

PRISONERS WITH AIDS: CONSTITUTIONAL AND STATUTORY RIGHTS IMPLICATED IN FAMILY VISITATION PROGRAMS

Since the Centers for Disease Control (CDC) reported the first cases of Acquired Immune Deficiency Syndrome (AIDS)¹ in 1981,² the disease has evolved into a full-scale epidemic.³ AIDS has had a pervasive and profound impact on various segments of United States society,⁴ including employment,⁵ health care,⁶ education,⁷ and housing.⁸ At the same time, a wave of AIDS-related litigation has

¹ AIDS is a disease caused by the human immunodeficiency virus (HIV) that can destroy the body's ability to fight infections. The virus allows other infections to invade the body. T. HAMMETT, *Essential Medical Information*, in AIDS IN CORRECTIONAL FACILITIES: ISSUES AND OPTIONS 1, 3 (1988).

² U.S. DEP'T OF HEALTH AND HUMAN SERVS., SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME 5 (1986) [hereinafter SURGEON GENERAL'S REPORT].

³ As of February 28, 1990, there had been 124,984 cases of AIDS reported to the Centers for Disease Control (CDC). U.S. DEP'T OF HEALTH AND HUMAN SERVS., HIV/AIDS SURVEILLANCE 5 (March, 1990) [hereinafter HHS, HIV/AIDS SURVEILLANCE]. The number of cases of AIDS reported to the CDC is thought to capture about 90% of the actual cases meeting the CDC's surveillance definition. T. HAMMETT, *Epidemiology of HIV Infection and AIDS in Correctional Facilities and the Population at Large*, in 1988 UPDATE: AIDS IN CORRECTIONAL FACILITIES 1, 7 (1989). By February 28, 1990, 76,030 persons had died of AIDS in the United States. HHS, HIV/AIDS SURVEILLANCE, *supra*, at 13. The Public Health Service estimates that, by the end of 1992, there will have been 365,000 AIDS cases diagnosed and 263,000 cumulative deaths. T. HAMMETT, *Epidemiology of HIV Infection and AIDS*, *supra*, at 7. Moreover, the Public Health Service estimates that a range of 1 to 1.5 million Americans were asymptotically infected in 1988. *Id.* The racial and ethnic breakdown of AIDS cases in the United States represents an increasing overrepresentation of blacks and Hispanics. This increase reflects a shift in the AIDS epidemic from gay white males to black and Hispanic intravenous drug users, their sexual partners, and children. *Id.*

⁴ See generally M. GUNDERSON, D. MAYO & F. RHAME, AIDS: TESTING AND PRIVACY 1 (1989) (examines role of HIV testing and its constitutional implications).

⁵ See, e.g., *Chalk v. United States Dist. Court*, 840 F.2d 701, 712 (9th Cir. 1988) (holding that teacher with AIDS was entitled to preliminary injunction allowing him to continue to teach).

⁶ See SURGEON GENERAL'S REPORT, *supra* note 2, at 6. According to former Surgeon General C. Everett Koop, M.D., "in the year 1991, an estimated 145,000 patients with AIDS will need health and supportive services at a total cost of between \$8 and \$16 billion." See also M. GUNDERSON, D. MAYO & F. RHAME, *supra* note 4, at 147-63 for a general discussion of AIDS testing and health care delivery.

⁷ Parents have filed an increasing number of claims seeking to enjoin school districts from preventing children with AIDS or human immunodeficiency virus (HIV) from attending school. See, e.g., *Thomas v. Atascadero Unified School Dist.*, 662 F. Supp. 376, 376 (C.D. Cal. 1987).

⁸ See Graham, *AIDS Lives Here*, Boston Phoenix, Oct. 6, 1989, at 6, col. 4.

arisen from the alleged infringement of both constitutional and statutory rights of the increasing numbers of individuals with AIDS.⁹

Prisons in the United States have not been immune from the growing incidence of AIDS.¹⁰ Because of the increasing number of inmates infected with AIDS, prisons have promulgated new policies and regulations to address the special needs and demands of a terminally ill population.¹¹ The presence or absence of AIDS-related policies and regulations has triggered lawsuits against the prisons by inmates with AIDS alleging violations of their constitutional rights.¹² Prison regulations purportedly directed toward penological goals of order, security and deterrence have challenged and, sometimes, further restricted the already limited constitutional and statutory rights of inmates.¹³

⁹ See, e.g., *Thomas*, 662 F. Supp. at 382; see also THE NATIONAL PRISON PROJECT: 1988 AIDS IN PRISON BIBLIOGRAPHY 23-27 (1988) [hereinafter NATIONAL PRISON PROJECT BIBLIOGRAPHY].

¹⁰ See T. HAMMETT, *supra* note 3, at 9. As of October 1, 1988, a cumulative total of 3136 confirmed cases of AIDS among inmates in 70 responding federal, state, and local correctional systems in the United States had been reported. *Id.* A total of 2047 cases of AIDS were reported in 44 state and federal correctional systems. *Id.* In 1988, the overall incidence of AIDS for state and federal correctional facilities ranged from 0 to 536 per 100,000 prison population, compared with 13.3 cases per 100,000 total United States population. *Id.* at 11. The higher rate of incidence in correctional facilities appears to arise from the higher percentage of high-risk groups in the prison population. Prisoners are placed at high risk for contracting the AIDS virus through past or present intravenous drug use and through homosexual activity. *Id.* A cumulative total of 1088 inmates (1051 males and 37 females) had died of AIDS while in custody in state and federal prison systems. *Id.* at 9. According to Hammett, "[i]n some correctional systems, AIDS has come to account for a significant proportion of all mortalities. In New York, almost 60% of deaths among correctional inmates in 1987 and 1988 were the result of AIDS." *Id.* Many more prisoners are HIV-positive. *Id.* at 14-15. Seroprevalence (HIV-positive) rates among prisoners are estimated to be much higher than in the general population, attributable to the high percentage of intravenous drug use in the prison population. *Id.* at 11. The seroprevalence rates appear to vary significantly from as low as 0% to as high as 17%. *Id.* at 15.

¹¹ See T. HAMMETT, *supra* note 3, at 23.

¹² See, e.g., *Doe v. Coughlin*, 697 F. Supp. 1234, 1235 (N.D.N.Y. 1988) (involuntary transfer of HIV-positive inmates to special dormitory); *Woods v. White*, 689 F. Supp. 874, 874-75 (W.D. Wis. 1988) (non-consensual disclosure of HIV status of inmates to non-medical staff and other inmates); see also NATIONAL PRISON PROJECT BIBLIOGRAPHY, *supra* note 9, at 14-23. Prisoners have filed suits alleging constitutional infringements based on violation of confidentiality, mandatory segregation, conditions of confinement, medical care, mandatory testing, criminal assault, and deprivation of programs. *Id.*

¹³ See, e.g., *Procunier v. Martinez*, 416 U.S. 396, 412 (1974). The Supreme Court delineated the following penological objectives: preservation of internal order and discipline, maintenance of institutional security against escape or unauthorized entry, and rehabilitation of prisoners. *Id.*

Although courts traditionally have granted prison officials great deference, they have responded unevenly to AIDS-related prison regulations.¹⁴ Moreover, courts have subjected such regulations to very limited review.¹⁵ At times, prisons have adopted policies that ostensibly arise from legitimate penological goals but, in reality, may stem from prejudicial reactions to AIDS.¹⁶ One such policy is the ineligibility of prisoners with AIDS to participate in family visitation programs.¹⁷

In *Doe v. Coughlin*, the one case to address conjugal visits for prisoners with AIDS, the New York Court of Appeals in 1987 upheld state prison regulations denying such visits.¹⁸ The *Doe* court held that the denial of a prisoner's participation in a family visitation program neither infringed upon the prisoner's constitutional rights nor violated section 504 of the Rehabilitation Act of 1973 (the Rehabilitation Act),¹⁹ which prohibits discrimination on the basis of handicap in federally funded programs.²⁰ The court reasoned that the state did not infringe upon the prisoner's constitutional rights because there is no constitutional right to conjugal visits.²¹ In addition, according to the *Doe* court, prison officials had a rational basis for prohibiting a prisoner with AIDS from participating in conjugal visits.²² The court also held that the state's denial did not violate the Rehabilitation Act because a prisoner with AIDS was not eligible to participate in conjugal visits.²³

¹⁴ See *infra* notes 35-57 and accompanying text for a more complete discussion of judicial deference to prison administrators. See also Comment, *AIDS Behind Bars: Prison Responses and Judicial Deference*, 62 TEMP. L. REV. 327, 334-38 (1989) [hereinafter Comment, *AIDS Behind Bars*].

¹⁵ See *Cordero v. Coughlin*, 607 F. Supp. 9, 10 (S.D.N.Y. 1984); *Doe v. Coughlin*, 71 N.Y.2d 48, 56, 518 N.E.2d 536, 542, 523 N.Y.S.2d 782, 788 (1987), *cert. denied*, 109 S. Ct. 196 (1988).

¹⁶ See generally Comment, *AIDS Behind Bars*, *supra* note 14, at 328, 352 (advocates that prison responses to AIDS may be pretext for discrimination).

¹⁷ To date, only 10 states allow conjugal visits in their state prisons. Such visits provide overnight visitation between prisoners and family members, typically spouses and children. These 10 states include California, Connecticut, Minnesota, Mississippi, New Mexico, New York, South Carolina, Utah, Washington, and Wyoming. Telephone conversation with Theodore Hammett, Cambridge, Massachusetts, October 10, 1989. See *infra* notes 240-242 and accompanying text for a more complete description of family visitation programs.

¹⁸ *Doe*, 71 N.Y.2d at 60, 518 N.E.2d at 544, 523 N.Y.S.2d at 790.

¹⁹ Section 504 is codified at 29 U.S.C. §§ 706(8)(C), 794 (1988).

²⁰ *Doe*, 71 N.Y.2d at 60, 518 N.E.2d at 544, 523 N.Y.S.2d at 790.

²¹ *Id.* at 54, 518 N.E.2d at 540, 523 N.Y.S.2d at 786.

²² *Id.*

²³ *Id.* at 61, 518 N.E.2d at 544, 523 N.Y.S.2d at 790.

This note examines the constitutional and statutory issues raised by differing treatments accorded inmates with AIDS and their families in the context of family visitation programs. Section I provides an overview of both the traditional judicial deference to prison officials and the constitutional rights of prisoners, including marital privacy.²⁴ This section also addresses the standards of judicial review that courts have applied to substantive due process and equal protection claims of prisoners under the fourteenth amendment.²⁵ Section II provides an overview of the impact of AIDS on the constitutional and statutory rights of prisoners.²⁶ The section addresses the impact of AIDS on the judicial treatment of the constitutional claims of AIDS-infected prisoners.²⁷ Section II then discusses the Rehabilitation Act of 1973 and reviews its application to prisoners with AIDS.²⁸ Section III provides an overview of family visitation programs in prisons.²⁹ Section III also presents the New York Court of Appeals' majority and dissenting opinions in *Doe v. Coughlin*, the case denying AIDS-infected prisoners the right to participate in family visitation programs.³⁰ Section IV analyzes the *Doe* court's minimum scrutiny analysis and its refusal to find an infringement of constitutional rights of AIDS-infected inmates or their families.³¹ Section IV advocates a strict scrutiny standard for courts in reviewing regulations that implicate the fundamental right to marital privacy and equal protection under the law.³² Further, this section analyzes the *Doe* court's failure to apply the Rehabilitation Act to the AIDS-infected prisoner's claim of discrimination.³³ Finally, Section IV discusses the need for judicial intervention, not deference, in the face of prison regulations infringing upon constitutional and statutory rights of prisoners.³⁴ This note concludes that the state's denial of an AIDS-infected prisoner's participation in conjugal visits solely because of AIDS is an impermissible infringement upon that individual's constitutional and statutory rights.

²⁴ See *infra* notes 35-100 and accompanying text.

²⁵ See *infra* notes 101-38 and accompanying text.

²⁶ See *infra* notes 139-234 and accompanying text.

²⁷ See *infra* notes 140-176 and accompanying text.

²⁸ See *infra* notes 177-234 and accompanying text.

²⁹ See *infra* notes 235-259 and accompanying text.

³⁰ See *infra* notes 260-337 and accompanying text.

³¹ See *infra* notes 338-92 and accompanying text.

³² See *infra* notes 358-92 and accompanying text.

³³ See *infra* notes 393-438 and accompanying text.

³⁴ See *infra* notes 439-447 and accompanying text.

I. THE ROLE OF COURTS IN THE PRISON CONTEXT

A. *The Balancing of Penological Interests and Prisoners' Rights*

Traditionally, courts have sought to strike a balance between deference to legitimate penological objectives and the protection of prisoners' constitutional and statutory rights.³⁵ Prison officials have strong penological interests in the establishment of order, discipline, and security.³⁶ Prison officials design regulations to ensure the fulfillment of these interests in the day-to-day administration of the prisons.³⁷ Prison regulations may limit the rights of prisoners in order to ensure the general security and welfare of the entire prison population, including the correctional staff.³⁸ Because of the special nature of prisons, prison officials may restrict or deny rights to inmates that free citizens take for granted.³⁹

Historically, courts have taken a broad, hands-off approach to prison administration.⁴⁰ In part, judicial deference results from the courts' perception of the appropriate separation of powers, in which prison administration is considered to be within the purview of the legislative and executive, and not the judicial, branches of government.⁴¹ Consequently, courts have adopted a policy of judicial restraint, particularly where the operation of state prisons implicates federalism concerns.⁴² Moreover, courts have stated that they lack the special expertise and knowledge of prison administrators in penal operations.⁴³ Courts are reluctant, if not unwilling, to substitute their judgment for that of prison administrators.⁴⁴

More recently, however, courts have rejected complete deference to prison administrators and have been more wary of indis-

³⁵ See *Turner v. Safley*, 482 U.S. 78, 85 (1987); see also Comment, *AIDS Behind Bars*, *supra* note 14, at 334-38 for a description of judicial deference to prison administrators.

³⁶ See *Block v. Rutherford*, 468 U.S. 576, 586 n.8 (1984); *Bell v. Wolfish*, 441 U.S. 520, 547 (1979).

³⁷ See *Bell*, 441 U.S. at 547.

³⁸ See *id.* at 546.

³⁹ See *id.*

⁴⁰ See, e.g., *Procunier v. Martinez*, 416 U.S. 396, 404 (1974); see also S. KRANTZ, *THE LAW OF CORRECTIONS AND PRISONERS' RIGHTS* 242 (1981) (quoting *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871)); R. SINGER & W. STASKY, *RIGHTS OF THE IMPRISONED* 581 (1974).

⁴¹ See *Turner v. Safley*, 482 U.S. 78, 84-85 (1987); *Bell*, 441 U.S. at 548; *Procunier*, 416 U.S. at 405.

⁴² See *Turner*, 482 U.S. at 85.

⁴³ See, e.g., *Bell*, 441 U.S. at 548.

⁴⁴ See *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987); *Block v. Rutherford*, 468 U.S. 576, 588 (1984).

criminate deference to prison officials, particularly where prison regulations have implicated the constitutional rights of prisoners.⁴⁵ Yet, prisoners do not enjoy the same rights and privileges of free citizens.⁴⁶ The exigencies of the penal system may justify the restriction of many of the rights and privileges enjoyed by the ordinary citizen.⁴⁷ Courts have recognized, however, that they can draw no "iron curtain" between the Constitution and the prison.⁴⁸ Prisoners do retain certain constitutional rights, including substantial religious freedom,⁴⁹ protection from invidious racial discrimination,⁵⁰ access to courts,⁵¹ protection from cruel and unusual punishment,⁵² limited freedom of speech,⁵³ and the right to marry.⁵⁴ When a prison regulation infringes upon any of these constitutional rights, courts weigh such rights against the penological objectives put forth to justify such infringement in order to determine whether the actions of prison officials are justified.⁵⁵

Thus, although courts have upheld many constitutional rights of prisoners, these rights are subject to restrictions imposed by the exigencies of the penal system.⁵⁶ Courts seek to balance their policy of judicial restraint against the need to protect prisoners' rights.⁵⁷ The balancing of these competing interests involves a weighing of the nature of the prisoners' rights against the legitimacy of the purported penological objectives put forth to justify restrictions of those rights.

⁴⁵ See, e.g., *Block*, 468 U.S. at 593-94 (Blackmun, J., concurring).

⁴⁶ See *Bell*, 441 U.S. at 546.

⁴⁷ See *id.*

⁴⁸ See *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974). The Court stated in *Wolff*: "[T]hough his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country." *Id.*

⁴⁹ See *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (prisoners' complaint alleging denial of free exercise of religion stated valid claim under the first amendment).

⁵⁰ See *Lee v. Washington*, 390 U.S. 333, 333 (1968) (segregation of races in prison violated equal protection clause of fourteenth amendment).

⁵¹ See *Johnson v. Avery*, 393 U.S. 483, 485 (1969) (prisoners have right of access to courts to present their complaints).

⁵² See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (prisoners have right to medical care as part of prohibition against cruel and unusual punishment under the eighth amendment).

⁵³ See *Pell v. Procunier*, 417 U.S. 817, 827 (1974) ("A prisoner retains those first amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system").

⁵⁴ See *Turner v. Safley*, 482 U.S. 78, 95-96 (1987).

⁵⁵ See, e.g., *Procunier v. Martinez*, 416 U.S. 396, 405 (1974).

⁵⁶ See *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974).

⁵⁷ See *Turner*, 482 U.S. at 85.

B. Constitutional Rights of Prisoners

In considering the constitutionality of prison regulations, courts have had to determine what constitutional rights of free citizens are preserved in the prison setting. The United States Supreme Court has firmly established the fundamental right of privacy as a liberty interest for all free citizens.⁵⁸ Any right to privacy for prisoners, however, initially might appear to be contradictory to incarceration.⁵⁹ At the very least, courts have held that the legitimate penological concerns of institutional security and order necessitate restrictions on prisoners' privacy.⁶⁰ Courts have imposed such restrictions, for example, in search and seizure actions,⁶¹ and in receipt of subscription publications.⁶² In these instances, the Supreme Court has reasoned that prisons are public institutions, not private places, and that prisoners, therefore, must be subject to the necessary constraints of those institutions.⁶³

Nonetheless, courts generally recognize some privacy rights for prisoners, including the right to marry.⁶⁴ The Supreme Court has described the decision to marry as one of the personal decisions protected by the right of privacy.⁶⁵ In the 1965 case of *Griswold v.*

⁵⁸ See, e.g., *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (abortion); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (marriage); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (contraception).

⁵⁹ See R. SINGER & W. STATSKY, *supra* note 40, at 564.

⁶⁰ See Comment, *AIDS Behind Bars*, *supra* note 14, at 336-37.

⁶¹ See *Hudson v. Palmer*, 468 U.S. 517, 526 (1984) ("[S]ociety is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell").

⁶² See *Thornburgh v. Abbott*, 109 S. Ct. 1874, 1882 (1989) (Federal Bureau of Prisons had right to exclude incoming publications that "although not necessarily 'likely' to lead to violence, are determined by the warden to create an intolerable risk of disorder under the conditions of a particular prison at a particular time").

⁶³ See Note, *Conjugal Visitation Rights and the Appropriate Standard of Judicial Review for Prison Regulations*, 73 MICH. L. REV. 398, 403 (1974) [hereinafter Note, *Conjugal Visitation Rights*].

⁶⁴ See *Turner v. Safley*, 482 U.S. 78, 95 (1987) (citing *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978)); see also *Salisbury v. List*, 501 F. Supp. 105, 110 (D. Nev. 1980) (applying strict scrutiny in holding that Nevada Department of Prisons could not prohibit women from marrying inmates in the absence of a compelling state interest). But see *Butler v. Wilson*, 415 U.S. 953, 953 (1974), *aff'g* *Johnson v. Rockefeller*, 365 F. Supp. 377, 381-82 (S.D.N.Y. 1973). The Supreme Court's decision in *Butler* can be distinguished from *Turner*. In *Butler*, the prisoners were sentenced to life imprisonment, and the district court considered the denial of the right to marry to be part of the punishment for the crime because the governmental interest in punishing the crime was sufficiently important to justify the deprivation of the right to marry. *Johnson*, 365 F. Supp. at 381-82 (Lasker, J., concurring in part and dissenting in part).

⁶⁵ See *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

Connecticut, the United States Supreme Court held that a Connecticut birth control law forbidding a married couple's use of contraceptives violated the marital privacy right protected by the Constitution.⁶⁶ The Court further expanded the fundamental right of privacy in marriage to embrace intimate decision-making of the married couple as part of this right.⁶⁷

Some lower courts have held that prisoners do not waive their right to marital privacy.⁶⁸ For example, in the 1980 case of *Salisbury v. List*, the United States District Court for the District of Nevada struck down an inmate marriage procedure because it interfered with the prisoner's constitutional right to marry.⁶⁹ In *Salisbury*, the Nevada Department of Prisons enforced a marriage procedure that prohibited inmates from marrying in the absence of any strong compelling reason.⁷⁰ The state promulgated such a procedure to maintain order, discipline, and proper custody of the inmates.⁷¹ Although the court acknowledged that a state may deny inmates from marrying for compelling reasons, the court held that no such compelling reasons existed in this case.⁷² The *Salisbury* court held that a prisoner's right to marry is part of the fundamental right of privacy under the fourteenth amendment.⁷³ The court concluded that a prisoner's right to marry must be upheld in the absence of any compelling state interests, and, therefore, it struck down the inmate marriage procedure as unconstitutional.⁷⁴

In contrast, other courts have limited the prisoners' right of marital privacy.⁷⁵ In the 1974 case of *Lyons v. Gilligan*, the United States District Court for the Northern District of Ohio held that the prisoners' constitutional right of privacy does not extend to sexual intimacy between prisoners and their wives during visits.⁷⁶ The *Lyons*

⁶⁶ 381 U.S. 479, 485-86 (1965).

⁶⁷ *Id.*

⁶⁸ See, e.g., *Salisbury*, 501 F. Supp. at 109. See also *infra* notes 155-173 and accompanying text for a discussion of cases in which courts upheld the privacy rights of AIDS-infected prisoners.

⁶⁹ 501 F. Supp. at 110.

⁷⁰ *Id.* at 106. The procedure specifically stated that the Director of the Nevada Department of Prisons "may permit an inmate to marry when legal and institutional requirements have been met and it appears that the union will be constructive in effect on both parties." *Id.*

⁷¹ *Id.*

⁷² *Id.* at 107.

⁷³ *Id.* at 109.

⁷⁴ *Id.* at 110.

⁷⁵ See, e.g., *Lyons v. Gilligan*, 383 F. Supp. 198, 200 (N.D. Ohio 1974).

⁷⁶ *Id.*

court noted that the state does not have an affirmative duty to create special places in prisons for the private conduct of marital relations.⁷⁷

Despite the penal system's power to impose substantial restrictions on prisoners' right to marry, the United States Supreme Court has held that, at the very least, prisoners still retain the basic right to marry.⁷⁸ In *Turner v. Safley*, the Supreme Court in 1987 struck down a corrections regulation that prohibited inmates from marrying other inmates or civilians unless the superintendent determined that compelling reasons for the marriage existed.⁷⁹ In holding that the regulation was unconstitutional because it interfered with the prisoner's constitutional right to marry, the *Turner* Court recognized that many of the important attributes of marriage still exist in prison.⁸⁰ By concluding that the decision to marry remains completely private and that the United States Constitution protects the marital relationship in the prison context as a liberty interest, the Court has acknowledged the prisoner's right to privacy in some of the decision-making surrounding marriage.⁸¹

Despite the existence of the right of marital privacy, however, prison officials at times may still seek to restrict it.⁸² In those situations, courts must balance this fundamental right against the competing interests in penological security and order.⁸³ Some courts have upheld prisoners' fundamental right of privacy because these penological interests did not outweigh this fundamental right.⁸⁴ Other courts, however, have held that prisoners' constitutional right of privacy is sufficiently limited that any infringement of penological interests in the expression of privacy justifies its restriction.⁸⁵ In effect, courts have reached different results in weighing the fun-

⁷⁷ *Id.*

⁷⁸ See *Turner v. Safley*, 482 U.S. 78, 95-96 (1987).

⁷⁹ *Id.* at 87. See *infra* notes 131-136 for a more complete discussion of *Turner*.

⁸⁰ *Turner*, 482 U.S. at 95, 99. The *Turner* Court noted that these attributes include emotional support, public commitment, personal dedication, and religious faith. *Id.* at 95.

⁸¹ See *id.* at 95-96.

⁸² See *Block v. Rutherford*, 468 U.S. 576, 589 (1984). In dissent, Justice Marshall described the fundamental right regarding family relationships to be the "freedom to engage in and prevent the deterioration of [prisoners'] relationships with their families Persons' freedom to enter into, maintain, and cultivate familial relations is entitled to constitutional protection." *Id.* at 598-99 (Marshall, J., dissenting).

⁸³ See *id.* at 589.

⁸⁴ See, e.g., *Turner*, 482 U.S. at 96. See also *infra* notes 155-173 for a discussion of cases in which courts have held that AIDS-infected prisoners' privacy rights outweigh any penological interests.

⁸⁵ See, e.g., *Lyons v. Gilligan*, 382 F. Supp. 198, 200 (N.D. Ohio 1974).

damental right of privacy against competing penological interests. Courts, however, commonly have employed minimum scrutiny, which merely requires a rational relationship between a regulation and a legitimate state purpose, as the standard of review in deciding the prisoner's right to privacy.⁸⁶

Just as prison regulations sometimes infringe upon the constitutional rights of prisoners, they also may infringe upon the rights of spouses and other family members.⁸⁷ For example, in the 1974 case of *Procunier v. Martinez*, the United States Supreme Court struck down mail censorship regulations in the prisons as a restriction on the first and fourteenth amendment rights of free citizens.⁸⁸ In *Martinez*, prison regulations allowed prison officials to censor correspondence between inmates of California prisons and both outsiders and other prison inmates.⁸⁹ The *Martinez* Court applied a heightened standard of review to the regulations because they implicated the constitutional rights of free citizens, those persons corresponding with prisoners.⁹⁰ Specifically, the Court held that the mail regulations must further important or substantial, not merely legitimate, governmental interests.⁹¹ The Court held the regulations unconstitutional because they did not meet this higher standard of review, a standard not applied to the rights of prisoners themselves.⁹²

In the recent 1989 case of *Thornburgh v. Abbott*, the United States Supreme Court overturned *Martinez* in part, holding that censorship of incoming mail for federal prisoners was justified because of legitimate institutional security concerns reasonably linked to incoming mail.⁹³ Outgoing mail was not at issue because the penological interests of security and order were relevant only to incoming mail that might jeopardize the internal prison environment.⁹⁴ The Supreme Court noted that prison walls do not prevent

⁸⁶ See *infra* notes 103-105 and accompanying text for a discussion of minimum scrutiny.

⁸⁷ See *Procunier v. Martinez*, 416 U.S. 396, 409 (1974).

⁸⁸ *Id.*

⁸⁹ *Id.* at 399.

⁹⁰ *Id.* at 413.

⁹¹ *Id.*

⁹² *Id.* at 415; see also *Turner v. Safley*, 482 U.S. 78, 97 (1987). The *Turner* Court noted that a state regulation severely limiting the rights of prisoners to marry also infringed on the rights of civilians seeking to marry prisoners. *Id.* at 97. In dicta, the *Turner* Court noted that the implication of non-prisoners' rights might warrant the application of the *Martinez* standard but did not reach this question because the marriage regulation did not withstand scrutiny, even under the reasonableness standard. *Id.*

⁹³ *Thornburgh v. Abbott*, 109 S. Ct. 1874, 1879-81 (1989).

⁹⁴ *Id.*

free citizens from exercising their own constitutional rights by seeking contact with those on the inside.⁹⁵ In weighing the legitimate demands of those on the outside against the legitimate need for order and security on the inside, the Court upheld prison officials' interests in order and security.⁹⁶ Relying on its earlier decisions involving prison regulations affecting the rights of prisoners and non-prisoners, the Supreme Court in *Abbott* broadly stated, in contrast to *Martinez*, that these two groups should not be subject to separate standards.⁹⁷

Courts have held that prisoners have constitutionally protected rights to privacy that include the marital relationship.⁹⁸ Courts may restrict such rights, however, and subject them to a balancing of competing interests between penological goals and prisoners' rights.⁹⁹ When prison regulations implicate the rights of non-prisoners, this fact may influence the courts in weighing and balancing the rights and competing interests. The Supreme Court, however, has not established a heightened standard of review for regulations affecting the privacy rights of non-prisoners.¹⁰⁰

C. Standards of Judicial Review for Prison Regulations

Although incarceration does not completely divest prisoners of all constitutional rights, the traditional judicial deference to prison administrators has commonly tipped the balance between penological interests and prisoners' rights in favor of prison officials' limitation of such rights.¹⁰¹ This judicial deference has impacted the standards of judicial review employed in testing the constitutionality of prison regulations.¹⁰² Traditionally, the Supreme Court has employed minimum scrutiny in its judicial review of prison regulations.¹⁰³ Minimum scrutiny merely requires a rational relationship between the prison regulation and a legitimate penological

⁹⁵ *Id.* at 1878 (quoting *Turner*, 482 U.S. at 84, 94-99).

⁹⁶ *Id.*

⁹⁷ *Id.* at 1879-80 n.9 (citing *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 136 (1977); *Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

⁹⁸ See *supra* note 64 for a discussion of cases in which courts upheld the prisoner's right of marital privacy.

⁹⁹ See *supra* notes 82-85 and accompanying text for a discussion of judicial balancing of competing interests.

¹⁰⁰ See *Turner v. Safley*, 482 U.S. 78, 97 (1987); *Procunier v. Martinez*, 416 U.S. 396, 409 (1974).

¹⁰¹ See, e.g., *Block v. Rutherford*, 468 U.S. 576, 589 (1984).

¹⁰² See *Bell v. Wolfish*, 441 U.S. 520, 546-47 (1979).

¹⁰³ See, e.g., *Turner*, 482 U.S. at 89.

objective.¹⁰⁴ The Court has been reluctant to employ a higher level of scrutiny because of the necessary restraints imposed by incarceration, restraints that the Court might invalidate if it imposed higher scrutiny.¹⁰⁵

On some rare occasions, the Supreme Court has employed strict scrutiny to review prison regulations.¹⁰⁶ Unlike minimum scrutiny, strict scrutiny requires a compelling state interest to justify infringement of a fundamental right or discrimination against a suspect class.¹⁰⁷ The Court has employed such scrutiny only for prison classifications involving invidious racial discrimination.¹⁰⁸ In the 1968 case of *Lee v. Washington*, the Court struck down Alabama statutes requiring segregation of the races in prisons.¹⁰⁹ The statutes required black and white prisoners to be housed in separate areas of the prisons.¹¹⁰ The Court held that the statutes violated the equal protection clause of the fourteenth amendment because prison officials had no compelling state interest in separating the white prisoners from black prisoners, who represented a suspect racial class.¹¹¹ In addition to such racial classifications, the Court sparingly has employed heightened scrutiny when prison regulations have implicated fundamental rights of non-prisoners.¹¹²

¹⁰⁴ See *id.*; see also *Morales v. Schmidt*, 489 F.2d 1335, 1343 (7th Cir. 1973).

¹⁰⁵ See *Turner*, 482 U.S. at 89. The *Turner* Court stated:

Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decision-making process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby "unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration."

Id.

¹⁰⁶ See, e.g., *Lee v. Washington*, 390 U.S. 333, 333 (1968); see also *Procunier v. Martinez*, 416 U.S. 396, 413 (1974). In *Martinez*, the Court employed heightened scrutiny to censorship of prisoner mail, holding that the prison regulation "must further . . . one or more of the substantial governmental interests of security, order, and rehabilitation." *Id.*

¹⁰⁷ See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977); *Roe v. Wade*, 410 U.S. 113, 154 (1973); *Lee*, 390 U.S. at 333.

¹⁰⁸ See *Lee*, 390 U.S. at 333.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² See *Procunier v. Martinez*, 416 U.S. 396, 413 (1979); see also *infra* notes 87-97 and accompanying text for a discussion of the constitutional rights of non-prisoners.

In all other cases not involving these few exceptional circumstances, courts have employed minimum scrutiny to equal protection claims that do not implicate fundamental rights or involve suspect classifications.¹¹³ Minimum scrutiny is the standard of review normally employed by the courts in reviewing social and economic legislation.¹¹⁴ As the lowest level of judicial review, minimum scrutiny is an easy standard to satisfy because the government must show merely a rational relationship between a regulation and a legitimate state purpose.¹¹⁵

In the 1976 case of *French v. Heyne*, the United States Court of Appeals for the Seventh Circuit applied minimum scrutiny in holding that a prisoner classification scheme for participation in vocational programs had no rational basis on its face.¹¹⁶ Therefore, the *French* court did not dismiss the prisoner's equal protection claim.¹¹⁷ In *French*, an Indiana state prison offered vocational training programs to those inmates with short indeterminate sentences but not to inmates with longer indeterminate and determinate sentences.¹¹⁸ Moreover, prison officials denied vocational and educational programs to those inmates already possessing a vocational trade or high school degree.¹¹⁹ The court applied minimum scrutiny to the program, stating that a classification resulting in unequal treatment need only bear some rational relationship to a legitimate state purpose.¹²⁰ The court refused to dismiss the prisoner's equal protection claim because the prisoner classification had no rational relationship to a legitimate state purpose.¹²¹

Similarly, the Court of Appeals for the Seventh Circuit employed minimum scrutiny in the 1978 case of *Durso v. Rowe*, holding that no clear rationale existed for a prison official's denial of a hearing for an inmate before terminating his work-release status.¹²² Accordingly, the *Durso* court refused to dismiss the prisoner's equal

¹¹³ See *Durso v. Rowe*, 579 F.2d 1365, 1372 (7th Cir. 1978); *Nadeau v. Helgemore*, 561 F.2d 411, 414 (1st Cir. 1977); *French v. Heyne*, 547 F.2d 994, 997 (7th Cir. 1976).

¹¹⁴ See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 8-7, at 581-586 (2d ed. 1988) for a discussion of minimum scrutiny applied to social and economic legislation.

¹¹⁵ See *id.* at 568-69.

¹¹⁶ *French*, 547 F.2d at 999, 1002.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 996.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 997.

¹²¹ *Id.* at 999.

¹²² *Durso v. Rowe*, 579 F.2d 1365, 1372 (7th Cir. 1978).

protection claim.¹²³ In *Durso*, a prisoner brought a claim alleging that prison officials violated his right to equal protection by purposefully denying him a hearing before terminating his work-release status, even though such hearings were normally provided to other similarly situated inmates.¹²⁴ Although the court acknowledged that mere inconsistency in prison administration may not constitute a valid equal protection claim, the court refused to dismiss the prisoner's claim.¹²⁵ The *Durso* court held that the regulation did not facially meet minimum scrutiny because the state did not identify any legitimate state interest.¹²⁶

In contrast, in *Jones v. North Carolina Prisoners' Labor Union* the United States Supreme Court held in 1977 that the different classifications among prisoner groups were rationally related to penological goals of order and security.¹²⁷ The North Carolina Department of Corrections prohibited inmates from holding union meetings but did not exclude other rehabilitative organizations, such as Alcoholics Anonymous and the Boy Scouts.¹²⁸ The Court noted that, where classifications among prisoners arise from a penological interest in maintaining order and security in the prisons, such classifications further a legitimate state interest and do not violate the equal protection clause.¹²⁹ Because the *Jones* Court reasoned that order and security in the prison could be undermined if prisoners were allowed to form a union, the Court concluded that the exclusion of union meetings furthered a legitimate state interest in maintaining such order and security.¹³⁰

The Supreme Court elaborated on its traditional minimum scrutiny in reviewing prisoners' claims in the 1987 case of *Turner v. Safley*.¹³¹ In *Turner*, the Supreme Court struck down a prison regulation prohibiting prisoners from marrying other prisoners or civilians unless the prison superintendent determined that compelling reasons for the marriage existed.¹³² The *Turner* Court employed

¹²³ *Id.*

¹²⁴ *Id.* at 1371.

¹²⁵ *Id.* at 1372.

¹²⁶ *Id.*

¹²⁷ 433 U.S. 119, 136 (1977).

¹²⁸ *Id.* at 134.

¹²⁹ *Id.* at 132; see also *Hodges v. Klein*, 562 F.2d 276, 278 (3d Cir. 1977).

¹³⁰ *Jones*, 433 U.S. at 132-33. The *Jones* Court stated: "The case of a prisoners' union, where the focus is on the presentation of grievances to, and encouragement of adversary relations with, institution officials surely would rank high on anyone's list of potential trouble spots." *Id.* at 133.

¹³¹ 482 U.S. 78, 89-90 (1987).

¹³² *Id.* at 82. Prison officials did not define the term "compelling" but testified at trial

a four-part test for minimum scrutiny, which included whether a valid rational connection exists between the prison regulation and a legitimate and neutral penological interest put forward to justify it; alternative means of exercising the right remain open to prisoners; an adverse impact on correction employees, other inmates, or prison resources will result from accommodating the asserted constitutional right; and, ready alternatives remain available to prison administrators to address the advanced concerns.¹³³ If obvious, easy alternatives exist, then the Court will regard the regulation as an exaggerated response to prison concerns.¹³⁴ The Court held that the marital regulation in *Turner* failed this four-part test.¹³⁵ Of particular concern to the Court was the lack of a rational connection between the regulation and the purported penological interests of security and rehabilitation.¹³⁶

The Supreme Court subsequently has employed the *Turner* test of minimum scrutiny in its review of prison regulations.¹³⁷ This most recent standard of review reflects the still-present judicial deference to prison administrators, who merely need to demonstrate a reasonable relationship between a prison regulation and a legitimate penological objective.¹³⁸ The judicial requirement of merely legitimate, not important or compelling, state interests in this regard results in a balancing of competing interests that favor the correctional system and oppose prisoners' rights. Despite this implicit deference toward prison officials, however, the *Turner* test provides some specific, albeit limited, guidelines in balancing penological interests against the constitutional rights of prisoners.

II. THE IMPACT OF AIDS ON THE CONSTITUTIONAL AND STATUTORY RIGHTS OF PRISONERS

Special considerations arise in the judicial balancing of competing interests where prison regulations involve AIDS. The growing presence of AIDS in prisons creates special problems for prison officials, who now must view traditional penological objectives

that compelling reasons would generally be restricted to a pregnancy or the birth of an illegitimate child. *Id.*

¹³³ *Id.* at 89-91.

¹³⁴ *Id.* at 90-91.

¹³⁵ *Id.* at 99.

¹³⁶ *Id.* at 98-99.

¹³⁷ See, e.g., *Thornburgh v. Abbott*, 109 S. Ct. 1874, 1882 (1989); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987).

¹³⁸ See *Turner v. Safley*, 482 U.S. 78, 89 (1987).

through the realities of AIDS.¹³⁹ The formulation of new policies and regulations to respond to the AIDS crisis has significant impact on the constitutional and statutory rights of prisoners and their families.

A. Constitutional Rights of AIDS-Infected Prisoners

Prisoners are entitled to certain protections under the fourteenth amendment of the Constitution.¹⁴⁰ The increasing incidence of AIDS in prisons,¹⁴¹ however, has challenged the already tenuous status of prisoners' constitutional rights.¹⁴² Prison administrators have been faced with formulating appropriate policies concerning prevention, identification, treatment and institutional management of AIDS, and with balancing the competing interests of legitimate penological objectives against the special needs of prisoners with AIDS.¹⁴³ These policies have included the segregation and confinement of prisoners with AIDS and mandatory HIV testing of prisoners.¹⁴⁴ The constitutional implications of these policies and regulations have resulted in lawsuits initiated by both AIDS-infected and AIDS-free prisoners.¹⁴⁵

Prisoners' lawsuits have included equal protection claims arising from special conditions imposed on them because of their having AIDS.¹⁴⁶ For example, in the 1984 case of *Cordero v. Coughlin*, the United States District Court for the Southern District of New York denied the equal protection claim of prisoners with AIDS because they were not similarly situated to other prisoners.¹⁴⁷ In *Cordero*, a group of segregated state prisoners with AIDS sued the state's

¹³⁹ See *Cordero v. Coughlin*, 607 F. Supp. 9, 10 (S.D.N.Y. 1984).

¹⁴⁰ See *supra* notes 49-54 and accompanying text for a discussion of the constitutional rights of prisoners.

¹⁴¹ See *supra* notes 10-11 and accompanying text.

¹⁴² See Moriarity, *AIDS in Correctional Institutions: The Legal Aspects*, 23 CRIM. L. BULL. 533, 535 (1987); see also *Trautler v. Thompson*, 662 F. Supp. 945, 946 (N.D. Ill. 1987). The *Trautler* court stated in dicta that "AIDS unquestionably is a serious public health problem that is impacting on our nation's prisons. To stem its spread among the inmate population, prison administrators undoubtedly will have to make delicate policy decisions that will have some constitutional implications." *Id.*

¹⁴³ See Comment, *AIDS Behind Bars*, *supra* note 14, at 336, 351-52. According to some commentators, prison administrators have imposed restrictive responses to AIDS because of their fear of liability to prisoners or prison employees who contract the disease. See *id.* at 347-51 and Moriarity, *supra* note 142, at 545-48 for discussions of prison liability and AIDS.

¹⁴⁴ See T. HAMMETT, *supra* note 3, at 47.

¹⁴⁵ *Id.*

¹⁴⁶ See Moriarity, *supra* note 142, at 537.

¹⁴⁷ 607 F. Supp. 9, 10 (S.D.N.Y. 1984).

Department of Correctional Services, alleging, among other things, that they were deprived of social, recreational and rehabilitative opportunities by being medically segregated and, thereby, denied equal protection of the law.¹⁴⁸ The *Cordero* court held that the prisoners were not denied equal protection of the law.¹⁴⁹ Alternatively, the court stated in dicta that, even if the equal protection clause did apply, individuals with AIDS do not constitute a suspect class and, therefore, the court would employ minimum scrutiny.¹⁵⁰ This standard requires correctional services merely to show a rational relationship between the segregation and a legitimate government end.¹⁵¹ The *Cordero* court stated that the protection of both prisoners with AIDS and other prisoners from the tensions and harms that might arise from fear surrounding AIDS was a legitimate government end.¹⁵² Accordingly, the court concluded that the prisoner classification would meet the minimum scrutiny standard if the court applied the equal protection clause.¹⁵³

Although courts have generally ruled against prisoners' alleged claims of violations of privacy under the fourteenth amendment,¹⁵⁴ some courts have upheld AIDS-infected prisoners' right of privacy regarding their medical records and HIV status.¹⁵⁵ In the 1988 case of *Woods v. White*, the United States District Court for the Western District of Wisconsin held that prisoners' privacy rights include non-disclosure of their medical records to other prison personnel.¹⁵⁶ In *Woods*, prison medical service personnel disclosed to non-medical staff and other inmates the fact that a prison inmate had tested positive for the AIDS virus.¹⁵⁷ The *Woods* court held that prisoners retain some constitutional right to privacy despite incarceration.¹⁵⁸ The court further noted that the constitutional right to privacy exists in withholding disclosure of certain types of personal infor-

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ See *supra* notes 58-84 and accompanying text for a discussion of prisoners' right to privacy under the fourteenth amendment.

¹⁵⁵ See *Rodriguez v. Coughlin*, No. CIV-87-1577E, 1, 6-7 (W.D.N.Y. June 5, 1989) (WESTLAW, Allfeds library); *Doe v. Coughlin*, 697 F. Supp. 1234, 1240-41 (N.D.N.Y. 1988); *Woods v. White*, 689 F. Supp. 874, 876 (W.D. Wis. 1988).

¹⁵⁶ *Woods*, 689 F. Supp. at 876.

¹⁵⁷ *Id.* at 874-75.

¹⁵⁸ *Id.* at 876 (quoting *Torres v. Wisconsin Dep't of Health and Social Servs.*, 538 F.2d 944, 951 (7th Cir. 1988)).

mation, a right that must be balanced against the governmental interest in limited disclosure.¹⁵⁹ Finally, the *Woods* court held that no countervailing governmental interest existed in the disclosure by prison medical service personnel of the prisoner's HIV-positive status to non-medical staff and other inmates, and, as a result, the prisoner retained the right to non-disclosure of his medical records.¹⁶⁰

In another case involving an AIDS-infected prisoner's right to privacy, the United States District Court for the Northern District of New York held in 1988 in *Doe v. Coughlin* that prisoners were entitled to a preliminary injunction enjoining their further involuntary transfer to a segregated dormitory for prisoners who were HIV-positive.¹⁶¹ The court reasoned that prisoners who are HIV-positive are entitled to some protection against non-consensual disclosure of their status.¹⁶² At the same time, the court required the prisoners to demonstrate that the right to privacy existed and that the program in question was not reasonably related to a legitimate penological objective.¹⁶³ The *Doe* court held that prisoners' constitutional rights were violated by their inability to choose whether they wished to be placed in the special dormitory for those who were HIV-positive.¹⁶⁴

Similarly, in the 1989 case of *Rodriguez v. Coughlin*, the United States District Court for the Western District of New York held that an AIDS-infected prisoner stated a valid constitutional claim regarding the alleged infringement upon his privacy by corrections officers.¹⁶⁵ In *Rodriguez*, corrections officers entirely enveloped an AIDS-infected inmate in a hygiene suit when they transferred him from a prison hospital to the main prison facility.¹⁶⁶ The inmate protested his wearing the suit because he was afraid that it would conspicuously identify him to other prisoners as having AIDS.¹⁶⁷ His fears proved well-founded because, prior to corrections officers assigning him a cell, two inmates threatened to harm or kill him.¹⁶⁸

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ 697 F. Supp. 1234, 1243 (N.D.N.Y. 1988).

¹⁶² *Id.* at 1238.

¹⁶³ *Id.* at 1236. The district court described the right to privacy argument as the "less traveled path marked by the uncertain borders of the constitutionally protected right to privacy." *Id.*

¹⁶⁴ *Id.* at 1241, 1243.

¹⁶⁵ No. CIV-87-1577E, 1, 4, 8-9 (W.D.N.Y. June 5, 1989) (WESTLAW, Allfeds library).

¹⁶⁶ *Id.* at 2.

¹⁶⁷ *Id.* at 3.

¹⁶⁸ *Id.*

Further, while he was incarcerated in two different prison dorms, corrections officers informed various inmates that he had AIDS.¹⁶⁹ The court noted that the significant incidence of AIDS in prisons presents legal issues, some of which have constitutional dimensions.¹⁷⁰ The court delineated one such legal issue to be the prisoner's right of privacy regarding his AIDS status.¹⁷¹ Applying the reasoning of *Doe v. Coughlin* and *Woods v. White*, the *Rodriguez* court stated that information about the disease of AIDS is of the most personal kind and that an individual has a strong interest in protecting against the disclosure of this information to others.¹⁷² As a result, the court held that the prisoner stated a valid claim regarding the alleged violation of his right to privacy when prison officers informed other inmates that he suffered from AIDS.¹⁷³

Although courts traditionally have limited the constitutional rights of prisoners in favor of countervailing penological interests, some courts have recognized that penological interests cannot always justify infringement upon the privacy rights of AIDS-infected prisoners.¹⁷⁴ Increasingly, courts seem to be upholding the right of privacy of inmates with AIDS to confidentiality in their medical records and HIV status.¹⁷⁵ In weighing the competing interests between prison officials and AIDS-infected prisoners, some courts have affirmed the prisoners' privacy rights in the absence of legitimate penological interests that justify infringement upon those rights.¹⁷⁶

B. Statutory Rights of AIDS-Infected Prisoners: Section 504 of the Rehabilitation Act of 1973

In addition to constitutional protection under the fourteenth amendment, AIDS-infected prisoners may be entitled to statutory

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 4.

¹⁷¹ *Id.* at 7.

¹⁷² *Id.* at 6-7.

¹⁷³ *Id.* at 3. Other courts have dismissed as frivolous claims brought by prisoners for the failure of prison officials to protect them from other inmates with AIDS. See *Glick v. Henderson*, 855 F.2d 536, 539 (8th Cir. 1988); *Trautler v. Thompson*, 662 F. Supp. 945, 946-47 (N.D. Ill. 1987); *Jarrett v. Faulkner*, 662 F. Supp. 928, 929 (S.D. Ind. 1987). These courts have held that such suits arise from unsubstantiated fears that do not justify wholesale AIDS testing and segregation. See *Glick*, 855 F.2d at 539; *Trautler*, 662 F. Supp. at 946-47; *Jarrett*, 662 F. Supp. at 929.

¹⁷⁴ See *Rodriguez v. Coughlin*, No. CIV-87-1577E, 1, 7 (W.D.N.Y. June 5, 1989) (WESTLAW, Allfeds library); *Doe v. Coughlin*, 697 F. Supp. 1234, 1240-41 (N.D.N.Y. 1988).

¹⁷⁵ See *Rodriguez*, No. CIV-87-1577E at 8; *Doe*, 697 F. Supp. at 1243.

¹⁷⁶ See *Rodriguez*, No. CIV-87-1577E at 8; *Doe*, 697 F. Supp. at 1243.

protection under section 504 of the Rehabilitation Act of 1973.¹⁷⁷ Section 504 prohibits discrimination in federally assisted programs against otherwise qualified individuals with handicaps solely on the basis of the handicaps.¹⁷⁸ The evaluation of a section 504 claim requires a four-part inquiry that includes whether the individual is handicapped within the meaning of the Rehabilitation Act; whether the individual with handicaps is otherwise qualified to participate in the program; whether the handicap was the sole reason for exclusion from the program; and whether the program in question is a recipient of federal funds.¹⁷⁹

In evaluating a section 504 claim, the court must first determine if the individual claimant is handicapped within the meaning of the Rehabilitation Act.¹⁸⁰ Although the Supreme Court has not held

¹⁷⁷ Section 504 is codified at 29 U.S.C. §§ 706(8)(C), 794 (1988).

¹⁷⁸ Section 504 provides in pertinent part:

No otherwise qualified individual with handicaps in the United States, as defined in section 706(7) of this title, shall, solely by reason of his [or her] handicap, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency of the United States

Id.

In 1974, the Senate Committee on Labor and Public Welfare and the House Committee on Labor and Education determined that "certain clarifying and perfecting changes in the Act would be required in order to permit the full implementation of Congressional intent." Baxley, *Rehabilitating AIDS-Based Employment Discrimination: HIV Infection As A Handicap Under The Vocational Rehabilitation Act Of 1973*, 19 SETON HALL L. REV. 23, 35 (1989) (quoting S. REP. NO. 1297, 93d Cong., 2d Sess. 38, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6376-77). Congress amended the definition of a handicapped individual because of a statement in a Senate report that the definition had been too limited in its orientation toward employment and vocational rehabilitation services. Baxley, *supra*, at 35. The report stated:

It was clearly the intent of the Congress in adopting section 503 (affirmative action) and section 504 (nondiscrimination) that the term "handicapped individual" in those sections was not to be narrowly limited to employment (in the case of section 504), nor to the individual's potential benefit from vocational rehabilitation services . . . (in the case of both sections 503 and 504) of the Act [A] test of discrimination against a handicapped individual under section 504 should not be couched either in terms of whether such individual's disability is a handicap to employment, or whether such individual can reasonably be expected to benefit, in terms of employment, from vocational rehabilitation services. Such a test is irrelevant to the many forms of potential discrimination covered by section 504.

S. REP. NO. 1297, 93d Cong., 2d Sess. 38, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6388.

¹⁷⁹ See *Strathie v. Department of Transp.*, 716 F.2d 227, 230 (3d Cir. 1983); *Doe v. New York Univ.*, 666 F.2d 761, 774-75 (2d Cir. 1981).

¹⁸⁰ See *School Bd. v. Arline*, 480 U.S. 273, 280 (1987); *Strathie*, 716 F.2d at 230; *Doe*, 666 F.2d at 774-75.

expressly that individuals with AIDS are protected under the Rehabilitation Act,¹⁸¹ the Court held in the 1987 case of *School Board v. Arline* that contagious diseases are handicaps under the Rehabilitation Act.¹⁸² In 1988, Congress amended the statutory definition of individuals with handicaps to include those with contagious diseases.¹⁸³ As a result of these legislative and judicial actions, courts increasingly have found AIDS-infected individuals to be handicapped within the meaning of section 504.¹⁸⁴

For example, in the 1988 case of *Chalk v. United States District Court*, the Court of Appeals for the Ninth Circuit held that a teacher with AIDS is a handicapped person under the Rehabilitation Act.¹⁸⁵ A school district fired Chalk as a teacher and reinstated him in a non-teaching position because he had AIDS.¹⁸⁶ The *Chalk* court granted a preliminary injunction to reinstate Chalk in the classroom, stating that he demonstrated a strong probability of success on the merits of his section 504 claim.¹⁸⁷

Once the court determines that the individual is handicapped, it must find the handicapped individual otherwise qualified under the Rehabilitation Act.¹⁸⁸ The Supreme Court has held that an otherwise qualified person is one who meets all of a program's requirements despite the handicap.¹⁸⁹ Where the handicapped condition is a contagious disease, the Supreme Court noted in *School Board v. Arline* that courts should engage in an individualized inquiry to determine if the individual is otherwise qualified.¹⁹⁰ This individualized inquiry includes an assessment of the nature of the risk, the duration of the risk, the severity of the risk, and the probability

¹⁸¹ *Arline*, 480 U.S. at 282 n.7.

¹⁸² *Id.* at 289.

¹⁸³ See Civil Rights Restoration Act of 1987, 29 U.S.C. §§ 706(8)(C), 794(b) (1988). The Act states in pertinent part:

{S}uch term does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.

Id.

¹⁸⁴ See *Chalk v. United States Dist. Court*, 840 F.2d 701, 709 (9th Cir. 1988); *District 27 Community School Bd. v. Board of Educ.*, 130 Misc. 2d 398, 414, 502 N.Y.S.2d 325, 336 (Sup. Ct. 1986).

¹⁸⁵ 840 F.2d at 709.

¹⁸⁶ *Id.* at 703.

¹⁸⁷ *Id.* at 709, 712.

¹⁸⁸ See *School Bd. v. Arline*, 480 U.S. 273, 287-88 (1987).

¹⁸⁹ See *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979).

¹⁹⁰ 480 U.S. at 287.

of transmission and resultant harm.¹⁹¹ The significance of the risk of transmission is the particularly significant element in this individualized inquiry.¹⁹² Courts have held that a significant risk of transmission may exist when the infected person places others at definite, not theoretical, risk of transmission of the contagious disease.¹⁹³

In the 1987 case of *Thomas v. Atascadero Unified School District*, the United States District Court for the Southern District of Florida held that an HIV-infected child was otherwise qualified to attend kindergarten.¹⁹⁴ In *Thomas*, the parents of a child alleged that their school district had prohibited their HIV-infected son from attending regular kindergarten classes.¹⁹⁵ The court found no evidence that the child posed any significant risk of transmission to other children or teachers.¹⁹⁶ Therefore, the *Thomas* court held that section 504 protected the child from the discriminatory actions of the school because he was otherwise qualified under the Rehabilitation Act.¹⁹⁷ As a result, the court granted a preliminary injunction prohibiting the school district from excluding the HIV-infected child from the classroom.¹⁹⁸

Similarly, the Court of Appeals for the Ninth Circuit in *Chalk* employed the significant risk standard in determining whether the AIDS-infected school teacher was otherwise qualified for his position.¹⁹⁹ The court noted that no evidence existed of any significant risk of transmission of the AIDS virus by the AIDS-infected teacher in the school setting.²⁰⁰ Further, the *Chalk* court concluded that every theoretical possibility of risk need not be disproved.²⁰¹

The Supreme Court has held that where a handicapped person presents a significant risk of transmission, the person is not other-

¹⁹¹ *Id.* at 288.

¹⁹² *Id.* at 287 n.16.

¹⁹³ See *Thomas v. Atascadero Unified School Dist.*, 662 F. Supp. 376, 380 (C.D. Cal. 1987); *District 27 Community School Bd. v. Board of Educ.*, 130 Misc. 2d 398, 413, 502 N.Y.S.2d 325, 337 (Sup. Ct. 1986).

¹⁹⁴ 662 F. Supp. at 381.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 381-82.

¹⁹⁸ *Id.* at 382.

¹⁹⁹ *Chalk v. United States Dist. Court*, 840 F.2d 701, 707 (9th Cir. 1988).

²⁰⁰ *Id.*

²⁰¹ *Id.* at 709; see also *District 27 Community School Bd. v. Board of Educ.*, 130 Misc. 2d 398, 413, 415, 502 N.Y.S.2d 325, 335, 337 (Sup. Ct. 1986). The court in *District 27* noted that routine precautions can significantly reduce any theoretical risk of transmission of the AIDS virus. *Id.*

wise qualified unless reasonable accommodation can eliminate the significant risk.²⁰² The Court has also noted that accommodation is not reasonable if it either results in undue financial and administrative burden to the program or fundamentally alters the nature of the program.²⁰³ In the 1979 case of *Southeastern Community College v. Davis*, the Supreme Court held that a community college's refusal to make major adjustments in its nursing program to accommodate a hearing impaired licensed practical nurse was not discriminatory.²⁰⁴ The *Davis* Court stated that such accommodation would impose undue burdens upon the college and lower or modify the standards of its nursing program.²⁰⁵ The Court concluded that the nurse was not otherwise qualified because the college could not reasonably accommodate her handicap in its program.²⁰⁶ Thus, a handicapped individual is not otherwise qualified if the program cannot reasonably accommodate the handicap.

If the court finds a handicapped individual to be otherwise qualified, the individual must show that his or her exclusion from the program was based solely on the handicap.²⁰⁷ Where program officials explicitly state that the individual was excluded because of the handicap, the handicapped individual has met this element of a section 504 claim. For example, courts have held that AIDS-infected individuals have met this element of their section 504 claim where program officials admit that their exclusion of such individuals is based solely on their having AIDS.²⁰⁸

Lastly, a court must determine whether the program in question receives federal funds.²⁰⁹ In 1988, Congress enacted the Civil Rights Restoration Act of 1987 (the Restoration Act)²¹⁰ to restore

²⁰² See *School Bd. v. Arline*, 480 U.S. 273, 287 n.17 (1987); *Southeastern Community College v. Davis*, 442 U.S. 397, 410-12 (1979).

²⁰³ See *Arline*, 480 U.S. at 287 n.17; *Davis*, 442 U.S. at 412.

²⁰⁴ 442 U.S. at 413.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 414.

²⁰⁷ See *Strathie v. Department of Transp.*, 716 F.2d 227, 230 (3d Cir. 1983); *Doe v. New York Univ.*, 666 F.2d 761, 774 (2d Cir. 1981).

²⁰⁸ See, e.g., *Doe v. Centinela Hosp.*, No. CV 87-2514 PAR (PX), 1, 10 (C.D. Cal. June 30, 1988) (WESTLAW, Allfeds library) (HIV positive patient in residential alcohol and drug rehabilitation program excluded solely because of HIV status); *District 27 Community School Bd. v. Board of Educ.*, 130 Misc. 2d 398, 413, 502 N.Y.S.2d 325, 335 (Sup. Ct. 1986) (court noted in dicta that "automatic exclusion from school of all children with AIDS would violate their rights under the Rehabilitation Act").

²⁰⁹ In pertinent part, 29 U.S.C. section 794 states that section 504 applies to "any program or activity receiving Federal financial assistance." Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (1988).

²¹⁰ Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (codified as

the broad range of institution-wide coverage of section 504 that the United States Supreme Court had narrowed since the promulgation of the Rehabilitation Act of 1973.²¹¹ The Restoration Act defines "program or activity" to include, among other things, *all* the operations of a department or agency of the state, rather than only specific programs or activities.²¹² In effect, the Restoration Act ensures broad, institution-wide application of section 504 to include all programs of a state department that receives federal financial assistance.

Since the enactment of the Restoration Act, courts have held that individual programs do not have to be specific recipients of federal funds as long as the broader institution itself is a federal recipient.²¹³ For example, in *Bonner v. Arizona Department of Corrections*, the United States District Court for the District of Arizona in 1989 held that section 504 applies to prisoners incarcerated in state prisons.²¹⁴ In *Bonner*, a deaf, mute, and vision-impaired inmate at the Arizona State Prison brought a section 504 claim against the prison for its alleged failure to provide him with a qualified interpreter.²¹⁵ The court rejected the Department of Corrections' contention that the inmate did not have a viable claim under section 504 because no nexus existed between the Department's federal

amended at 29 U.S.C. §§ 706(8)(C), 794(b) (1988)). The purpose of the Act is to "[r]estore the broad scope of coverage and to clarify the application of . . . section 504 of the Rehabilitation Act of 1973." *Id.* The Restoration Act further states:

(1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon [its] broad application . . . and (2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.

Id.

²¹¹ See, e.g., *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 636 (1984) (Court stated that section 504 was limited to the "specific program that receives federal funds"); *Grove City College v. Bell*, 465 U.S. 555, 573-74 (1984) (Court stated that section 501(a) of Title IX of the Education Amendments of 1972, which prohibited sex discrimination in "any education program or activity receiving federal financial assistance," was limited to the particular program or activity receiving such assistance).

²¹² The Restoration Act states in relevant part that "[f]or the purposes of this section, the term 'program or activity' means all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government . . ." 29 U.S.C. § 794 (b)(1)(A) (1988).

²¹³ See, e.g., *Leake v. Long Island Jewish Medical Center*, 695 F. Supp. 1414, *aff'd*, 869 F.2d 130 (2d Cir. 1989); *Bonner v. Arizona Dep't of Corrections*, 714 F. Supp. 420 (D. Ariz. 1989). In *Leake* and *Bonner*, the courts held that the Restoration Act applied retroactively. *Leake*, 869 F.2d at 131; *Bonner*, 714 F. Supp. at 422.

²¹⁴ 714 F. Supp. at 422.

²¹⁵ *Id.* at 420.

funds and the programs in which the inmate sought to participate.²¹⁶ The *Bonner* court applied the Restoration Act in noting that the term "program or activity" under section 504 encompasses all the operations of a department that receives federal funds.²¹⁷ Because the Arizona Department of Corrections admitted that it received federal assistance, the court held that section 504 applied and that the inmate therefore was entitled to auxiliary aids for participation in all the Department's operations.²¹⁸

Even prior to the enactment of the Restoration Act, some courts had held that section 504 applied not only to state departments that received federal funds but to individual components within the departments as well.²¹⁹ For example, courts had held that local school districts under state departments of education were recipients of federal funds under the Rehabilitation Act.²²⁰ These state departments of education distributed federal funds to local school districts, which then had to comply with the obligations of section 504.²²¹ Courts have noted that local school districts that excluded AIDS-infected students or teachers are federal recipients, and, therefore, must comply with the Rehabilitation Act.²²² In line with such cases, the Restoration Act defines the term "program or activity" broadly to ensure institution-wide coverage of section 504 for handicapped individuals seeking protection under the Rehabilitation Act.

Once the handicapped individual meets the four elements of a section 504 claim, the handicapped individual has established a *prima facie* case of handicap discrimination.²²³ The program then

²¹⁶ *Id.* at 421.

²¹⁷ *Id.* at 422.

²¹⁸ *Id.* The *Bonner* court applied the Restoration Act retroactively, adopting the reasoning of *Leake v. Long Island Jewish Medical Center*, which has been the only other federal district court case to examine the question "whether Congress intended the Civil Rights Restoration Act to be applied retroactively to cases that were pending at the time of its passage." *Bonner*, 714 F. Supp. at 422.

²¹⁹ See, e.g., *Association for Retarded Citizens v. Frazier*, 517 F. Supp. 105, 119-20 (D. Colo. 1981) (court regarded State Department of Education as the recipient of federal funds for purposes of section 504, which it distributed to local educational agencies, and, therefore, these agencies fell under the obligations of section 504); *District 27 Community School Bd. v. Board of Educ.*, 130 Misc. 2d 398, 414, 502 N.Y.S.2d 325, 336 (Sup. Ct. 1986).

²²⁰ See, e.g., *Association for Retarded Citizens*, 517 F. Supp. at 119-20; *District 27 Community School Bd.*, 130 Misc. 2d at 414, 502 N.Y.S.2d at 336.

²²¹ See, e.g., *District 27 Community School Bd.*, 130 Misc. 2d at 414, 502 N.Y.S.2d at 336.

²²² See *id.*

²²³ See *Doe v. New York Univ.*, 666 F.2d 761, 776-77 (2d Cir. 1981); *Pushkin v. Regents of Univ. of Colo.*, 658 F.2d 1372, 1387 (10th Cir. 1981).

has the burden of demonstrating either that the handicapped person was not otherwise qualified because of the handicap or that exclusion from the program was for reasons other than the handicap.²²⁴ Courts have held that this burden of proof requires more rigorous scrutiny than the mere minimum scrutiny applied to many constitutional claims.²²⁵ If the recipient meets this burden, the handicapped individual then has the ultimate burden of showing that the recipient's reasons for excluding him or her from the program are pretextual.²²⁶

To date, prisoners with AIDS have raised section 504 claims only on rare occasions. In the 1987 case of *Judd v. Packard*, the United States District Court for the District of Maryland held that an HIV-infected inmate had no claim under section 504 of the Rehabilitation Act.²²⁷ In *Judd*, a prisoner alleged that his placement in medical isolation for testing, diagnosis and treatment of an AIDS-related condition was an act of discrimination on the basis of a handicap.²²⁸ The court held that Judd did not demonstrate any relationship between the alleged discrimination by prison officials and any specific federally-funded program.²²⁹ Therefore, the court dismissed his statutory claim.²³⁰ The *Judd* court decided this case, however, prior to the enactment and subsequent interpretation by the courts of the Restoration Act, which was designed to ensure institution-wide, not merely program-specific, application of section 504 to federal recipients.²³¹

²²⁴ See *Doe*, 666 F.2d at 776-77; *Pushkin*, 658 F.2d at 1387.

²²⁵ See *Doe*, 666 F.2d at 776-77; *Pushkin*, 658 F.2d at 1387.

²²⁶ See *Pushkin*, 658 F.2d at 1383-84; *Strathie v. Department of Transp.*, 716 F.2d 227, 231 (3d Cir. 1983); *Bentivegna v. United States Dep't of Labor*, 694 F.2d 619, 621 (9th Cir. 1982).

²²⁷ *Judd v. Packard*, 669 F. Supp. 741, 742 (D. Md. 1987).

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.* at 743.

²³¹ See *supra* notes 210-213 and accompanying text for a discussion of the Restoration Act. In light of the Restoration Act and its subsequent judicial application in *Bonner v. Arizona Dep't. of Corrections*, the *Judd* court likely would have reached a different result if the AIDS-infected prisoner had brought his section 504 claim after the enactment of the Restoration Act. In *Bonner*, the court stated:

[t]he Act's goals of independent living and vocational rehabilitation should in fact mirror the goals of prison officials as they attempt to rehabilitate prisoners and prepare them to lead productive lives once their sentences are complete. By ensuring that inmates have meaningful access to prison activities, such as disciplinary proceedings and counseling, the goals of both the institution and the Rehabilitation Act are served.

857 F.2d 559, 562 (9th Cir. 1988).

Although AIDS-infected prisoners rarely have raised section 504 claims, the statute does prohibit discrimination against handicapped persons participating in federally-funded institutions.²³² Courts have held that AIDS as a contagious disease is a protected handicap under section 504 and that AIDS-infected individuals may be otherwise qualified to participate in such programs.²³³ Moreover, courts have considered state prisons that have received federal financial assistance to be subject to the obligations of section 504.²³⁴ Thus, section 504 provides statutory protection for AIDS-infected individuals, including state prisoners, from discrimination in federally-funded institutions.

III. FAMILY VISITATION PROGRAMS AND RIGHTS OF PRISONERS WITH AIDS

Prison officials have denied prisoners with AIDS meaningful access to social, recreational and rehabilitation programs.²³⁵ Such denial of access has been due, in part, to the seclusion and segregation of AIDS-infected prisoners in isolation units of prisons.²³⁶ Although relatively few prisons totally exclude segregated inmates with AIDS from all programs, access has been limited, particularly with respect to conjugal visitation programs.²³⁷

²³² Rehabilitation Act of 1973, 29 U.S.C. §§ 706(8)(C), 794 (1988). See also *supra* note 178 for text of the statute.

²³³ See *supra* notes 184-201 and accompanying text for a discussion of cases in which courts held that AIDS-infected individuals were otherwise qualified handicapped individuals under section 504.

²³⁴ See *Bonner*, 714 F. Supp. at 422. In *Bonner*, the court cited United States Department of Justice regulations promulgated under section 504 that apply to federally assisted correctional institutions. *Id.* at 423. The regulations require those institutions to "[p]rovide appropriate auxiliary aids to qualified handicapped persons with impaired sensory, manual, or speaking skills where refusal to make such provision would discriminatorily impair or exclude the participation of such persons." 28 C.F.R. § 42.503(f) (1988). Thus, the Department of Justice has acknowledged the application of section 504 to correctional institutions receiving federal financial assistance.

²³⁵ See T. HAMMETT, *supra* note 3, at 36.

²³⁶ See *Cordero v. Coughlin*, 607 F. Supp. 9, 10 (S.D.N.Y. 1984).

²³⁷ In an October, 1988 survey of state prisons regarding segregated prisoners with AIDS, only 5% of the prisons provided full access to conjugal visits, 3% provided limited access, and 79% (incomplete responses) provided no access. See T. HAMMETT, *Housing and Correctional Management Policies*, in 1988 UPDATE: AIDS IN CORRECTIONAL FACILITIES I, 36-37 (1989). For asymptomatic HIV carriers, state prisons provided 23% full access, 0% limited access, and 69% (incomplete responses) no access. *Id.* For city and county jails in the same survey, 12% provided full access, 6% limited access, and 65% (incomplete responses) no access for prisoners with AIDS. *Id.* For asymptomatic HIV carriers, 13% of city and county jails provided full access, 63% limited access, and 0% (incomplete responses) no access. *Id.*

A. Family Visitation Programs in Prisons

To date, ten states have implemented family visitation programs in their prison systems.²³⁸ At least one state, Connecticut, allows prisoners with AIDS to participate in conjugal visits.²³⁹ Family visitation programs allow prisoners and their spouses to visit privately and engage in family interaction, including sexual relations.²⁴⁰ Program goals include preserving marital and family relationships, reducing homosexual activity, and offering other

²³⁸ See *supra* note 17 for a list of these ten states. See also Hopper, *The Conjugal Visit at Mississippi State Penitentiary*, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 340, 341 (1962). Mississippi was the first state to allow conjugal visits. Correctional officials first implemented such visits at the Mississippi State Prison Farm in Parchman in 1944. *Id.* at 341; see also Jacobs & Steele, *Sexual Deprivation and Penal Policy*, 62 CORNELL L. REV. 289, 298, 304 (1977). California first allowed conjugal visits at the California Correctional Institution at Tehachapi in 1968, and eventually expanded such visits to all of its state prisons. *Id.* Florida established conjugal visits in 1971, and New York followed suit in 1976. *Id.* See also Hayner, *Attitudes Toward Conjugal Visits for Prisoners*, FED. PROBATION 43, 48-49 (1971) for a description of conjugal visits in Latin American countries.

²³⁹ See Appellants' Brief, Exhibit 4, *Doe v. Coughlin*, 71 N.Y.2d 48, 518 N.E.2d 536, 523 N.Y.S.2d 782 (1987) (No. 5402), *cert. denied*, 109 S. Ct. 196 (1988). The Medical Director of the Connecticut Department of Correction wrote to Ms. Deborah Schneer, legal counsel for John Doe in *Doe v. Coughlin*, regarding conjugal visits for prisoners with AIDS in the Connecticut correctional system. His letter stated in part:

With regard to inmates that are known to be positive for the AIDS virus antibody test, it is assumed that they are all capable of transmitting this virus sexually. Our protocol in Connecticut when such an inmate is scheduled for a trailer visit, is for myself, as Medical Director, to personally interview all family members participating in this visit. The risk of transmitting AIDS virus with intimate contact (sexual, shooting drugs, prolonged oral contact) is thoroughly discussed. When I am satisfied that the participants have been fully informed and understand the risk of AIDS virus transmission, a standard release form, again outlining these risks, is signed by those family members. The trailer visit may then take place as scheduled.

Id.

²⁴⁰ See Hayner, *supra* note 238, at 48. Lawrence E. Wilson, former deputy director of the California Department of Corrections, stated that family visitation programs are an:

[a]ttempt by California prison administrators to provide an opportunity for the inmate to visit his wife and children in a relaxed normal-like family setting. . . . California wants family visiting aimed at preserving the family relationship and helping families grow stronger. The fact that husbands and wives engage in sexual intercourse is incidental to our main objective: the preservation and strengthening of the family.

Id.; see also *Hingisto v. Mercure*, 72 A.D.2d 850, 851, 421 N.Y.S.2d 690, 693 (1979) (noting in dicta that pursuant to section 70 (Subd. 2) of the Correction Law, the Family Reunion Program was a program designed "to assist sentenced persons to live as law abiding citizens"). The purpose of the Family Reunion Program in the New York State prison system is further defined in its governing regulations: "The goal of the program is to preserve, enhance and strengthen family ties that have been disrupted as a result of incarceration." N.Y. COMP. CODES R. & REGS. tit. 7, § 220.1 (1983).

potential rehabilitative benefits to prisoners.²⁴¹ Prison officials' denial of participation in conjugal visits may undermine the rehabilitation of prisoners, resulting in the deprivation of important emotional support, the weakening of family ties, and physiological frustration.²⁴²

Courts have consistently refused to recognize any constitutional right of prisoners to conjugal visits.²⁴³ In the 1974 case of *Lyons v. Gilligan*, the United States District Court for the Northern District of Ohio held that the constitutional right of marital privacy does not require prison officials to grant conjugal visits to prisoners and their spouses.²⁴⁴ In *Lyons*, state prisoners and their wives brought an action against prison officials for depriving them of conjugal visits, alleging that the deprivation was a denial of marital privacy.²⁴⁵ The *Lyons* court held that the Constitution does not impose an affirmative duty on the state to create private places for sexual relations between prisoners and their spouses.²⁴⁶ The court concluded that the absence of conjugal visits does not infringe upon the prisoner's right of privacy.²⁴⁷

Similarly, in the 1984 case of *Mary of Oakknoll v. Coughlin*, the New York Supreme Court held that no constitutional right to conjugal visits exists in state prisons.²⁴⁸ In *Mary of Oakknoll*, a prisoner and his alleged wife brought a claim against prison officials for denying them participation in conjugal visits because they did not have a valid marriage license.²⁴⁹ The court noted that conjugal visits

²⁴¹ See Hayner, *supra* note 238, at 48. In a survey conducted by Dr. Columbus Hopper at the Parchman State Prison in Mississippi, 50% of the prisoners who participated in conjugal visits noted "keeping marriages from breaking up" as the most helpful result of conjugal visits. *Id.* In California, many of the wives of prisoners at Tehachapi State Prison had expressed to staff that they were not sure they wanted to continue their marriage. After family visits, their marriage strengthened, and they decided against separation. *Id.* at 49. See also *In re Cummings*, 30 Cal. 3d 870, 874, 640 P.2d 1101, 1103, 180 Cal. Rptr. 826, 828 (1982). The Supreme Court of California noted that the social purpose of conjugal visits is to preserve family unity, and that prisoners and family members, "bonded by legally recognized ties, benefit from a generally laudable and humane attempt to preserve these ties during incarceration." *Id.*

²⁴² See Note, *Conjugal Visitation Rights*, *supra* note 63, at 417.

²⁴³ See *Lyons v. Gilligan*, 382 F. Supp. 198, 201-02 (N.D. Ohio 1974); *In re Mary of Oakknoll v. Coughlin*, 101 A.D.2d 931, 932, 475 N.Y.S.2d 644, 646 (1973).

²⁴⁴ 382 F. Supp. at 203.

²⁴⁵ *Id.* at 199.

²⁴⁶ *Id.* at 200.

²⁴⁷ *Id.*

²⁴⁸ 101 A.D.2d at 932, 475 N.Y.S.2d at 646.

²⁴⁹ *Id.* at 932, 475 N.Y.S.2d at 645.

are a privilege, not a right.²⁵⁰ The court concluded that prison officials rationally required a marriage license as a prerequisite for participation in conjugal visits in order to promote administrative convenience and efficiency.²⁵¹

Courts also have limited the constitutional rights of spouses and other family members implicated in family visitation programs in the prisons.²⁵² One court held that the spouse of a prisoner had no valid claim in asserting that refusal of conjugal visits with her inmate spouse violated her due process rights.²⁵³ Another court found that the spouse of a prisoner was not entitled to the same incidents of marriage that she had prior to the incarceration of her husband, because of the nature of incarceration.²⁵⁴ These cases, however, pre-date the United States Supreme Court case of *Turner v. Safley*, which recognized that many of the incidents of marriage still remain in the prison setting.²⁵⁵

Courts have granted prison officials broad discretion in formulating policies and regulations regarding conjugal visits.²⁵⁶ With respect to AIDS-infected prisoners, courts rarely have reviewed the constitutional and statutory implications of such prisoners' participation in or exclusion from conjugal visits.²⁵⁷ Although courts have been willing to protect prisoners' privacy rights in other circumstances, including confidentiality of medical records and HIV status,²⁵⁸ only one case to date has addressed the privacy rights of AIDS-infected prisoners in family visitation programs.²⁵⁹

B. *The Exclusion of Prisoners with AIDS from Family Visitation Programs: Doe v. Coughlin*

In the 1987 case of *Doe v. Coughlin*, the New York Court of Appeals held that a prisoner with AIDS could be denied partici-

²⁵⁰ *Id.* at 932, 475 N.Y.S.2d at 646.

²⁵¹ *Id.*

²⁵² See *Payne v. District of Columbia*, 253 F.2d 867, 868 (D.C. Cir. 1958); *Mary of Oakknoll*, 101 A.D.2d at 932-33, 475 N.Y.S.2d at 646.

²⁵³ *Payne*, 253 F.2d at 868.

²⁵⁴ See *Mary of Oakknoll*, 101 A.D.2d at 932-33, 475 N.Y.S.2d at 646.

²⁵⁵ See *supra* notes 79-81 and accompanying text for a discussion of *Turner*.

²⁵⁶ See, e.g., *Mary of Oakknoll*, 101 A.D.2d at 932, 475 N.Y.S.2d at 646.

²⁵⁷ But see *Doe v. Coughlin*, 71 N.Y.2d 48, 48, 518 N.E.2d 536, 536, 523 N.Y.S.2d 782, 782 (1987), *cert. denied*, 109 S. Ct. 196 (1988) (noting that AIDS-infected prisoner was not entitled to conjugal visits).

²⁵⁸ See *supra* notes 155-173 and accompanying text for a discussion of cases in which courts upheld certain privacy rights of AIDS-infected prisoners.

²⁵⁹ See *Doe*, 71 N.Y.2d at 48, 518 N.E.2d at 536, 523 N.Y.S.2d at 782.

pation in a family visitation program.²⁶⁰ In October, 1985, the prisoner, John Doe, qualified for participation in the Family Reunion Program at Auburn Correctional Facility and, subsequently, he and his wife participated in the program for the first time and completed a two-day conjugal visit on prison grounds.²⁶¹ In December of the same year, John Doe was diagnosed with AIDS, and the prison placed him in a hospital unit.²⁶² Prison officials allowed his wife to visit with her husband but required that he sit in a chair in the doorway of the isolation room while his wife sat in the hospital's main corridor with a table placed between them.²⁶³ A correction officer remained in close proximity.²⁶⁴ During the months following his diagnosis, Doe and his wife sought counseling and education regarding safe sex practices and other precautions to avoid infection.²⁶⁵ Counselors advised the wife of the importance of providing emotional support and maintaining the family bond during her husband's illness.²⁶⁶

In February, 1986, correction officials denied Doe's application for further conjugal visits.²⁶⁷ Officials purportedly based this denial on regulations issued by the Department of Correctional Services.²⁶⁸ These regulations stated that prisoners who have diagnosed communicable diseases may be disqualified from participating in the family visitation program.²⁶⁹ Prison officials denied Doe's application to visit privately with other family members for the same reason.²⁷⁰ Doe challenged the correction officials' decision to terminate him from further conjugal visits, arguing that the denial violated his constitutional rights to marital privacy, due process, and equal protection of the laws.²⁷¹ The lower court held that prison officials had the right to deny Doe participation in conjugal visits.²⁷² Affirm-

²⁶⁰ *Id.* at 60, 518 N.E.2d at 544, 523 N.Y.S.2d at 790.

²⁶¹ *Id.* at 50, 518 N.E.2d at 538, 523 N.Y.S.2d at 784.

²⁶² *Id.*

²⁶³ *Id.* at 70, 518 N.E.2d at 550, 523 N.Y.S.2d at 796 (Alexander, J., dissenting).

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 70, 518 N.E.2d at 550-51, 23 N.Y.S.2d at 796.

²⁶⁷ *Id.* at 50, 518 N.E.2d at 538, 523 N.Y.S.2d at 784.

²⁶⁸ *Id.* at 51, 518 N.E.2d at 538, 523 N.Y.S.2d at 784 (citing N.Y. COMP. CODES R. & REGS. tit. 7, § 220.3(c)(8) (1983), which states that a prisoner "who has a diagnosed communicable disease may be disqualified from participating in the program unless found eligible after special review").

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 70, 518 N.E.2d at 551, 523 N.Y.S.2d at 797 (Alexander, J., dissenting).

²⁷¹ *Id.* at 52, 518 N.E.2d at 539, 523 N.Y.S.2d at 785.

²⁷² *Id.* at 60, 518 N.E.2d at 544, 523 N.Y.S.2d at 790. The New York Supreme Court dismissed the prisoner's claim. The Appellate Division of the Supreme Court affirmed.

ing the ruling of the lower court, the New York Court of Appeals upheld the prison's refusal to allow John Doe to participate in the Family Reunion Program.²⁷³ The *Doe* court held that no constitutional right to conjugal visits exists and that denying Doe's participation in the program violated neither his due process rights nor his equal protection rights.

First, the Court of Appeals recognized that a general right to privacy exists and cited several Supreme Court cases affirming such right.²⁷⁴ The court then noted that prisoners do not forfeit all constitutional rights upon incarceration, including the right to privacy.²⁷⁵ At the same time, however, the appeals court stated that the realities of confinement and legitimate penological goals limit such rights.²⁷⁶ The court added that intimate marital relations have traditionally been inconsistent with penological goals such as punishment, security, deterrence and rehabilitation.²⁷⁷ To this end, the court held that no constitutional right to conjugal visits exists and, further, that the state has no obligation to establish family reunion programs.²⁷⁸ The court cited *Turner v. Safley*, which enumerated several elements of marriage that survive incarceration but did not specifically include conjugal visits.²⁷⁹ Further, the court held that neither a prisoner nor his spouse has a right to marital privacy while the prisoner is incarcerated, and, therefore, prison officials did not violate any constitutional right to privacy by denying John Doe further conjugal visits.²⁸⁰

Next, the *Doe* court held that prison officials did not violate any due process rights in denying John Doe participation in the family reunion program.²⁸¹ The court refuted the prisoner's claim that the prison gave him a legitimate expectation that it would provide him conjugal visits and that such expectation gave rise to protection under the due process clause.²⁸² The *Doe* court reasoned that only a legitimate expectation of a benefit, as compared to merely a possibility that such benefit may be forthcoming, creates a constitutional interest.²⁸³

²⁷³ *Id.*

²⁷⁴ *Id.* at 52, 518 N.E.2d at 539, 523 N.Y.S.2d at 785.

²⁷⁵ *Id.* at 53, 518 N.E.2d at 539, 523 N.Y.S.2d at 785.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 54, 518 N.E.2d at 540, 523 N.Y.S.2d at 786.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.* at 56, 518 N.E.2d at 541, 523 N.Y.S.2d at 787.

To distinguish legitimate expectation from mere possibility, the *Doe* court looked to whether access to the program arose from objective or subjective criteria.²⁸⁴ Where access derives from subjective criteria, no legitimate expectation is involved and, thus, access does not implicate a constitutional right.²⁸⁵ In the case of the Family Reunion Program at Auburn Correctional Center, the criteria consisted of fifteen guidelines, many of which the *Doe* court characterized as subjective.²⁸⁶ Further, the court noted that prison regulations require prisoners to reapply each time for participation in the program, and officials review each new application.²⁸⁷ The court concluded that the program does not create a liberty interest because prisoners do not have a legitimate expectation of participation in a discretionary program.²⁸⁸

Finally, the *Doe* court held that prison officials did not violate John Doe's right to equal protection of the laws.²⁸⁹ The court recognized that the right to equal protection of the laws survives incarceration.²⁹⁰ The court noted, however, that minimum scrutiny constitutes the appropriate standard of review of equal protection claims in the absence of a classification affecting fundamental rights or creating suspect classifications.²⁹¹ In *Doe*, the court held that conjugal visits are not a fundamental right and that a classification based on a communicable disease is not suspect.²⁹² Thus, equal protection analysis merely required prison officials to show a rational relationship between the prison classification and some legitimate, articulated state purpose.²⁹³

The *Doe* court stated that preventing the transmission and spread of communicable diseases was a legitimate state purpose.²⁹⁴

²⁸⁴ *Id.* at 55, 518 N.E.2d at 540, 523 N.Y.S.2d at 787.

²⁸⁵ *Id.* at 55, 518 N.E.2d at 541, 523 N.Y.S.2d at 787.

²⁸⁶ *Id.* The 15 guidelines are as follows: (1) length of incarceration; (2) degree of institutional adjustment; (3) eligibility for temporary release; (4) security classification; (5) assignment to a special housing unit; (6) pattern of disruptive behavior; (7) prior violations of Family Reunion Program regulations; (8) designation as a central monitoring case; (9) outstanding warrants; (10) nature of conviction; (11) parole violation status; (12) protective custody status; (13) participation in some other special program; (14) assignment to mental hygiene unit; and (15) diagnosis as having a communicable disease. *Id.* at 55 n.1, 518 N.E.2d at 541 n.1, 523 N.Y.S.2d at 787 n.1.

²⁸⁷ *Id.* at 56, 518 N.E.2d at 541, 523 N.Y.S.2d at 787.

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 60, 518 N.E.2d at 544, 523 N.Y.S.2d at 790.

²⁹⁰ *Id.* at 56, 518 N.E.2d at 541, 523 N.Y.S.2d at 787.

²⁹¹ *Id.* at 56, 518 N.E.2d at 541-42, 523 N.Y.S.2d at 788.

²⁹² *Id.* at 57, 518 N.E.2d at 542, 523 N.Y.S.2d at 788.

²⁹³ *Id.*

²⁹⁴ *Id.*

The court noted that legitimate penological objectives are not restricted necessarily to the internal prison environment but may include the general safety of society.²⁹⁵ The court cited section 70(2)(a) of the New York Correction Law, which directed prison officials to consider the safety and security of the community in maintaining prisons and establishing rehabilitation programs.²⁹⁶ The court concluded that preventing the spread of communicable diseases to those outside the prison fell within this statute, and that this penological goal was legitimate.²⁹⁷ To this end, the court held that prison officials had a rational basis for denying John Doe's application to the family visitation program because reducing the risk of transmitting the AIDS virus to others, such as his wife, is a legitimate state purpose.²⁹⁸ Accordingly, the court denied Doe's equal protection claim under the minimum standard of review.²⁹⁹ The court did not, however, employ the four-part test of *Turner v. Safley* for reviewing prisoners' claims under this standard of review.³⁰⁰ In *Turner*, the Court had applied a reasonableness standard in which the regulation had to be reasonably related to a legitimate state purpose.³⁰¹ Instead, the *Doe* court deferred to the judgment and expertise of the correctional system in employing minimum scrutiny, requiring only that a rational relationship exist between the regulation and legitimate penological goals.³⁰²

In addition to his constitutional challenges, the *Doe* court also denied John Doe's claim that prison officials discriminated against him as a handicapped person under section 504 of the Rehabilitation Act.³⁰³ The court implicitly recognized that AIDS may constitute a handicap under section 504.³⁰⁴ The court noted, however, that, even if AIDS constitutes a handicap under section 504, John Doe was not otherwise qualified to participate in the program because he had a communicable disease, and prisoners with communicable diseases were excluded from the program.³⁰⁵

²⁹⁵ *Id.* at 59, 518 N.E.2d at 543, 523 N.Y.S.2d at 789.

²⁹⁶ *Id.*

²⁹⁷ *Doe v. Coughlin*, 71 N.Y.2d 48, 59, 518 N.E.2d 536, 543, 523 N.Y.S.2d 782, 789 (1987), *cert. denied*, 109 S. Ct. 196 (1988).

²⁹⁸ *Id.* at 60, 518 N.E.2d at 544, 523 N.Y.S.2d at 790.

²⁹⁹ *Id.*

³⁰⁰ See *supra* note 133 and accompanying text for a discussion of the *Turner* test.

³⁰¹ See *Turner v. Safley*, 482 U.S. 78, 95-96 (1987).

³⁰² *Doe*, 71 N.Y.2d at 59-60, 518 N.E.2d at 543-44, 523 N.Y.S.2d at 789-90.

³⁰³ *Id.* at 61, 518 N.E.2d at 544, 523 N.Y.S.2d at 790.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

In summary, the *Doe* court held that prisoners have no constitutional right to conjugal visits, and that prison officials did not violate any marital privacy right of John Doe or his wife. Further, the court held that Doe had no legitimate expectation of participation in conjugal visits that created a liberty interest and, therefore, prison officials did not violate any due process rights of John Doe. The court also held that prison officials did not violate Doe's right to equal protection of the laws because the classification for contagious diseases was rationally related to a legitimate state purpose of reducing the risk of transmission of the AIDS virus. Lastly, the court held that prison officials did not violate section 504 because the prisoner, even if handicapped within the meaning of the Rehabilitation Act, was not otherwise qualified to participate in conjugal visits.

Concurring opinions of both Chief Judge Wachtler and Judge Bellacosa noted that the prison regulation warranted a higher level of review than minimum scrutiny.³⁰⁶ Both judges acknowledged that conjugal visits implicate fundamental constitutional protections.³⁰⁷ Chief Judge Wachtler reasoned that the prison officials' decision to deny conjugal visits to an AIDS-infected prisoner encroached upon intimate aspects of the marital relationship, and, therefore, the decision raised constitutional implications that should not be controlled by a mere rational basis test.³⁰⁸

Although Chief Judge Wachtler stated that higher scrutiny was appropriate, he concluded that the prison regulation still met the higher standard of review under *Turner v. Safley*.³⁰⁹ In applying the four-part *Turner* test, Chief Judge Wachtler first stated that the prison regulation was reasonably related to a legitimate penological objective—the safety and security of the community.³¹⁰ He noted that a legitimate penological objective includes protecting a prison visitor from the risk of exposure to AIDS.³¹¹ Chief Judge Wachtler then stated that alternative means of exercising conjugal visits did not exist and that prison officials could not provide easy alternatives to accommodate the interests of the AIDS-infected prisoner.³¹² He

³⁰⁶ *Id.* at 61, 518 N.E.2d at 544, 523 N.Y.S.2d at 790 (Bellacosa, J., concurring); *id.* at 62, 518 N.E.2d at 545, 523 N.Y.S.2d at 791 (Wachtler, C.J., concurring).

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 62, 518 N.E.2d at 545, 523 N.Y.S.2d at 791 (Wachtler, C.J., concurring).

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

concluded that the prison regulation was not an exaggerated response to the perceived risk of transmission of the AIDS virus.³¹³

At the same time, however, Chief Judge Wachtler noted that prison officials need to consider alternatives to complete inaccess to family visitation programs.³¹⁴ He stated that the emotional support and commitment of marriage might be the only remaining comfort for an AIDS-infected prisoner, and, therefore, prison officials should consider alternatives to denial of conjugal visits.³¹⁵

In his dissenting opinion in *Doe*, Judge Alexander disagreed with the majority opinion's minimum standard of review.³¹⁶ In contrast to the majority opinion, Judge Alexander argued both that conjugal visits implicate marital privacy rights and that no legitimate penological purpose existed for prison officials' denial of such visits to John Doe and his wife.³¹⁷ Like the concurring judges, Judge Alexander advocated a higher standard of judicial review than the mere rational basis applied by the majority.³¹⁸

Judge Alexander asserted that the regulation preventing John Doe from participating in the family visitation program violated the fundamental right of marital privacy.³¹⁹ Judge Alexander noted that a married couple's decision to risk the consequences of sexual intercourse was constitutionally protected as part of the intimate decision-making affirmed by *Griswold v. Connecticut* and its progeny.³²⁰ Although Judge Alexander acknowledged that constitutional rights are necessarily limited or withdrawn by incarceration, he also noted that prisoners do not forfeit all such rights.³²¹ According to Judge Alexander, such rights are guaranteed unless outweighed by competing penological interests.³²² Judge Alexander cited *Turner v. Safley* in noting that such rights include the marital relationship, which retains many of its important attributes during and despite incarceration.³²³

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.* at 63, 518 N.E.2d at 546, 523 N.Y.S.2d at 792 (Alexander, J., dissenting).

³¹⁷ *Id.*

³¹⁸ *Id.* at 68, 518 N.E.2d at 549, 523 N.Y.S.2d at 795 (Alexander, J., dissenting).

³¹⁹ *Id.* at 63, 67, 518 N.E.2d at 546, 549, 523 N.Y.S.2d at 792, 795 (Alexander, J., dissenting).

³²⁰ *Id.*

³²¹ *Id.* at 65, 518 N.E.2d at 547, 523 N.Y.S.2d at 793 (Alexander, J., dissenting).

³²² *Id.* at 64-65, 518 N.E.2d at 548, 523 N.Y.S.2d at 794 (Alexander, J., dissenting).

³²³ *Id.* at 65, 518 N.E.2d at 547, 523 N.Y.S.2d at 793 (Alexander, J., dissenting).

Although Judge Alexander agreed with the majority that no actual constitutional right to conjugal visits exists, he noted that once the state implements such visits, prison officials do not have unfettered discretion to condition eligibility.³²⁴ Having made such visits available, decisions involving sexual relations implicate the fundamental marital privacy right.³²⁵ According to Judge Alexander, such marital privacy rights survive incarceration and, therefore, the prison could not infringe upon that right by precluding John Doe and his wife from making personal intimate decisions regarding sex.³²⁶ Judge Alexander noted that the court must balance the competing interests of the prisoner's fundamental right in marital privacy against the penological needs justifying the denial of conjugal visits.³²⁷ He concluded that prison officials did not have any legitimate penological purpose for this denial of conjugal visits because it was not based on any concern for institutional security or any other legitimate penological objectives.³²⁸

Judge Alexander asserted that the purported penological goal of reducing the transmission of the AIDS virus was not legitimate because it was directed not at prisoners but at their family members, and, therefore, bore no relationship to traditional penological interests of security, deterrence or rehabilitation.³²⁹ Judge Alexander noted that the Department of Correctional Services did not have the authority to regulate matters pertaining to public health.³³⁰ He stated that section 70(2)(a) of the New York Correction Law, cited by the majority, defined safety and security of the community in terms of protecting the community from dangerous criminals, not from contagious diseases.³³¹ In effect, Judge Alexander asserted

³²⁴ *Id.* at 67, 518 N.E.2d at 548, 523 N.Y.S.2d at 794 (Alexander, J., dissenting).

³²⁵ *Id.*

³²⁶ *Id.* at 67, 518 N.E.2d at 549, 523 N.Y.S.2d at 795 (Alexander, J., dissenting). Judge Alexander also validated John Doe's equal protection claim on the basis that prison officials discriminated against him by treating him differently from like-situated prisoners at the prison in a way that burdened the exercise of the marital privacy right. *Id.*

³²⁷ *Id.* at 68-69, 518 N.E.2d at 549-50, 523 N.Y.S.2d at 796 (Alexander, J., dissenting).

³²⁸ *Id.* at 71, 518 N.E.2d at 551, 523 N.Y.S.2d at 797 (Alexander, J., dissenting).

³²⁹ *Id.*

³³⁰ *Id.* at 73, 518 N.E.2d at 553, 523 N.Y.S.2d at 799 (Alexander, J., dissenting).

³³¹ *Id.* In his concurring opinion, Chief Judge Wachtler stated that the penological goals included protecting a visitor to the prison from the risks of contracting AIDS. *Id.* at 61-62, 518 N.E.2d at 545, 523 N.Y.S.2d at 791 (Wachtler, C.J., concurring). In his dissent, Judge Alexander stated that the purpose of the statute was to "enable [prison administrators] to structure programs that reintegrate the inmate with society and reduce recidivism." *Id.* at 73, 518 N.E.2d at 553, 523 N.Y.S.2d at 799 (Alexander, J., dissenting). He asserted that

that the *Doe* majority mistakenly construed the prevention of transmission of the AIDS virus to be a legitimate penological goal.

Unlike the majority, Judge Alexander employed the four-part reasonableness standard delineated in *Turner v. Safley* to assess the competing interests of prisons and prisoners.³³² In so doing, he found no valid logical connection between the prison regulation and the purported penological interest put forward to justify it; that the penological interest was not legitimate; and that, even if the connection was less tenuous, the denial of conjugal visits represented an exaggerated response to Doe's AIDS status because obvious, easy alternatives to the prison regulation existed that could accommodate Doe's interests while imposing de minimis burdens on prison resources.³³³ He further asserted that the prison regulations impinged upon the constitutional rights of non-prisoners, denying Doe's wife her marital privacy right to decide whether to risk engaging in sexual intercourse with her husband.³³⁴

Judge Alexander concluded that the court should weigh competing interests in favor of Doe, because prison officials had not established any legitimate penological goal that outweighed the significant interests of Doe and his wife in marital privacy.³³⁵ Unlike the majority, Judge Alexander favored a higher standard of review in light of the significant fundamental interest in marital privacy at stake. But even in applying the less stringent standard of review from *Turner v. Safley*, Judge Alexander argued that the denial of conjugal visits did not pass constitutional muster because the state had no right to prevent John Doe and his wife from engaging in conjugal visits.³³⁶ He concluded that whether the court employed higher or lower level judicial scrutiny, the prison regulation was based on illegitimate penological interests, and was, therefore, an impermissible infringement upon John Doe's constitutional rights.³³⁷

safety and security pertain to the "protection of the community from dangerous criminals who [prison officials] may consider releasing into the community as members of a rehabilitation program." *Id.*

³³² *Id.* at 68, 518 N.E.2d at 549, 523 N.Y.S.2d at 795 (Alexander, J., dissenting).

³³³ *Id.* at 71-72, 518 N.E.2d at 551-52, 523 N.Y.S.2d at 797 (Alexander, J., dissenting).

³³⁴ *Id.* at 72-73, 518 N.E.2d at 552, 523 N.Y.S.2d at 798 (Alexander, J., dissenting). Judge Alexander noted that prison officials' denial of Doe's visits with other family members further highlighted the exaggerated response of those officials to Doe's having AIDS because family members are in no danger of contracting the HIV virus in such casual visits. *Id.* at 72, 518 N.E.2d at 552, 523 N.Y.S.2d at 798 (Alexander, J., dissenting).

³³⁵ *Id.* at 74-75, 518 N.E.2d at 554, 523 N.Y.S.2d at 799 (Alexander, J., dissenting).

³³⁶ *Id.* at 68, 518 N.E.2d at 549, 523 N.Y.S.2d at 795 (Alexander, J., dissenting).

³³⁷ *Id.* at 74, 518 N.E.2d at 553, 523 N.Y.S.2d at 799 (Alexander, J., dissenting).

The *Doe* court concluded that conjugal visits are a privilege, not a constitutional right, and, therefore, AIDS-infected prisoners are not deprived of any constitutional right when prison officials deny them conjugal visits. Further, the court held that prisoners with AIDS do not have valid section 504 claims because they are not otherwise qualified for conjugal visits, and state prisons are not federal recipients. Although the concurring judges agreed with the majority's conclusion that prison officials did not infringe upon the constitutional rights of AIDS-infected prisoners by denying them conjugal visits, both Chief Judge Wachtler and Judge Bellacosa advocated a higher standard of review than mere minimum scrutiny. In dissent, Judge Alexander not only advocated for higher scrutiny but concluded that prison officials' denial of conjugal visits violated the AIDS-infected prisoner's fundamental right of marital privacy.

IV. ANALYSIS OF AIDS-INFECTED PRISONERS' CONSTITUTIONAL AND STATUTORY RIGHTS IMPLICATED IN FAMILY VISITATION PROGRAMS

A. *The Fundamental Right to Marital Privacy Implicated in Conjugal Visits*

The United States Supreme Court has held that prisoners retain some fundamental rights despite their incarceration.³³⁸ Although the Supreme Court has recognized a fundamental right of privacy for free citizens,³³⁹ courts have differed in the degree to which they have accorded the right of privacy to prisoners.³⁴⁰ Courts have grounded the right to marital privacy for free citizens in the recognition of a married couple's right to make intimate personal decisions pertaining to their marriage.³⁴¹ Even in the prison setting, where constitutional rights are limited, the Supreme Court has recognized that the right to marital privacy still exists.³⁴²

³³⁸ See *supra* notes 46-54 and accompanying text for an identification of the range of constitutional rights to which prisoners are entitled.

³³⁹ See *supra* note 58 and accompanying text for a discussion of the fundamental right of privacy.

³⁴⁰ See *supra* notes 68-86 and accompanying text for a discussion of how courts have ruled on fundamental privacy rights of prisoners.

³⁴¹ See *supra* notes 65-67 and accompanying text for a discussion of the marital right of privacy.

³⁴² See *supra* notes 68-81 and accompanying text for a discussion of the marital privacy right of prisoners.

In *Turner v. Safley*, the Supreme Court held that even though prison officials impose substantial restrictions on the right of prisoners to marry, prisoners still maintain certain rights that touch issues of marital privacy.³⁴³ The *Turner* Court identified certain aspects of marriage that are unaffected by incarceration or the pursuit of legitimate penological interests, including expressions of emotional support and public commitment.³⁴⁴ The *Turner* Court noted that the decision to marry is a completely private one and, moreover, elements of marriage that remain despite incarceration are sufficient to form a constitutionally protected marital relationship in the prison context.³⁴⁵

Courts have held that prisoners are not constitutionally entitled to conjugal visits.³⁴⁶ Once state prisons establish family visitation programs, however, the state has created a program affording the opportunity for prisoners to exercise a fundamental right.³⁴⁷ When that opportunity is denied solely to prohibit sex between the married couple in order to prevent the transmission of the AIDS virus, the state has implicated the marital privacy right.³⁴⁸

Judge Alexander was correct in his *Doe* dissent in stating that prison officials' denial of conjugal visits for an AIDS-infected prisoner implicates the fundamental right to marital privacy. Even Judge Bellacosca and Chief Judge Wachtler, in their concurring opinions, noted that conjugal visits implicate fundamental constitutional rights worthy of protection.³⁴⁹ Judges Alexander, Bellacosca and Wachtler all correctly stated that the *Doe* court should apply heightened, not minimum, scrutiny because the prison regulation prohibiting an AIDS-infected prisoner from participating in conjugal visits implicated the fundamental right to marital privacy.³⁵⁰

The state's prohibition of AIDS-infected prisoners from conjugal visits also implicates the marital privacy rights of free citizens.

³⁴³ See *supra* notes 131-136 for a more complete discussion of *Turner v. Safley*.

³⁴⁴ *Turner v. Safley*, 482 U.S. 78, 95-96 (1987).

³⁴⁵ *Id.*

³⁴⁶ See *supra* notes 243-254 and accompanying text for a discussion of the constitutionality of conjugal visits.

³⁴⁷ See *Doe v. Coughlin*, 71 N.Y.2d 48, 67, 518 N.E.2d 536, 548-49, 523 N.Y.S.2d 782, 794-95 (Alexander, J., dissenting).

³⁴⁸ *Id.* at 67, 518 N.E.2d at 549, 523 N.Y.S.2d at 795 (Alexander, J., dissenting). Further, when prison officials deny prisoners family visits with their children or extended family members, the deprivation implicates the privacy rights of prisoners even more seriously.

³⁴⁹ See *id.* at 61, 518 N.E.2d at 544, 523 N.Y.S.2d at 790 (Bellacosca, J., concurring); *id.* at 62, 518 N.E.2d at 545, 523 N.Y.S.2d at 791 (Wachtler, C.J., concurring).

³⁵⁰ See *id.* at 61, 518 N.E.2d at 544, 523 N.Y.S.2d at 790 (Bellacosca, J., concurring); *id.* at 62, 518 N.E.2d at 545, 523 N.Y.S.2d at 791 (Wachtler, C.J., concurring); *id.* at 63, 518 N.E.2d at 546, 523 N.Y.S.2d at 792 (Alexander, J., dissenting).

In *Procunier v. Martinez*, the Supreme Court recognized the constitutional rights of free citizens when prison regulations worked a consequential restriction on the rights of those citizens.³⁵¹ In *Martinez*, the Court applied heightened scrutiny to mail censorship regulations because such censorship restricted the first and fourteenth amendment rights of those who were not prisoners.³⁵² Although the Supreme Court recently overruled *Martinez* in part in the 1989 case of *Thornburgh v. Abbott*, the *Abbott* Court noted that prisons cannot prevent free citizens from exercising their own constitutional rights in making contact with prisoners.³⁵³

In *Abbott*, the Supreme Court noted that prison officials must strike a balance between institutional order and security, and the legitimate demands of outsiders.³⁵⁴ In cases where the courts have limited the rights of outsiders, however, the penological interests have involved institutional operations, not public health.³⁵⁵ When the state denies family members conjugal visits with prisoners, the purported penological interests become embedded in such public health concerns, not legitimate penological objectives.

Thus, the majority in *Doe v. Coughlin* was incorrect in concluding that denial of conjugal visits does not implicate the fundamental right of marital privacy. Further, certain marital privacy rights of both prisoners and their family members survive even incarceration. Although the Court in *Turner v. Safley* struck down a prison marriage regulation because the purported penological objectives of security and order had no reasonable relationship to the regulation, the Court stated in dicta that the implication of family members' interests may support application of the higher standard of review employed in *Martinez*.³⁵⁶ Heightened scrutiny is appropriate in reviewing the constitutionality of denying prisoners family visits because such visits implicate the fundamental rights of privacy of not only prisoners but of free citizens as well.³⁵⁷

³⁵¹ *Procunier v. Martinez*, 416 U.S. 396, 409 (1974). See also *supra* notes 87-100 and accompanying text for a discussion of the constitutional rights of non-prisoners implicated in prison regulations.

³⁵² *Martinez*, 416 U.S. at 413.

³⁵³ See *Thornburgh v. Abbott*, 109 S. Ct. 1874, 1878 (1989).

³⁵⁴ *Id.*

³⁵⁵ See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 546 (1979); *Pell v. Procunier*, 417 U.S. 817, 822-23 (1974).

³⁵⁶ See *Turner v. Safley*, 482 U.S. 78, 97 (1987).

³⁵⁷ See *supra* note 64 and accompanying text for a discussion of heightened scrutiny applied by the courts to the constitutional rights of non-prisoners.

B. *Strict Scrutiny as the Appropriate Standard of Review for Conjugal Visits*

Judge Alexander was correct in his dissenting opinion in *Doe* when he noted that conjugal visits implicate the fundamental right of marital privacy and, therefore, that their denial to prisoners must be reviewed under strict scrutiny.³⁵⁸ The *Doe* court should have employed strict scrutiny as the standard of review for conjugal visit regulations. Strict scrutiny requires a compelling state interest to justify infringement of a fundamental right.³⁵⁹ Such scrutiny is appropriate where prison regulations regarding conjugal visits implicate the fundamental right to marital privacy.

If a compelling state interest does exist in the context of prison regulations, it must be related to the penological objectives of the prison administration.³⁶⁰ In *Doe*, the purported state interest was the reduction of the incidence of AIDS.³⁶¹ Reducing the risk of a communicable disease within the prison itself may be a compelling state interest when directed at prisoners because such reduction clearly relates to penological interests in prison safety and security. Reducing the risk of a communicable disease in the outside community directed at non-prisoners, however, is not a compelling state interest.³⁶²

In *Doe*, the regulation prohibiting an inmate from participating in further conjugal visits purportedly focused on concerns for community, not institutional, safety and security. As Judge Alexander pointed out in his discussion of section 70(2)(a) of the New York Correction Law, prison regulations should address matters of institutional security, not public health, particularly when statutory references to community safety and security have focused on the escape or presence of dangerous criminals, not the containment of sexually transmitted diseases.³⁶³ The prohibition against AIDS-in-

³⁵⁸ See *Doe v. Coughlin*, 71 N.Y.2d 48, 68, 518 N.E.2d 536, 549, 523 N.Y.S.2d 782, 795 (1987) (Alexander, J., dissenting), *cert. denied*, 109 S. Ct. 196 (1988).

³⁵⁹ See *supra* notes 83-86 and accompanying text for a discussion of strict scrutiny.

³⁶⁰ See *Pell v. Procunier*, 417 U.S. 817, 822-23 (1974) (legitimate penological objectives included deterrence of crime, insulation of offenders from society, rehabilitation, and internal prison security); *Salisbury v. List*, 501 F. Supp. 105, 110 (D. Nev. 1980) (compelling state interests included security, order and discipline).

³⁶¹ *Doe*, 71 N.Y.2d at 71, 518 N.E.2d at 551, 523 N.Y.S.2d at 797 (Alexander, J., dissenting).

³⁶² *Id.* Judge Alexander stated: "[Prison officials] have not shown how [their] policy bears any relationship to the traditional purposes for incarceration, or how it addresses concerns for institutional security and administration." *Id.*

³⁶³ *Id.* at 73, 518 N.E.2d at 553, 523 N.Y.S.2d at 799 (Alexander, J., dissenting) (citing N.Y. CORRECT. LAW § 70(2)(a) (McKinney 1987)). Judge Alexander added that the Department of Correctional Services is not charged with the regulation of public health. *Id.*

fected prisoners' participation in conjugal visits does not meet any compelling state interest related to institutional security or safety.

The prohibition against the participation in conjugal visits by inmates with AIDS does, however, contravene rehabilitation as a legitimate penological objective. Prisons developed conjugal visits because of their potential rehabilitative purpose in helping to maintain or restore family and marital relationships, to facilitate smoother transitions from prison to civilian life, and to offer needed emotional support.³⁶⁴ For prisoners with terminal illnesses such as AIDS, the rehabilitative value of conjugal visits may be even more significant.³⁶⁵ The denial, and particularly the revocation, of participation in conjugal visits for eligible prisoners withholds what may be a particularly life-enhancing rehabilitation program for AIDS-infected prisoners.

Of all the various penological interests, rehabilitation, not security or order, remains most relevant to conjugal visits. Denial of such visits undermines rehabilitation and it does not further any other legitimate penological interest. In this context, rehabilitation seems to be the only relevant penological interest at stake and outweighs any purported interest in public health, particularly when such interest is not even a legitimate penological concern.

The *Doe* court minimized rehabilitative concerns in its balancing of penological interests against an AIDS-infected prisoner's right to marital privacy.³⁶⁶ Further, the state failed to demonstrate that any legitimate, let alone compelling, state interest existed to justify an AIDS-infected prisoner's exclusion from participation in conjugal visits.³⁶⁷ Where there is no compelling state interest to justify this exclusion, then prison officials' actions must fail under strict scrutiny.³⁶⁸

C. *The Failure of Doe v. Coughlin to Meet the Reasonableness Standard under Turner v. Safley*

Even in the absence of strict scrutiny, *Doe v. Coughlin* fails the reasonableness standard of minimum scrutiny delineated in *Turner*

³⁶⁴ See *supra* notes 240-242 and accompanying text for a discussion of the rehabilitation purposes of conjugal visits.

³⁶⁵ See *Doe*, 71 N.Y.2d at 61-62, 518 N.E.2d at 545, 523 N.Y.S.2d at 791 (Wachtler, C.J., concurring). Even Chief Judge Wachtler acknowledged the particular significance of the "emotional support and commitment symbolized by marriage" for a prisoner with AIDS. *Id.*

³⁶⁶ *Id.* at 59, 518 N.E.2d at 543, 523 N.Y.S.2d at 789.

³⁶⁷ *Id.* at 73, 518 N.E.2d at 553, 523 N.Y.S.2d at 799 (Alexander, J., dissenting).

³⁶⁸ *Id.*

v. Safley and employed subsequently by the Supreme Court in reviewing prison regulations.³⁶⁹ A prison regulation that reasonably relates to legitimate penological objectives lies at the crux of the *Turner* standard.³⁷⁰ The *Doe* court incorrectly failed to apply the four-part *Turner* test to determine whether the denial of conjugal visits for an AIDS-infected prisoner was unconstitutional. If the court had applied the *Turner* test, it would have found that prison officials' denial of conjugal visits did not meet the reasonableness standard under *Turner*.

The prison regulation in *Doe* failed to meet the first part of the test, in which the connection between the regulation and a legitimate and neutral penological interest must be rational.³⁷¹ In *Doe*, the purported penological interest in reducing the transmission of a communicable disease in the community was not legitimate. Legitimacy should be based on proper authority and expertise.³⁷² Penological interests related to institutional security, order and discipline are legitimate because they arise from the unique expertise and authority of prison officials. In *Doe*, prison officials prohibited an inmate from further conjugal visits purportedly to protect the health of the inmate's family and, speculatively, the health of the general community.³⁷³ These officials did not base the prohibition on traditional institutional interests of security, order or discipline. In contrast, officials purportedly acted on the basis of public health goals that were neither substantiated by evidence nor within the realm of correctional expertise.³⁷⁴

Further, the purported penological interest in public health was not neutral. Prison officials prevented *Doe* from family visitation not only with his wife but with other family members because of the purported risk of transmission of the AIDS virus. Given that family members were at no risk of contracting the virus through casual contact with their AIDS-infected relative,³⁷⁵ the prohibition

³⁶⁹ See *supra* note 137 and accompanying text for a discussion of Supreme Court cases applying the *Turner* standard.

³⁷⁰ See *Turner v. Safley*, 482 U.S. 78, 89 (1987). The four parts of the *Turner* test include: (1) a valid rational connection between the prison regulation and a legitimate and neutral penological interest; (2) alternative means of exercising the right; (3) the impact on the prison environment; and (4) ready alternatives to address the advanced concerns. *Id.* at 89-91.

³⁷¹ *Doe*, 71 N.Y.2d at 71, 518 N.E.2d at 551, 523 N.Y.S.2d at 797 (Alexander, J., dissenting).

³⁷² *Id.* at 74, 518 N.E.2d at 553, 523 N.Y.S.2d at 799 (Alexander, J., dissenting).

³⁷³ *Id.* at 57-58, 518 N.E.2d at 542, 523 N.Y.S.2d at 788.

³⁷⁴ *Id.* at 73, 518 N.E.2d at 553, 523 N.Y.S.2d at 799 (Alexander, J., dissenting).

³⁷⁵ See generally M. GUNDERSON, D. MAYO & F. RHAME, *supra* note 4, at 24-29; T. HAM-

of conjugal visits by prison officials was merely a pretext for discriminating against John Doe. Thus, the prison regulation fails the first part of the *Turner* test because the penological interest was neither legitimate nor neutral.

Even if the state interest in reducing the risk of transmission of AIDS constituted a legitimate and neutral penological objective, no valid, logical connection existed between such interest and the denial of conjugal visits to a prisoner with AIDS. In *Doe*, prison officials' decision to deny an AIDS-infected prisoner conjugal visits was grounded in what Judge Alexander found to be "presumptions" and "speculations."³⁷⁶ The state presumed, for instance, that prisoners with AIDS and their spouses would not take appropriate precautions if and when they engaged in sexual intercourse and, further, that spouses were necessarily at high risk to contract the AIDS virus. These presumptions and speculations reveal that the purported logical connection was tenuous at best.

The prison regulation in *Doe* may have met the second part of the *Turner* test in that alternative means of exercising the right to marital privacy may not have existed. The prison regulation, however, failed the third part of the *Turner* test. No adverse impact on prison officials, other prisoners, or prison resources resulted from accommodating the right of prisoners and their spouses to make their private decisions regarding sexual intimacy.

First, prison staff was no more burdened in providing conjugal visits to prisoners with AIDS than to other prisoners. Second, other prisoners were unaffected by AIDS-infected prisoners' participation in conjugal visits. Third, no additional prison resources needed to be expended, other than providing counseling and education for prisoners and their families. Prison officials should provide such counseling and education for all prisoners, however, regardless of their participation in conjugal visits, because all prisoners are po-

METT, *supra* note 1, at 8; T. HAMMETT, *supra* note 3, at 6 for discussions that casual contact presents no risk of transmission of the HIV virus.

³⁷⁶ See *Doe*, 71 N.Y.2d at 71, 518 N.E.2d at 551, 523 N.Y.S.2d at 797 (Alexander, J., dissenting). In his dissent, Judge Alexander noted:

[Prison administrators'] determination, at bottom, is based on a series of speculations and unwarranted presumptions: that petitioners necessarily will disregard the advice of their professional health care counselors and not employ "safe sex" techniques, that petitioner wife necessarily will contract AIDS from her husband, and that petitioner wife necessarily will engage in adulterous sexual activities with others—without the use of prophylactics—and thereby transmit the virus to the population at large.

Id.

tentially at risk to contract the AIDS virus.³⁷⁷ It is inappropriate to combat AIDS by infringing upon the privacy rights of married prisoners, a policy that will have little effect on the incidence of AIDS. Rather, counseling and education of all prisoners is a more rational response to the risk of the transmission of AIDS. In *Doe*, given that the purported penological interests in question were community, not institutionally, oriented, the availability of conjugal visits for prisoners with AIDS did not impact the prison environment itself.

Lastly, ready alternatives existed to address the concerns of prison officials regarding the risk of transmission of AIDS to non-prisoners.³⁷⁸ Prisoners could choose to refrain from sex altogether, or they could receive education about necessary precautions, including hygiene and safe sex practices.³⁷⁹ When a married couple, such as the Does, has received education and counseling, the existence of alternatives to ensure the reduced risk of transmission of the AIDS virus shows that the regulation is an exaggerated response to prison concerns. As a result, the prison regulation failed the last part of the *Turner* test because ready alternatives to address the concerns of prison officials were available.

Prison officials' decision to prohibit participation in conjugal visits, and subsequent judicial support for such a decision, reflects an exaggerated response to the problem of prisoners with AIDS. In fact, a court's facial validation for such prohibition suggests a prejudicial reaction to AIDS. Such paternalism, particularly over free citizens capable of making informed decisions about their health and intimate relations with AIDS-infected family members, is not assumed legitimately by prison officials. As Judge Alexander stated in his dissent in *Doe*, prison officials acted outside their scope of expertise and knowledge in denying conjugal visits on the basis of public health goals.³⁸⁰ Although prisoners may not be constitutionally entitled to conjugal visits, if the state establishes such visits,

³⁷⁷ See *supra* note 10 for a description of the incidence of HIV infection in the prison population.

³⁷⁸ *Doe*, 71 N.Y.2d at 71, 518 N.E.2d at 552, 523 N.Y.S.2d at 797 (Alexander, J., dissenting).

³⁷⁹ Condoms have been demonstrated to be effective preventive devices; moreover, the AIDS virus is quite fragile and transmission can be easily avoided. See Rinzler, *The Return of the Condom*, AM. HEALTH, July 1987, at 97; see also SURGEON GENERAL'S REPORT, *supra* note 2, at 17.

³⁸⁰ *Doe*, 71 N.Y.2d at 73-74, 518 N.E.2d at 553, 523 N.Y.S.2d at 799 (Alexander, J., dissenting).

they must be administered constitutionally, because they directly implicate the fundamental right to marital privacy.³⁸¹

Prison regulations precluding AIDS-infected inmates from participation in conjugal visits fail to satisfy strict scrutiny because prison officials cannot provide any compelling state interest for such regulations. Further, these regulations even fail the lesser standard of review of the four-part *Turner* test. The *Doe* court wrongly applied minimum scrutiny to the prison regulations and, moreover, did not comply with the *Turner* test.

D. Denial of Conjugal Visits to AIDS-Infected Inmates: Denial of Equal Protection

In addition to violating the substantive due process right to marital privacy, prison officials' denial of conjugal visits also violates equal protection of the laws. Although the United States Supreme Court has applied strict scrutiny to racial classifications in prisons,³⁸² the Court has applied almost uniformly a lesser standard of review to non-racial classifications.³⁸³ If courts did employ strict scrutiny in reviewing prison classifications, however, and compelling state interests were found, such classifications must be narrowly tailored to those compelling interests.³⁸⁴

The classification of prisoners with contagious diseases in *Doe v. Coughlin* would necessarily fail strict scrutiny because such classification was both under and overinclusive, and it was not narrowly tailored to state interests.³⁸⁵ In *Doe*, the regulation was underinclusive because it did not necessarily include all prisoners who might be HIV-positive³⁸⁶ and, thus, at risk to expose spouses to the AIDS

³⁸¹ See *id.* at 67, 518 N.E.2d 548-49, 523 N.Y.S.2d at 794-95 (Alexander, J., dissenting).

³⁸² See *Lee v. Washington*, 390 U.S. 333, 333 (1968).

³⁸³ See *supra* notes 103-105 and accompanying text for a discussion of the minimum scrutiny standard of judicial review for prisoner classifications.

³⁸⁴ See *supra* notes 106-112 and accompanying text for a discussion of strict scrutiny.

³⁸⁵ See L. TRIBE, *supra* note 114, § 16-4, at 1446-50 for a discussion of over and underinclusive classifications.

³⁸⁶ At the same time, someone may be infected with the HIV virus without yet having developed any antibodies. T. HAMMETT, *supra* note 1, at 4. Antibodies, which arise in the blood, are evidence of infection, and develop as part of the immune system's attempt to fight off the infection. *Id.* at 3. In the absence of antibodies, the HIV test result may be negative, depending upon the type of HIV test taken by the individual. *Id.* at 4. According to Hammett:

A principal advantage of an antigen test is that it will be positive immediately upon infection, whereas the antibody tests will be falsely negative during the period between infection and appearance of antibodies. This period is generally

virus. As a result, the regulation unwittingly placed spouses at risk for exposure to the virus. A spouse might have been placed at even greater risk by engaging in unprotected sex because of the married couple's ignorance of the prisoner's HIV-positive status. Such ignorance places spouses of prisoners at potentially greater risk than those spouses of prisoners diagnosed with AIDS who have informed their spouses of their medical status.

The classification in *Doe* was also overinclusive in that its inclusion of all prisoners with AIDS imposed a burden upon prisoners who may not have placed their spouses at the risk that the regulation sought to prevent. Such a classification would include prisoners who place their spouses at no risk for potential transmission of the AIDS virus. The state, however, presumed all prisoners would place their spouses at risk and, accordingly, the state set up an overinclusive classification.³⁸⁷ Such a classification was based upon speculation and unwarranted presumptions.³⁸⁸ In effect, this classification was an overgeneralization that lacked a narrow fit between the classification and any compelling state interest.³⁸⁹ On this basis, the regulation in *Doe v. Coughlin* violated equal protection under the fourteenth amendment.

Courts, however, have generally subjected prisoners' equal protection claims to minimum, not strict, scrutiny.³⁹⁰ Prison administrators may not, however, regulate programs in a constitutionally impermissible manner.³⁹¹ If prison administrators deny a prisoner a privilege enjoyed by similarly situated inmates, this denial raises an equal protection claim.³⁹² Where unequal treatment exists, the state must demonstrate a rational relationship between such treatment and a legitimate state purpose. The purported penological purpose in denying a prisoner with AIDS conjugal visits, however,

thought to be between three and twelve weeks, although some recent data indicate that the lagtime may sometimes be significantly longer.

Id. Thus, the prison regulation would not necessarily be underinclusive where an HIV test cannot yet detect the presence of antibodies.

³⁸⁷ *Doe v. Coughlin*, 71 N.Y.2d 48, 71, 518 N.E.2d 536, 551, 523 N.Y.S.2d 782, 797 (1987) (Alexander, J., dissenting), *cert. denied*, 109 S. Ct. 196 (1988).

³⁸⁸ See *supra* note 376 for a description of these unwarranted presumptions and speculations.

³⁸⁹ See L. TRIBE, *supra* note 114, § 16-4, at 1449-50 for a brief discussion of overinclusive classifications.

³⁹⁰ See *supra* notes 113-129 and accompanying text for a discussion of the minimum scrutiny standard of judicial review of prisoners' equal protection claims.

³⁹¹ See Appellants' Brief at 8, *Doe v. Coughlin*, 71 N.Y.2d 48, 518 N.E.2d 536, 523 N.Y.S.2d 782 (1987) (No. 5402), *cert. denied*, 109 S. Ct. 196 (1988).

³⁹² See Appellants' Brief at 7.

is illegitimate because the public health does not fall within the appropriate purview of prison officials. Therefore, the state still violates a prisoner's equal protection claim under the less stringent standard of minimum scrutiny in the absence of a legitimate state interest.

Thus, prison officials in *Doe* failed to meet the constitutional standards under both equal protection and substantive due process. In both cases, prison officials failed to demonstrate even under minimum scrutiny a rational relationship between denial of conjugal visits and any legitimate state purpose. The minimum standard of review applied to both the equal protection and substantive due process claims of the AIDS-infected prisoner results in the same conclusion that the *Doe* court wrongly decided these constitutional claims.

E. Application of the Rehabilitation Act to Conjugal Visits for AIDS-Infected Prisoners

Section 504 of the Rehabilitation Act precludes discrimination against individuals with handicaps.³⁹³ Congress amended the Rehabilitation Act to include contagious diseases as a handicap entitled to protection under section 504.³⁹⁴ Similarly, courts have held that a person with AIDS is handicapped within the meaning of the Rehabilitation Act.³⁹⁵ Thus, a prisoner with AIDS is a handicapped individual under the Rehabilitation Act.

Once the court has established that an individual is handicapped under the Rehabilitation Act, the court must find that the handicapped individual is otherwise qualified for the program in question.³⁹⁶ The United States Supreme Court has held that if applicants meet all the requirements of a program in spite of the handicap, they are otherwise qualified.³⁹⁷ Courts employ an individualized inquiry in each case to determine whether an individual is otherwise qualified. To do so, courts evaluate the nature of the risk;

³⁹³ 29 U.S.C. §§ 706(8)(C), 794 (1988). See also *supra* notes 177-179 and accompanying text for a discussion of section 504 of the Rehabilitation Act.

³⁹⁴ See *supra* note 183 and accompanying text for a discussion of the Civil Rights Restoration Act, Pub. L. No. 100-259, 102 Stat. 28 (codified as amended at 29 U.S.C. §§ 706(8)(C), 794(b) (1988)).

³⁹⁵ See *supra* notes 179, 184-230 and accompanying text for a discussion of AIDS as a handicap within the meaning of the Act.

³⁹⁶ See *supra* notes 188-98 and accompanying text for a discussion of "otherwise qualified" under the Act.

³⁹⁷ See *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979).

the duration of the risk; the severity of the risk; and the probability of transmission and resultant harm.³⁹⁸

This individualized inquiry regarding AIDS-infected prisoners' participation in conjugal visits reveals that such prisoners are otherwise qualified. First, the nature of the risk would be the transmission of the AIDS virus to the spouse of the prisoner through unprotected sexual activity. Assuming, however, that the married couple received education and counseling regarding safe sex practices, and took appropriate precautions, the nature of the risk is significantly reduced, if not completely eliminated.³⁹⁹ Unlike other contagious diseases, such as tuberculosis, transmission of the AIDS virus can be controlled because it is neither airborne nor otherwise easily transmitted.⁴⁰⁰ Second, however, the duration of the risk is permanent, given that researchers have found no cure for AIDS to date.⁴⁰¹

Next, courts have established strict guidelines regarding the severity of risk and the probability of transmission.⁴⁰² The Supreme Court in *School Board v. Arline* held that a person with a contagious disease may not be otherwise qualified if a significant risk of transmission exists.⁴⁰³ Other courts have applied this significant risk standard.⁴⁰⁴ Courts have required that infected persons place others at a definite, not theoretical, risk for transmission of a contagious disease.⁴⁰⁵ One court stated that routine precautions can significantly reduce any theoretical risk.⁴⁰⁶

Analogously, AIDS-infected prisoners must place their spouses at a definite, not theoretical, risk for transmission of the AIDS virus

³⁹⁸ See *School Bd. v. Arline*, 480 U.S. 273, 274 (1987).

³⁹⁹ Moreover, although heterosexual sex has been demonstrated to transmit the AIDS virus, it may be an inefficient mode of transmission. See T. HAMMETT, *supra* note 3, at 5; Appellants' Brief at 37-38, *Doe v. Coughlin*, 71 N.Y.2d 48, 518 N.E.2d 536, 523 N.Y.S.2d 782 (1987) (No. 5402), *cert. denied*, 109 S. Ct. 196 (1988).

⁴⁰⁰ See *Thomas v. Atascadero Unified School Dist.*, 662 F. Supp. 376, 380 (C.D. Cal. 1987).

⁴⁰¹ See M. GUNDERSON, D. MAYO & F. RHAME, *supra* note 4, at 36.

⁴⁰² See *Arline*, 480 U.S. at 288.

⁴⁰³ See *id.* at 330.

⁴⁰⁴ See *Thomas*, 662 F. Supp. at 382 (finding no evidence that AIDS-infected child posed significant risk of transmission to other children or teachers); *New York State Ass'n for Retarded Children v. Carey*, 612 F.2d 644, 650 (2d Cir. 1979) (noting lack of evidence that children who were carriers of hepatitis B actually engaged in high-risk activity for transmission of hepatitis).

⁴⁰⁵ See *Thomas*, 662 F. Supp. at 380; *District 27 Community School Bd. v. Board of Educ.*, 130 Misc. 2d 398, 413, 502 N.Y.S.2d 325, 335, 337 (Sup. Ct. 1986).

⁴⁰⁶ See *District 27 Community School Bd.*, 130 Misc. 2d at 413, 415, 502 N.Y.S.2d at 335, 337.

in light of the strict guidelines established by the courts. Similar to other individuals with contagious diseases, prisoners with AIDS can take routine precautions, just as the prisoner and his spouse did in *Doe v. Coughlin*.⁴⁰⁷ Specifically, AIDS-infected prisoners can receive counseling and education, notify family members of their diagnosis of AIDS and, if they engage in sex, ensure that it is protected sex. Other states should follow the state of Connecticut, which allows its prisoners with AIDS to participate in conjugal visits, provided that the prisoner and his family are first interviewed personally by the medical director and informed of the risk of transmission of the HIV virus.⁴⁰⁸

The Supreme Court held in *Southeastern Community College v. Davis* that a handicapped individual is not otherwise qualified if the program cannot reasonably accommodate the handicap.⁴⁰⁹ If the program must incur undue burden or alter its fundamental nature and purpose to accommodate the handicap, such accommodation is unreasonable. As a result, the handicapped person is not otherwise qualified.⁴¹⁰ Thus, if reasonable accommodation will not eliminate a significant risk of transmission, the handicapped person will not be otherwise qualified.⁴¹¹

With respect to conjugal visits, the accommodation by prison officials in ensuring that AIDS-infected prisoners and their spouses first engage in counseling and education neither imposes an undue burden upon the prison nor alters the fundamental nature or purpose of the family visitation program. Rather, the significance of family ties may be even greater for a terminally ill prisoner, thereby further enhancing the purpose of the program. This reasonable accommodation by prison officials can reduce the theoretical risk of transmission of the AIDS virus in conjugal visits. Courts demand an individualized inquiry, in part, to ensure that programs attempt reasonable accommodation where the risk of transmission is significant so that exclusion from such programs is not based on unfounded fear, prejudice, or stereotypes.⁴¹² If the *Doe* court had engaged in the individualized inquiry required under *Arline*,⁴¹³ the

⁴⁰⁷ 71 N.Y.2d 48, 69, 518 N.E.2d 536, 550, 523 N.Y.S.2d 782, 796 (1987), cert. denied, 109 S. Ct. 196 (1988).

⁴⁰⁸ See *supra* note 239 for a description of Connecticut's conjugal visitation program for AIDS-infected prisoners.

⁴⁰⁹ 442 U.S. 397, 412-13 (1979).

⁴¹⁰ *Id.* at 410-12.

⁴¹¹ See *School Bd. v. Arline*, 480 U.S. 273, 287 n.16 (1987).

⁴¹² See *id.*

⁴¹³ See *id.* at 288.

court would have found that the AIDS-infected prisoner was otherwise qualified to participate in conjugal visits.

The third element of a section 504 claim, exclusion based solely on the handicap, is met easily in *Doe*. Prison officials admitted that the sole reason for denying John Doe's participation in conjugal visits was his AIDS status. Accordingly, John Doe satisfied the third element of his handicapped claim because he was excluded solely because he had AIDS.

Lastly, the program must be a recipient of federal funds as defined under section 504.⁴¹⁴ The Restoration Act restored and clarified the term "program or activity" under section 504 to ensure its broad scope of coverage.⁴¹⁵ Congress rejected the United States Supreme Court's narrow application of section 504 to only those programs that actually received federal funding in favor of broader institution-wide coverage.⁴¹⁶ Since the enactment of the Restoration Act, courts have applied the Restoration Act in holding that all of the operations of federally assisted institutions fall under the obligations of section 504, whether or not specific programs within the institutions receive federal assistance.⁴¹⁷

At least one court has included state prisons in the broad institution-wide coverage under the Restoration Act.⁴¹⁸ In *Bonner v. Arizona Department of Corrections*, the United States District Court for the District of Arizona, on remand from the United States Court of Appeals for the Ninth Circuit in *Bonner v. Lewis*, held that section 504 protected a handicapped state prisoner.⁴¹⁹ The *Bonner* court held that individual programs within departments of correctional services that are the recipients of federal funds must comply with the obligations under section 504.⁴²⁰ Thus, state prisoners' section 504 claims may satisfy the fourth requirement of such claims, namely that the programs in which prisoners are denied participation qualify as federal recipients.

Even prior to the enactment of the Restoration Act, some courts had determined that section 504 provided institution-wide as well

⁴¹⁴ See *supra* note 211-21 and accompanying text for a discussion of the section 504 requirement that the program be a recipient of federal funds.

⁴¹⁵ See *supra* notes 210-213 and accompanying text for a discussion of the Restoration Act.

⁴¹⁶ See *id.*

⁴¹⁷ See *supra* note 213 and accompanying text for a discussion of courts' application of the Restoration Act.

⁴¹⁸ See *Bonner v. Lewis*, 714 F. Supp. 420, 422 (D. Ariz. 1989).

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

as program-specific protection for handicapped individuals.⁴²¹ For example, courts had held that local school districts under federally assisted state departments of education are protected under section 504.⁴²² The state departments of education would distribute federal funds to local school districts, which then had to comply with the obligations of section 504.⁴²³ Analogously, departments of correctional services are recipients of federal funds, which then distribute those funds to its state prisons.⁴²⁴ As a result, state prisons must comply with the requirements of section 504.

Similar to cases in which courts concluded that local school districts must meet the requirements of section 504 under the Rehabilitation Act, the *Doe* court should have required the state prison to comply with the Rehabilitation Act. In *Doe*, the federal government had provided the New York Department of Correctional Services financial assistance in 1977 to establish family visitation programs in some of its state prisons, but not specifically Auburn Correctional Center.⁴²⁵ The Department of Correctional Services was a federal recipient which allocated federal monies to its state prisons; thus, the *Doe* court should have held that the AIDS-infected prisoner met the requirement that the program from which prison officials denied him participation was a federal recipient. Accordingly, John Doe satisfied the fourth element of a *prima facie* section 504 claim.

More broadly, the congressional intent of the Rehabilitation Act was, in part, to promote independent living by protecting handicapped individuals from discrimination.⁴²⁶ Congress later enacted the Restoration Act to restore and clarify this intent by ensuring that *all* the operations of federally assisted state departments are covered under section 504.⁴²⁷ State prison rehabilitative programs, such as family visitation programs, share this intent by helping to

⁴²¹ See, e.g., *Thomas v. Atascadero Unified School Dist.*, 662 F. Supp. 376, 379 (C.D. Cal. 1987); *Association for Retarded Citizens v. Frazier*, 517 F. Supp. 105, 119-20 (D. Colo. 1981).

⁴²² See, e.g., *Chalk v. United States Dist. Court*, 840 F.2d 701, 703 (9th Cir. 1988); *Thomas*, 662 F. Supp. at 379; *Association for Retarded Citizens*, 517 F. Supp. at 119.

⁴²³ See, e.g., *Chalk*, 840 F.2d at 703; *Thomas*, 662 F. Supp. at 379; *Association for Retarded Citizens*, 517 F. Supp. at 119.

⁴²⁴ See Appellants' Brief at 21, *Doe v. Coughlin*, 71 N.Y.2d 48, 518 N.E.2d 536, 523 N.Y.S.2d 782 (1987) (No. 5402), *cert. denied*, 109 S. Ct. 196 (1988).

⁴²⁵ See Brief for Respondents at 12, *Doe v. Coughlin*, 71 N.Y.2d 48, 518 N.E.2d 536, 523 N.Y.S.2d 782 (1987) (No. 5402), *cert. denied*, 109 S. Ct. 196 (1988).

⁴²⁶ See *supra* note 231 for a discussion of the relationship between the congressional intent behind section 504 and prison rehabilitation programs.

⁴²⁷ See *supra* notes 210-213 for a discussion of the Restoration Act.

prepare inmates to lead productive lives.⁴²⁸ Since the enactment of the Restoration Act, courts have held that such rehabilitative programs fall under the obligations of section 504.⁴²⁹ Thus, programs within federally assisted state prisons, including family visitation programs, must comply with the obligations under section 504 in order to realize the original intent of the Rehabilitation Act.

In *Doe*, the AIDS-infected prisoner's claim established a prima facie case of handicapped discrimination because the claim satisfied the four elements of section 504.⁴³⁰ First, prisoners with AIDS are individuals with handicaps under the Rehabilitation Act. Second, prisoners with AIDS are otherwise qualified to participate in conjugal visits because reasonable accommodation can eliminate any significant risk of transmission of AIDS. Third, prisoners are excluded from conjugal visits based solely on their AIDS status. Finally, state prisons are recipients of federal funds under the Rehabilitation Act.

Once the AIDS-infected prisoner has established a prima facie case of discrimination, the burden of proof shifts to the prison officials to demonstrate either that the AIDS-infected prisoner was not otherwise qualified to participate in conjugal visits because of his having AIDS, or that he was denied conjugal visits for reasons other than his AIDS status.⁴³¹ Unlike constitutional claims regarding prison regulations that courts subject to minimum scrutiny, courts subject section 504 claims under the program's burden of proof to more rigorous scrutiny.⁴³²

In *Doe*, prison officials failed to meet their burden in disproving the prima facie case of handicapped discrimination. They admitted that the prisoner with AIDS was excluded from the family visitation program based solely on his AIDS status. Further, Doe was otherwise qualified for participation in conjugal visits. An individualized inquiry reveals that Doe did not fail the significant risk standard because the risk of transmission of the AIDS virus was theoretical, not definite. Unlike tuberculosis, the transmission of the AIDS virus

⁴²⁸ See *Bonner v. Lewis*, 857 F.2d 559, 562 (9th Cir. 1988).

⁴²⁹ See *supra* notes 214-18 and accompanying text for a discussion of courts' application of the Restoration Act to state prisons.

⁴³⁰ See *supra* note 425 and accompanying text for a description of a prima facie case of handicapped discrimination under the Rehabilitation Act.

⁴³¹ See *supra* note 224 and accompanying text for a description of the burden of proof on the part of the program.

⁴³² See *supra* note 225 and accompanying text for the standard of review under section 504.

can be avoided easily through either protected sex or abstinence. Even if a significant risk of transmission did exist, reasonable accommodation by prison officials could eliminate the significant risk. Specifically, prison officials can follow the Connecticut policy by ensuring that AIDS-infected prisoners and their families participate in counseling and education regarding safe sex practices. Thus, prison officials cannot rebut the *prima facie* case of handicapped discrimination established by the AIDS-infected prisoner.

As a result, prison officials' denial of conjugal visits to AIDS-infected prisoners in *Doe* was a pretext for discrimination against individuals with AIDS who are protected under section 504 of the Rehabilitation Act. New York State is not seriously concerned with preventing the potential transmission of AIDS when asymptomatic carriers of the virus are allowed to participate in conjugal visits. Moreover, given the high proportion of former or current intravenous drug users in state prisons,⁴³³ many undiagnosed prisoners who participate in conjugal visits certainly are infected with the HIV virus. This inclusion of prisoners in family visitation programs who are at high risk for exposure to the AIDS virus, or who are already exposed to the virus, contradicts the purported penological interest in reducing the risk of transmission of the virus. Accordingly, such contradiction belies the pretext in excluding prisoners with AIDS from conjugal visits. Moreover, this pretext is also apparent when prison officials prohibit visits not only between prisoners and their spouses, but also between prisoners and other family members for whom the risk of transmission of the virus is virtually non-existent.⁴³⁴ Yet, in *Doe*, John Doe was excluded from such family visits because of the alleged risks posed by his condition.

In *Doe*, the New York Court of Appeals summarily dismissed the claim by John Doe that prison officials discriminated against him on the basis of section 504 of the Rehabilitation Act.⁴³⁵ The court simply held that John Doe could be excluded from a family visitation program because its eligibility guidelines include being free from communicable diseases.⁴³⁶ Prison officials automatically disqualified Doe because he had a communicable disease.⁴³⁷ The

⁴³³ See *supra* note 10 for a discussion of intravenous drug users in prisons.

⁴³⁴ See *supra* note 375 and accompanying text for a discussion of the absence of risk of transmission of the AIDS virus from casual contact.

⁴³⁵ See *Doe v. Coughlin*, 71 N.Y.2d 48, 61, 518 N.E.2d 536, 544, 523 N.Y.S.2d 782, 790 (1987), *cert. denied*, 109 S. Ct. 196 (1988).

⁴³⁶ *Id.*

⁴³⁷ *Id.*

court's reasoning that Doe was disqualified because he had a handicap is a circular analysis that does not conform to the strict standard required under section 504. This standard demands individualized inquiry, not automatic exclusion.⁴³⁸

In summary, section 504 should protect prisoners with AIDS from denial of conjugal visits arising from pretextual reasons of prison officials. AIDS-infected prisoners deprived of conjugal visits satisfy the four elements of a section 504 claim. First, prisoners with AIDS are handicapped individuals under the Rehabilitation Act. Second, these prisoners are otherwise qualified to participate in conjugal visits. Third, they are excluded from conjugal visits based solely on their AIDS status. Finally, federally assisted state prisons qualify as federal recipients under section 504. In sum, the exclusion of AIDS-infected prisoners from conjugal visits fails the strict review required under the Rehabilitation Act.

F. *The Need for Judicial Intervention*

Although some states allow prisoners with AIDS to participate in conjugal visits,⁴³⁹ other states, such as New York, prohibit such participation on the basis that AIDS-infected prisoners represent a public health risk.⁴⁴⁰ To date, prisoners have raised few claims against those prisons denying conjugal visits. In *Doe*, the one case in which a prisoner raised such a claim, the court deferred to prison officials, upholding prison regulations preventing an AIDS-infected prisoner from continued participation in conjugal visits. In effect, this court weighed the competing interests of prisons and prisoners in favor of purported penological goals at the expense of significant constitutional and statutory rights of prisoners.

Courts' traditional deference to prison officials in their formulation of prison regulations arises from the assumption that prison officials have expertise and knowledge in penal matters with which courts should not interfere.⁴⁴¹ Courts have granted a presumption of administrative good faith to prison officials in their

⁴³⁸ See *School Bd. v. Arline*, 480 U.S. 273, 274 (1987).

⁴³⁹ See *supra* note 17 for a list of states allowing conjugal visits.

⁴⁴⁰ See, e.g., *Doe v. Coughlin*, 71 N.Y.2d 48, 48, 518 N.E.2d 536, 536, 523 N.Y.S.2d 782, 782 (1987), *cert. denied*, 109 S. Ct. 196 (1988).

⁴⁴¹ See *supra* notes 35-57 and accompanying text for a discussion of judicial deference to prison officials.

drafting and enforcing of regulations and policies.⁴⁴² Courts presume that such regulations and policies are rationally related to legitimate penological interests. The presumption of good faith ends only when prison regulations may violate constitutionally protected rights of prisoners.⁴⁴³

Denial of family visitation programs for AIDS-infected prisoners violates such constitutional rights. Judicial deference is not appropriate, therefore, in a case such as *Doe*, where prison administrators formulate regulations arising from illegitimate penological interests. In *Turner v. Safley*, the United States Supreme Court held that a prison regulation prohibiting marriage could not be justified by the purported penological goal of security for prison staff and other inmates because the inmate's private decision to marry did not affect them.⁴⁴⁴ The Court regarded the regulation as an exaggerated response to claimed security objectives.⁴⁴⁵ Thus, under the *Turner* doctrine, judicial deference is inappropriate when prison regulations are based on alleged penological interests that are neither legitimate nor neutral.

When prison officials formulate regulations arising from penological interests that do not address institutional operations, such as security, order, or discipline, judicial deference is not appropriate because prison officials are acting outside the realm of their expertise. In *Doe*, prison officials acted outside their expertise in that they did not even raise issues of institutional operations in justifying their exclusion of an AIDS-infected prisoner from conjugal visits. Prison officials regarded public safety as a sufficiently legitimate penological interest to justify the exclusion of John Doe from the family visitation program in order to protect his spouse from the risk of contagion. Although the New York correctional system identified public safety as a penological interest in section 70(2)(a) of the Correction Law, prison officials should construe its meaning narrowly.⁴⁴⁶ As Judge Alexander noted in his dissenting opinion in

⁴⁴² See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979); see also *Block v. Rutherford*, 468 U.S. 576, 594 (1984) (Blackmun, J., concurring). Justice Blackmun criticized the majority opinion in *Bell* because of its wide-ranging deference to prison administrators, stating "[t]he fact that particular measures advance prison security, however, does not make them *ipso facto* constitutional." *Id.*

⁴⁴³ See *Bell*, 441 U.S. at 562.

⁴⁴⁴ See *Turner v. Safley*, 482 U.S. 78, 98 (1987).

⁴⁴⁵ *Id.* at 97-98.

⁴⁴⁶ See New York Correction Law, section 70(2)(a), which states in part that prison

Doe, public safety involves protecting the community from dangerous criminals, not imposing public health concerns.⁴⁴⁷ Although the health of the community may be of general public interest, it does not fall within the range of legitimate penological interests of prison officials. When such officials act outside the realm of their expertise and knowledge, traditional judicial deference is no longer appropriate.

Prison officials must, of course, fashion policies and regulations in response to the AIDS crisis. Such regulations, however, should be construed narrowly to respond to the institutional environment for which such officials are accountable. Public safety goals may be appropriate with respect to protecting the community from violent criminals, but prison officials exceed their authority and power when they espouse such goals to protect the community from AIDS. In such instances, courts should intervene to protect the rights of AIDS-infected prisoners, not defer to prison officials whose actions are beyond their scope of expertise and authority. In fact, courts must intervene because they offer the only remedy for this infringement upon the constitutional and statutory rights of inmates with AIDS.

V. CONCLUSION

The court in *Doe v. Coughlin* applied the incorrect standard of review in upholding prison officials' right to deny conjugal visits to a prisoner with AIDS. Conjugal visits implicate the fundamental right to marital privacy, which deserves the highest level of judicial scrutiny. By applying strict scrutiny, courts should strike down prison regulations denying AIDS-infected prisoners from participating in conjugal visits because prison officials are unable to demonstrate any compelling state interest for such regulations.

First, the exclusion of AIDS-infected prisoners from conjugal visits requires this highest standard of judicial review to ensure that the constitutionally protected right to marital privacy of prisoners and their family members is adequately protected. Strict scrutiny exposes the unconstitutionality of depriving prisoners with AIDS of conjugal visits when they meet all the criteria for participation, except for their HIV status. Future courts should recognize the

programs may be established "with due regard to . . . the safety and security of the community." N.Y. CORRECT. LAW § 70(2)(a) (McKinney 1987).

⁴⁴⁷ See *Doe v. Coughlin*, 71 N.Y.2d 48, 74, 518 N.E.2d 536, 553, 523 N.Y.S.2d 782, 799 (1987) (Alexander, J., dissenting), *cert. denied*, 109 S. Ct. 196 (1988).

need for strict scrutiny where fundamental rights are implicated, even when those rights are denied by prison officials, a group to whom the courts traditionally grant much deference.

Second, even if courts continue to employ minimum scrutiny in their review of prison regulations denying the participation of AIDS-infected prisoners in conjugal visits, they should conduct a thorough application of the *Turner* test. In doing so, courts should assess carefully the legitimacy of penological goals put forward by prison officials to justify this infringement upon the constitutional rights of these prisoners. Judge Alexander, in his dissenting opinion in *Doe*, was correct in stating that public health as a penological objective in this context is illegitimate and, accordingly, prison officials fail even the minimum scrutiny of the *Turner* test. To this end, the exclusion of AIDS-infected prisoners from conjugal visits solely because of their having AIDS is unconstitutional, depriving prisoners and their family members of the constitutionally protected right to marital privacy.

Third, the exclusion of prisoners with AIDS from conjugal visits also illegally discriminates on the basis of handicap. Under section 504 of the Rehabilitation Act, an individual with AIDS is a handicapped individual whose exclusion from a federally funded program must be subject to strict review. When prisoners with AIDS are otherwise qualified to participate in conjugal visits and are excluded solely because of their having AIDS, such exclusion represents discrimination prohibited under section 504.

Prisoners with AIDS should not be denied benefits or rights available to other prisoners solely because of their HIV status. Courts must conduct thoughtful individualized inquiries to ensure that prisoners with AIDS are not subject to blanket discrimination merely because they bear the stigma of being both incarcerated and afflicted with a life-threatening illness. For such afflicted individuals, courts may be the sole source of protection.

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