> The court found that automatically segregating HIV+ inmates was “qualitatively different from the punishment normally suffered by a person convicted of a crime” and ruled that the inmate was “constitutionally entitled to due process.”<sup>259</sup>

---

250. 427 U.S. 236, 242 (1976); *see also* *Lekas v. Briley*, 405 F.3d 602, 603 (7th Cir. 2005) (holding that placing an inmate in disciplinary segregation is not atypical and significant, and therefore, was not a deprivation of a liberty interest).

251. *Nolley v. Cnty. of Erie*, 776 F. Supp. 715, 737 (W.D. N.Y. 1991) (referring to the holding in *Hewitt v. Helms*, 459 U.S. 460, 467-68 (1983)).

252. *See, e.g.*, *Cordero v. Coughlin*, 607 F. Supp. 9, 10 (S.D.N.Y. 1984); *Powell v. Dep’t of Corrs., State of Okla.*, 647 F. Supp. 968, 970 (N.D. Okla. 1986); *see also* *Daniels v. Williams*, 474 U.S. 327, 331-33 (1986) (holding that even an official’s negligent act which causes a loss of life, liberty, or property will not invoke a due process claim); *Cordero v. Coughlin*, 607 F. Supp. 9, 10 (S.D.N.Y. 1984) (holding that transferring an inmate to a more restrictive quarters for nonpunitive reasons does not violate the due process clause because it is within the terms of confinement ordinarily contemplated by an inmate).

253. 845 F.2d 175, 179 (8th Cir. 1988).

254. *See, e.g.*, *Vitek v. Jones*, 445 U.S. 480, 481 (1980).

255. *Id.* at 481.

256. 776 F. Supp. 715, 717 (W.D.N.Y. 1991).

257. *Id.* at 737.

258. *Id.*

259. *Id.* at 738.



### C. Fourteenth Amendment - Equal Protection

Inmates have also made challenges to the automatic segregation of HIV+ inmates based on the Equal Protection Clause of the Fourteenth Amendment.<sup>260</sup> When a person is sentenced to prison, they don't automatically forfeit their equal protection rights.<sup>261</sup> Because prisoners are not a suspect class, the court will use rational basis review when analyzing equal protection claims.<sup>262</sup> Therefore, it is difficult to find a violation and, as stated in *Nolley v. County of Erie*, "equal protection challenges to administrative segregation by HIV+ inmates have been *universally* rejected."<sup>263</sup> In order to prove a violation of the Equal Protection Clause, an inmate must prove: 1) the government is treating similarly situated inmates differently, and 2) there is no rational basis for the dissimilar treatment.<sup>264</sup> The difficulty of such an argument is that for the inmate to invoke the Equal Protection Clause, they must show they are similarly situated with other inmates,<sup>265</sup> and that there is no rational penological interest for the dissimilar treatment.<sup>266</sup> Since the courts have found that an inmate who is HIV+ is not similarly situated with other inmates, equal protection claims are commonly denied.<sup>267</sup>

### D. Right to Privacy

Finally, inmates have challenged the segregation of infected prisoners based on the constitutional right to privacy, which has been previously recognized by the Supreme Court.<sup>268</sup> For example, in 1965, the Supreme

---

260. *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (stating that the Equal Protection Clause requires that people who are similarly situated must be treated alike).

261. Michael F. Williams & Edward Joyce, *Substantive Rights Retained by Prisoners*, 88 GEO. L.J. 1716, 1746 (2000).

262. *Roller v. Gunn*, 107 F.3d 227, 233 (4th Cir. 1997) (holding that prisoners are not a suspect class); *Pryor v. Brennan*, 914 F.2d 921, 923 (7th Cir. 1990) (holding that prisoners are not a suspect class under the Fourteenth Amendment).

263. 776 F. Supp. 715, 739 (W.D.N.Y. 1991) (emphasis added); *see, e.g., Judd v. Packard*, 669 F. Supp. 741, 743 (D. Md. 1987) (holding that placing an inmate in a prison hospital while being tested for AIDS did not violate his constitutional rights); *see also Cordero v. Coughlin*, 607 F. Supp. 9, 10 (S.D.N.Y. 1984) (stating that an equal protection claim did not apply because inmates with AIDS are not similarly situated with other prisoners); *Moore v. Mabus*, 976 F.2d 268, 271 (5th Cir. 1992).

264. Williams & Joyce, *supra* note 261, at 1747.

265. *Plyer v. Doe*, 457 U.S. 202, 216 (1982) ("[T]he Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.'" (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920))).

266. Williams & Joyce, *supra* note 261, at 1746.

267. *See Nolley*, 776 F. Supp. at 739; *see, e.g., Judd*, 669 F. Supp. at 743.

268. *See, e.g., Whalen v. Roe*, 429 U.S. 589, 596 (1977); *Houchins v. KQED, Inc.*, 438 U.S. 1,

Court in *Griswold v. Connecticut* laid the foundation for a person's right to privacy.<sup>269</sup> In *Griswold*, the plaintiffs were found guilty of violating Connecticut's birth control laws because they prescribed a contraceptive device to a married couple for use in their bedroom.<sup>270</sup> The plaintiffs appealed arguing that the birth control laws violated their Fourteenth Amendment rights.<sup>271</sup> By a 7-2 vote, the Supreme Court ruled that Connecticut's state law violated a person's right to privacy.<sup>272</sup> In writing for the majority, Justice Douglas stated the right to privacy was found in the "penumbras" and "emanations" of the Bill of Rights that protects "zones of privacy."<sup>273</sup> Justice Goldberg concurred, stating the Ninth Amendment protected unenumerated but traditional fundamental rights.<sup>274</sup> Justice Harlan also wrote a concurring opinion and stated that the due process clause of the Fourteenth Amendment protected the right to privacy.<sup>275</sup>

Then, in *Whalen v. Roe*, the plaintiffs challenged a New York statute that required a centralized database be created to track the names and addresses of people who purchased certain drugs.<sup>276</sup> The plaintiffs argued that both the collection of the data, and its potential for release, violated their constitutional right to privacy.<sup>277</sup> The Court agreed with the plaintiffs and stated that, under the Fourteenth Amendment, a person is protected from disclosure of personal matters.<sup>278</sup>

The courts have continued to affirm the privacy interest in the non-disclosure of personal matters, as exemplified in *Nixon v. Administrator of General Services*<sup>279</sup> and *New York v. Ferber*.<sup>280</sup>

---

15-16 (1978); see also *Woods v. White*, 689 F. Supp. 874, 876 (W.D. Wis. 1988) (stating that even after being convicted of a crime, a prisoner retains their right to privacy), *aff'd*, 899 F.2d 17 (7th Cir. 1990).

269. 381 U.S. 479, 485-86 (1965).

270. *Id.* at 480.

271. *Id.*

272. *Id.* at 485. Justices Black and Stewart dissented stating there was no right to privacy in the Constitution, and criticized the interpretations of the Ninth and Fourteenth amendments. *Id.* at 510, 527.

273. *Id.* at 484.

274. *Id.* at 486-88.

275. See *id.* at 500.

276. 429 U.S. 589, 591 (1977).

277. *Id.* at 598, 600.

278. *Id.* at 599.

279. 433 U.S. 425, 465 (1977) (stating that in upholding a congressional statute authorizing the review of Presidential materials, the President's constitutional right to privacy was not violated).

280. 458 U.S. 747, 773-74 (1982) (finding a criminal statute prohibiting the distribution of child pornography to be constitutional).

Since *Whalen*, courts have held that the constitutional right to privacy includes the right to keep one's medical information private.<sup>281</sup> For example, in *Schaill ex rel. Kross v. Tippecanoe County School Corporation*, the court found that a school district's program of randomly administering drug tests to students did not violate the students' right to privacy.<sup>282</sup> But, in *Doe v. Borough of Barrington*, the court ruled that a police officer violated an individual's privacy rights by disclosing the individual's HIV status to other people, with whom the individual had little contact.<sup>283</sup>

However, the courts have allowed the disclosure of an inmate's HIV status if it is related to a legitimate penological interest,<sup>284</sup> such as disclosing an inmate's HIV status to prison guards,<sup>285</sup> and to a prison barber.<sup>286</sup>

But not all disclosures meet a legitimate penological interest. For example, in *Nolley v. County of Erie* the plaintiff argued that her constitutional right to privacy was violated because: 1) prison officials put a red sticker on the personal folders of all HIV+ inmates; and 2) the prison segregated her to a specialized ward (Female Delta) that housed HIV+ inmates and those in need of medical and psychological treatment.<sup>287</sup> The court held that the red sticker system violated the inmate's privacy because it disclosed the inmate's HIV status to non-medical staff.<sup>288</sup> The court stated that, "prison inmates are protected by a constitutional right to privacy from the unwarranted disclosure of their HIV status."<sup>289</sup>

The court further ruled that segregating inmates into a separate AIDS ward was similar to releasing the inmate's HIV status to the rest of the prison population.<sup>290</sup> In determining if this segregation was constitutional,

---

281. See, e.g., *Doe v. Coughlin*, 697 F. Supp. 1234, 1236-37, 1238 n.6, (N.D.N.Y. 1988) (granting a preliminary order enjoining a prison from involuntarily segregating an HIV+ inmate in part because such segregation could violate the inmate's constitutional right to privacy by disclosing his HIV status); *Nolley v. Cnty. of Erie*, 776 F. Supp. 715, 728-31 (W.D.N.Y. 1991); see also *Matson v. Bd. of Educ. of City Sch. Dist. of N.Y.*, 631 F.3d 57, 64 (2d Cir. 2011) (stating that although the privacy of medical records varies depending on the person's condition, a person infected with AIDS/HIV does have an expectation of privacy).

282. 864 F.2d 1309, 1321, 1324 (7th Cir. 1988).

283. 729 F. Supp. 376, 382 (D. N.J. 1990).

284. See, e.g., *Doe v. Delie*, 257 F.3d 309, 317 (3d Cir. 2001); see also *Seaton v. Mayberg*, 610 F.3d 530, 534-35 (9th Cir. 2010) (stating that the constitutional right of prisoners to keep their medical records private is not violated if prison officials need such information to protect other prisoners and prison staff, or to manage rehabilitative efforts).

285. *Doe v. Wigginton*, 21 F.3d 733, 736 (6th Cir. 1994).

286. *Anderson v. Romero*, 72 F.3d 518, 524-26 (7th Cir. 1995).

287. 776 F. Supp. 715, 731-36 (W.D.N.Y. 1991).

288. *Id.* at 728.

289. *Id.* at 731.

290. *Id.* at 734.

the court looked at “whether a policy of segregating *all* HIV+ inmates to Female Delta [was] rationally related to [a] legitimate purpose.”<sup>291</sup> After analyzing the stated penological purposes, the court found that the “policy of automatically segregating known HIV+ inmates in Female Delta [was] not reasonably related to legitimate penological interests” and therefore the inmate’s “constitutional right to privacy was violated.”<sup>292</sup>

#### VIII.A PROPOSED NEW SEGREGATION STANDARD

On March 28, 1991 the National Commission on AIDS released a report titled “HIV Disease in Correctional Facilities” in an attempt to create a national policy in response to the AIDS epidemic.<sup>293</sup> The Commission found that the automatic segregation of HIV+ prisoners was without merit, and not advised.<sup>294</sup> The reality is that automatic segregation penalizes an inmate based on nothing more than a medical condition.<sup>295</sup>

It would be difficult, if not impossible, to argue that AIDS/HIV+ inmates should never be segregated because some infected inmates are a danger to others.<sup>296</sup> It is equally difficult to argue that AIDS/HIV+ infected inmates should always be segregated because such a policy would be unfair to infected prisoners who pose little, or no, threat of spreading the disease.<sup>297</sup> Therefore, prison officials must create a new process by which infected prisoners are segregated so that segregation is done in an objective manner that is aimed at fulfilling each prison’s objectives.

Some states, such as South Carolina, segregate all AIDS/HIV+ inmates from non-infected prisoners.<sup>298</sup> Other states, such as Mississippi’s Department of Corrections has terminated the practice of segregating AIDS/HIV+ prisoners altogether.<sup>299</sup> Finally some states, such as California’s Department of Corrections and Rehabilitation, house AIDS / HIV+ inmates at their medical facility so they have access to medical care.<sup>300</sup>

---

291. *Id.* at 735.

292. *Id.* at 736.

293. Chang & McCooey, *supra* note 14, at 1025-26.

294. *Id.* at 1026.

295. *Id.* at 1016.

296. *See id.* at 1017-18.

297. *Id.* at 1018.

298. Kinnard, *supra* note 30.

299. *See* HUMAN RIGHTS WATCH, *supra* note 21, at 1.

300. OPERATIONS MANUAL, *supra* note 74.

However, another option is to use the approach that Michigan uses to house AIDS/HIV+ inmates.<sup>301</sup> Under the Michigan approach, inmates are segregated from other inmates only after they have been disciplined for misconduct, tested, and found to have AIDS or be HIV+.<sup>302</sup> Unfortunately, this approach is reactive in nature and does not proactively protect other prisoners.<sup>303</sup>

#### A. *The Proposed New Standard*

It is proposed here that prison officials base their decisions on how to house prisoners who are infected with AIDS / HIV+ based on objective criteria that evaluates if the inmate is likely to spread the disease. Using an inmate's history, or propensity to act in a particular way, is not a new concept.<sup>304</sup>

This would require prison officials to determine what criterion to use in determining which AIDS/HIV+ inmates are segregated from the general population. Just as the courts have left the administration of prisons to prison officials,<sup>305</sup> this article also leaves to prison officials to determine what objective criteria to use when housing prisoners with AIDS / HIV+.

#### B. *Proposed Criterion for Segregation*

The decision whether to segregate an infected inmate should be made when the inmate arrives at prison and is processed for permanent housing. When it is determined that the prisoner is infected with AIDS or is HIV+, then the prison official should analyze the particular attributes of the prisoner and determine if the inmate is likely to infect other inmates. At a minimum, the prison official should evaluate: 1) the inmate's past crimes, 2) statements made by the prisoner of their intent to infect other inmates or prison staff, and 3) the inmate's history of violence.

If it is determined that the inmate is not likely to spread the disease, then they should be placed into the general prison population. But, if there is a likelihood that the prisoner will infect other inmates, the inmate should be segregated. For example, infected inmates with convictions for crimes such as rape and sodomy would be segregated while an infected inmate

---

301. Donaldson, *supra* note 42, at 1613.

302. *Id.*

303. *Id.* (stating that AIDS/HIV+ infected inmates are segregated only after they have been disciplined for misconduct).

304. See, e.g., Theis, *supra* note 107 (describing how the Ohio prison system looks at an inmate's criminal history and gang affiliation to determine if a prisoner should be segregated).

305. *Id.* at 158.

with a past conviction for fraud may not be segregated. Similarly, an inmate who made statements expressing their intent to infect other inmates would be segregated while an inmate who made no such statements would not necessarily be segregated. Finally, an infected inmate who has been violent in the past would be segregated while a peaceful inmate would not necessarily be segregated.

This proposed standard would have segregated the infected inmate in *Goss v. Sullivan*.<sup>306</sup> In this case, an inmate who was infected with the AIDS virus got into a fight with the plaintiff.<sup>307</sup> As a result of the fight, the plaintiff cut his lip and the infected inmate cut his hand.<sup>308</sup> The plaintiff claimed that the infected inmate “deliberately wiped his hand across [his] mouth at least twice.”<sup>309</sup> In the complaint, the plaintiff stated that prison administration knew that the infected inmate was dangerous and did not do anything to segregate him.<sup>310</sup> After the fight, the infected inmate stated he would infect “whoever I can.”<sup>311</sup> In addition to the inmate described in *Goss v. Sullivan*, this proposed new standard would segregate AIDS/HIV+ prisoners who have committed sexual crimes<sup>312</sup> and prisoners with a history of violence.<sup>313</sup>

Although many jails and prisons segregate prisoners infected with HIV, others have passed statutes that segregate HIV+ inmates “under certain circumstances.”<sup>314</sup> For example, in 1990 the State of Michigan passed a statute that stated:

---

306. 839 F. Supp. 1532, 1534 (D. Wyo. 1993).

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.* at 1535.

311. *Id.*

312. *See, e.g.,* *Hubbart v. Super. Ct.*, 969 P.2d 584, 586 (Cal. 1999) (involving a prisoner with a long history of violent and bizarre sex crimes against women); *People v. Roberge*, 62 P.3d 97, 99 (Cal. 2003) (involving a violent sexual offender suffering from a sexual disorder where the offender got aroused from perverse, unorthodox encounters); *Kansas v. Hendricks*, 521 U.S. 346, 346 (1997) (involving a prisoner convicted for being a sexually violent predator); *Com. v. Birdsong*, 650 A.2d 26 (Pa. 1994) (involving someone who was convicted of first degree murder, aggravated assault, involuntary deviate sexual intercourse, and rape). Although none of these prisoners were infected with AIDS/HIV+, if they were infected, then according to the proposed new standard, they would have been segregated upon reception to the prison.

313. *See, e.g.,* *Marshall v. State*, 915 So. 2d 264, 266-67 (Fla. Dist. Ct. App. 2005) (involving an inmate who, on one occasion, assaulted an inmate and then inserted his finger into the victim inmate’s rectum, and on another occasion assaulted an inmate and inserted a tooth brush into the victim inmate’s rectum). Although this prisoner was not infected with AIDS/HIV+, had he been, then under the proposed new standard, he would be segregated upon reception to a prison.

314. *Donaldson*, *supra* note 42.

If a prisoner receives a positive test result, and is subsequently subject to discipline by the department for sexual misconduct that could transmit HIV, illegal intravenous use of controlled substances, or assaultive or predatory behavior that could transmit HIV, the department shall house that prisoner in administrative segregation, an inpatient health care unit, or a unit separate from the general prisoner population, as determined by the department.<sup>315</sup>

Unfortunately, the Michigan statute is reactive in nature because it does not segregate infected inmates until after they face discipline.<sup>316</sup> Unlike the Michigan statute that does not segregate infected prisoners until after they face discipline,<sup>317</sup> the proposed new standard is proactive because rather than waiting for a violation to occur before segregating infected prisoners, this proposed standard seeks to segregate AIDS/HIV infected prisoners who are likely to infect others, *before* they infect others.

## IX. CONCLUSION

Currently, when prison administrators segregate AIDS/HIV+ inmates, they will usually take one of two approaches. First, some prison administrators segregate all AIDS/HIV+ infected prisoners away from the general population.<sup>318</sup> Second, AIDS/HIV+ infected prisoners may be segregated only after the inmate has violated a prison rule and faces discipline.<sup>319</sup>

The proposed alternative standard, as described in this Comment, is for the creation of a uniform standard by which AIDS/HIV+ inmates can be segregated so that such segregation is not arbitrary, or capricious. The proposed standard offers a middle ground in the debate about how to segregate HIV+ prisoners.

This proposed approach does not automatically segregate all HIV+ inmates, because doing so would deprive them of social interaction and opportunities to improve themselves. Equally important is this proposed approach does not limit the prison officials to being reactive where officials would have to wait until the prisoner violates a prison regulation before being segregated.

Rather, this approach is proactive because upon booking an inmate into the prison facility, an assessment is performed to determine the likelihood

---

315. MICH. COMP. LAWS ANN. § 791.267(3) (West 1998).

316. *Id.* (stating that if a prisoner is HIV+, and is subsequently subject to discipline, then they can be segregated).

317. *Id.*

318. *See, e.g.,* Boyne, *supra* note 49, at 743-44.

319. *See, e.g.,* § 791.267(3).

that a prisoner will infect non-infected prisoners. During the intake of the AIDS/HIV+ prisoner, the prison official would ask a series of questions to determine if the inmate is likely to spread their infection to non-infected prisoners. Based on the assessment, the AIDS/HIV+ infected prisoner would either be placed in general prisoner population or segregated away from the general population.

The exact criterion is beyond the scope of this paper. However, at a minimum, the criterion should include past crimes committed, statements of a desire to infect others, and the inmate's proclivity for violence. Each of these criterion would indicate that the inmate is likely to engage in some activity that would infect other prisoners; therefore they should be segregated from non-infected inmates.

*Mark Velez\**

---

\* I would like to thank my wife for her support and sacrifices during the writing of this Comment. I would also like to thank Leslie Kolafa for her proofreading and suggestions on how I could improve this Comment. Mark Velez has been involved in law enforcement for over twenty years, and is a third year evening student at Southwestern Law School. Mark holds a Bachelor's degree in Business Management from the University of Redlands, a Master's degree in Public Administration from California State University, Dominguez Hills, and a PhD in Public Administration from the University of Southern California.