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Harris v. Thigpen: Segregating HIV-Positive Inmates in the Alabama Correctional System

I. INTRODUCTION

In Harris v. Thigpen, the Eleventh Circuit Court of Appeals largely upheld an Alabama statute which requires that all incoming prison inmates in correctional facilities be tested for sexually transmitted diseases, including the presence of the Human Immunodeficiency Virus disease ("HIV disease"). Carmen Harris, an inmate in the Alabama Correctional System whose tests showed the presence of HIV disease, brought this action challenging the mandatory testing and forced segregation from the general prison population of inmates who tested positive. On appeal, plaintiff brought three constitutional challenges and a statutory challenge: the inadequate medical care provided to HIV-positive inmates violated the Eighth Amendment; the segregation of HIV-positive inmates from the general population violated the constitutional right to privacy; the inadequate library privileges denied the HIV-positive inmates their

1. 941 F.2d 1495 (11th Cir. 1991).
3. HIV disease is an early stage of Acquired Immune Deficiency Syndrome ("AIDS").
4. 941 F.2d at 1500.
5. Id. at 1501.
6. Id.
constitutional right of access to the courts; and the exclusion from general population activities violated 29 U.S.C. § 794, commonly referred to as the Rehabilitation Act ("section 504"). The Eleventh Circuit affirmed the trial court's decision, holding that neither the Eighth Amendment's right to adequate medical care nor the Fourteenth Amendment's right to privacy had been violated, and remanded the case for further findings of fact on the issues of access to court and section 504.

This Casenote begins with a brief background of HIV testing and how correctional facilities have coped with HIV disease. It then examines the challenges plaintiff brought as applied in other cases and surveys challenges brought in similar situations. Finally, the Casenote examines and analyzes the case itself.

II. Background

A. HIV Disease in the Correctional Setting—General Facts

"AIDS is a serious communicable disease that undermines the human body's immune system. It makes the individual susceptible to a range of 'opportunistic' infections, malignancies, and other diseases which would not generally be life-threatening to persons with normally functioning immune systems." Opportunistic secondary infections which often prove fatal include pneumocystis carinii pneumonia, Kaposi's sarcoma, HIV dementia, wasting syndrome, extrapulmonary tuberculosis, and esophageal candidiasis. Even though the diagnosis and treatment of HIV disease has progressed substantially, no cure or vaccine exists.

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7. Id. Because the Eleventh Circuit did not devote much attention to the access to courts claim, which it remanded for further findings, this Casenote will not explore the viability of an access to courts claim for someone who has been segregated from the general prison population. The ramifications of the access to courts claim cannot be fully addressed until the trial court has had time to decide the issue.
8. Id.
9. Id. at 1528.
10. See infra text accompanying notes 13-78.
11. See infra text accompanying notes 79-198.
12. See infra text accompanying notes 199-263.
13. This Casenote, unless quoting directly, will use the commonly preferred term of HIV disease. The term will refer to all stages of HIV. While the term may be an oversimplification, its advantage far outweighs its simplification. With the use of the term, the different stages of HIV from infection to "full-blown" AIDS, which are difficult to diagnose, will not have to be discussed.
15. Id. See also Professor Sidney Watson, Untitled, February 27, 1991, infra note 30.
HIV disease was first detected in the United States in 1981 when previously healthy homosexual men contracted pneumocystis carinii pneumonia. After considerable study, researchers found the cause of HIV disease to be the HIV virus, a retrovirus that reverses the normal information flow between the genetic materials DNA and RNA. The abnormal flow of information lowers the number of white blood cells (or T4-cells) available to ward off infection.

HIV disease, among other things, is transmitted by blood, semen, and vaginal fluid passed during sexual intercourse; illegal intravenous drugs injected through contaminated needles; and HIV-positive blood mistakenly used in transfusions. Research indicates that HIV disease cannot be contracted through casual contact, non-sexual bodily fluids, feces, or insect bites. Additionally, incidents of infection by accidental needle sticks, or contact with open wounds or mucous membranes of an infected person, are extremely low. HIV disease is not solely a homosexual disease; heterosexuals can also be infected.

The incubation period for "full-blown" HIV disease is not precisely known. "One can be infected with HIV for years, possibly even indefinitely, without ever developing symptoms. However, asymptomatic (as well as symptomatic) persons can transmit the infection." While symptoms usually become manifest in five to seven years, some researchers have suggested that no upper limit exists. The long incubation period poses a significant problem for the individual and society since it is impossible to predict when the infected individual will manifest symptoms.

A number of tests have been developed to determine the presence of the HIV virus. The first test developed was the enzyme-linked immunosorbent assay ("ELISA"), designed to detect the presence of the HIV virus in the nation's blood supply. "[ELISA] is not a test for AIDS, nor does it even detect the presence of the virus itself—only the presence of
antibodies to the virus" which are found in the blood and are the body's attempt to ward off the infection. 28 Because of the long incubation period for HIV disease, ELISA is not fool-proof. 29 When an ELISA test detects the presence of the HIV virus, the Centers for Disease Control ("CDC") recommends that a second ELISA test be administered. Then, a more accurate confirmatory test, such as the Western Blot test, is administered. 30 "When this sequence of tests is used, the results have prove[d] extremely accurate, with very few false positives." 31 However, in correctional systems, problems with the administration of the tests abound.

The main problem in the prison context is the false negative. 32 A false negative occurs when test results indicate no presence of HIV disease in the body when in fact HIV disease is present. 33 Conversely, a false positive occurs when test results indicate the presence of HIV disease in the body when in fact HIV disease is not present. 34 Varied testing procedures and limited control over the testing facilities create conditions conducive to generating false negatives. 35 Because of the lack of standardized parameters used to indicate a positive response, the ELISA test is subject to various interpretations. 36 Likewise, "[t]he Western Blot is particularly

28. Id. at 3.
29. Id. at 4.

Several recent reports indicate that a small number of infected units of blood may have slipped through undetected, because the donor was only recently infected and antibodies had not had time to appear by the time the blood was donated. However, the CDC estimates that only about 100 transfusion-associated infections will occur annually out of a total of sixteen million units transfused.

Id.


The Western Blot test identifies antibodies to proteins to protection of a specific molecular weight and therefore helps to eliminate false positives. The HIV antigens are separated by electrophoresis (heating) and then blotted onto a special paper. The transferred antigens are then exposed to test serum and any specific antibodies present react with the specific antigen bands.

Professor Sidney Watson, Untitled, at 70 n.29 (February 24, 1991) (unpublished manuscript, on file with the Mercer Law Review).

31. Harris v. Thigpen, 941 F.2d 1495, 1499 n.2 (11th Cir. 1991).
32. Hammett, supra note 14, at 61. In a population with a high risk of infection, false negatives are a grave problem. Using Hammett's figures, assume that there are approximately 35,000 inmates in the state's correctional systems and that the actual number of infected inmates would equal 30% (10,500). Provided that the testing efficiency equals 99.5% effectiveness, approximately 50 inmates would not be identified in the mass screening program. Id. at 64.

33. Id.
34. Id.
35. Id. at 62. Minor variations in temperature and humidity adversely affect HIV antibody tests. Id.
36. Id. See infra note 60.
susceptible to human error and variability of results because most laboratories use unlicensed test kits."

The economic realities of performing ELISA and Western Blot tests also need to be considered. The ELISA test is inexpensive, costing two to three dollars. However, the Western Blot test costs considerably more, approximately one hundred dollars.

Because of the high mortality rate—fifty-seven percent of infected patients have died—prevention of HIV disease is paramount to any strategy of treatment. The risk of contracting HIV disease can be lessened through the use of condoms, the cessation of needle-sharing between intravenous drug-users, and the use of "barriers" such as gloves and masks in medical situations.

HIV disease has caused severe problems in the correctional setting since 1983 when the Texas correctional system reported its first case. In 1985, the number of infected prisoners in state prisons reached 420. Two years later, that figure had increased to either 1,650 or 1,964. Obviously, "[t]he HIV epidemic places enormous stress on already overburdened correctional systems."

Incarcerated females with HIV disease have caused additional problems for the correctional systems. "Even though women comprise only nine percent of AIDS cases, they are the fastest growing population to be affected by HIV disease." Additionally, more entering females have HIV disease than males. However, female prisoners receive less assistance. "While lack of medical care is a problem for most prisons and jails in this country, appropriate medical care for women is even more lacking. Women prisoners have long failed to receive even basic gynecological and medical services . . . ." As such, seropositive females pose an additional challenge to an already overburdened correctional system.

37. Hammett, supra note 14, at 62.
38. Watson, supra note 30, at 8.
39. Id.
40. Id., supra note 14, at 7.
41. Id. at 222-34 (discussing the various ways to prevent the spread of HIV disease in a variety of settings).
42. 6 NAT'L PRISON PROJECT J. 4 (Winter 1985).
43. Id. at 1.
44. 16 NAT'L PRISON PROJECT J. 7 (Summer 1988).
46. Id.
47. NATIONAL COMMISSION ON AIDS, REPORT: HIV DISEASE IN CORRECTIONAL FACILITIES 25 (1991) [hereinafter "Report"].
48. Id.
49. Id. at 26.
50. Seropositive refers to the presence of HIV infection in a person's blood.
Correctional systems have tried two methods to relieve the stress caused by the spread of HIV disease. The first method includes mass testing of inmates coupled with the segregation of inmates who test positive. The systems of Alabama, Iowa, Nebraska, New Hampshire, West Virginia, and the Federal Bureau of Prisons, among others, have implemented a mass screening program. As a general rule, "mass screening usually involves testing all [existing] inmates, all new inmates and/or all inmates prior to release." The primary justification for mass screening and subsequent segregation of seropositive inmates from the general population is the need to protect seropositive inmates from any potential adverse treatment by the general prison population. Because medical information is not confidential in most prisons, the general population, guards, and staff are likely to know who has tested positive for HIV disease. Therefore, seropositive inmates may be more likely to be attacked and threatened. As one inmate said: "You can be hurt or killed if your confidentiality is breached and other inmates find out especially since this is a dormitory facility and there is not even the security of a locked cell."

While the justification for mass screening is laudable, serious practical and constitutional problems arise. First, "[i]f the benefits of mass screening are to outweigh its disadvantages, then the program must offer highly accurate and reliable [test] results." That is not always the case. The time between contracting the disease and its appearance in an ELISA antibody test can average six to twelve weeks. Some evidence suggests that the time can be considerably longer. As a result, segregating inmates may not prevent the transmission of the disease within the prison walls. Second, technical problems in interpreting the test can produce a large number of false positive results, and uninfected prisoners would also be segregated. Third, no evidence supports the conclusion that mass screening is a practical and constitutional solution to the problem of HIV in prisons. The competing interests of the noninfected and the infected underscore the controversy surrounding mass screening and segregation policies. "While HIV-positive inmates want to remain in the mainstream of prison populations, those not infected want protection from those who are." Nathan McCall, AIDS Toll Rising in D.C. Jails; Better Care Sought for Afflicted Inmates, WASHINGTON POST, February 4, 1991 at D1.

51. Hammett, supra note 14, at 59. The competing interests of the noninfected and the infected underscore the controversy surrounding mass screening and segregation policies. "While HIV-positive inmates want to remain in the mainstream of prison populations, those not infected want protection from those who are." Nathan McCall, AIDS Toll Rising in D.C. Jails; Better Care Sought for Afflicted Inmates, WASHINGTON POST, February 4, 1991 at D1.
52. Hammett, supra note 14, at 60.
53. Id. at 59.
54. 7 NAT'L PRISON PROJECT J. 1, 4 (Spring 1986).
55. Id.
57. Hammett, supra note 14, at 61.
58. Id.
59. Id.
60. Id. The ELISA test is measured on a spectrum with certain "cut-off" points demarcated, which distinguish positive and negative results. When the ELISA test is used to
screening and segregation is an effective way to prevent the transmission of the disease.\footnote{61} With the problems of false negatives and the disease's considerable latent period, screening and segregation will only prevent new infections if inmates are repeatedly tested. Fourth, the segregation policy is replete with legal implications, including constitutional challenges based on the right to privacy, due process, equal protection, deliberate indifference in giving proper medical care, and unlawful search and seizure.\footnote{62} One inmate said: "I feel that incarceration is punishment for the crime I committed, but to be incarcerated and then isolated from all privileges afforded to other inmates who were convicted in the same courtroom I was convicted in, is above the law."\footnote{63}

The second method for coping with HIV disease in correctional facilities includes educating and training inmates and correctional staff about HIV disease.\footnote{64} "Education and training are particularly necessary because of the prevalence of misinformation on AIDS."\footnote{65} Although HIV disease cannot be contracted through "casual contact,"\footnote{66} many uninfected in-

screen a blood sample, the "cut-off" points are set low, since it is better to discard suspect blood rather than use it. When the ELISA test is used to screen people, a low "cut-off" point will produce a number of false positives. Although confirmatory tests may be used, a chance for false positives or false negatives still exists. Either error has dire consequences. The false positive inmate must suffer the mental anguish associated with the belief that one has contracted a terminal disease. The false negative inmate is released into the general prison population and could infect other inmates, effectively undermining the goal of non-transmission associated with a mass screening program. \textit{Id.}

\textit{Id.} at 65. See supra text accompanying notes 27-39.

\textit{Id.} at 65. See supra text accompanying notes 27-39.

\textit{Id.} at 65. See supra text accompanying notes 27-39.

\textit{Id.} at 65. See supra text accompanying notes 27-39.

\textit{Id.} at 65. See supra text accompanying notes 27-39.

\textit{Id.} at 65. See supra text accompanying notes 27-39.

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\textit{Id.} at 65. See supra text accompanying notes 27-39.

\textit{Id.} at 65. See supra text accompanying notes 27-39.
mates and correctional staff fear infection. Correctional staff fear infection through saliva transmitted by an aggressive inmate who bites a staff member, through urine thrown or maliciously excreted, and through blood spilled in a fight. This concern has led some staff members to refuse to work with HIV diseased inmates. “In some jurisdictions, correctional officers' unions have filed grievances and threatened strikes over the AIDS issue.”

While misconceptions about the disease still exist, inmates and staff alike are seeking more education. In December 1987, forty percent of the inmates in a New York prison signed up for voluntary HIV disease education classes. As a result, risky behavior, such as the sharing of needles, declined. Other states have distributed condoms to prevent additional infections. The National Commission on AIDS has recommended education and preventive activities, which may be the answer in some jurisdictions. However, other jurisdictions have reported that after implementing the educational programs, risky activities continue largely unabated. One correctional facility official noted that inmates with long sentences have no incentive to cease risky behavior, such as anal intercourse. Also, HIV disease education and training is expensive. In tough economic times, poorer states may cite expense as the reason for choosing screening and segregation over education and prevention.

B. Legal Challenges

In the area of prisoner's rights, courts are extremely deferential to correctional officials. "[T]his attitude springs from complementary perceptions about the nature of the problems and the efficacy of judicial intervention." Because of grossly complex problems and ill-equipped court systems, courts may lean toward upholding a prison regulation or statute even if a substantial prisoner right must be infringed.

68. Id.
69. Id.
70. Id. at 40.
71. Id. at 41.
72. Id.
73. Id.
74. See infra note 252.
76. Hammett, supra note 14, at 41.
77. Id.
78. Id. at 42.
80. Id. at 405.
1. Eighth Amendment Challenges

Inmates segregated from the general prison population because of their HIV disease status have raised Eighth Amendment challenges against correctional systems. The inmates argue either that they are denied adequate medical care because of their seropositive status or that their segregation from the general prison population amounts to cruel and unusual punishment. Rejecting these assertions, some nonseropositive inmates have brought challenges arguing that the placement of seropositive inmates in the general prison population amounts to cruel and unusual punishment.

Medical Care. The Eighth Amendment applies to the states through the Fourteenth Amendment. Originally, the Eighth Amendment concept of "cruel and unusual punishment" was thought to apply only to cases of physical torture. However, the concept has evolved and should not be confined to physical torture; it should be a flexible and dynamic standard based on the evolution of society. This evolution has allowed inmates to bring constitutional challenges based on inadequate medical care. In Estelle v. Gamble, the Court fashioned the standard that inmates complaining about medical care must meet to recover under a constitutional claim. Relying on precedent, the Court said: "These elementary principles establish the government's obligation to provide medical care to those whom it is punishing by incarceration." As a result, "deliberate indifference to [the] serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain.'" Prison doctors ignoring medical situations and prison guards unnecessarily delaying an inmate's access to medical care are examples of deliberate indifference.

81. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.
82. See infra text accompanying notes 84-116.
83. See infra text accompanying notes 117-127.
86. Id. at 171.
88. Id. at 103.
89. Id.
90. Id. at 104.
91. Id.
claim of inadequate medical care made by a prisoner states a valid claim for a violation of the Eighth Amendment.92

[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.93

Before a court can find deliberate indifference to needed medical care, it must determine whether medical care is needed at all. In Bowring v. Godwin,94 the Fourth Circuit Court of Appeals formulated a three-part test to determine when medical care is needed.95 Under this test, medical treatment is mandated when a health care provider determines through the exercise of ordinary care "that the prisoner's symptoms evidence a serious disease or injury; that such disease or injury is curable or may be substantially alleviated; and that the potential for harm to the prisoner by reason of delay or the denial of care would be substantial."96 Various courts, like the Fourth Circuit in Bowring, have defined deliberate indifference.97 Differing medical opinions will not rise to the level of deliberate indifference.98 A medical decision not to order x-rays is a medical judgment, and even though the decision may be considered medical malpractice, it will not rise to the level of a constitutional violation.99 "It is not required that the medical care provided to a prisoner be perfect, the best obtainable, or even very good."100 However, the Eleventh Circuit Court of Appeals has held that a medical misdiagnosis that results from a violation of the deliberate indifference standard is a factual question for expert witnesses.101

92. Id. at 105.
93. Id. at 106.
94. 551 F.2d 44 (4th Cir. 1971).
95. Id. at 47-48.
96. Id.
97. In Bass v. Sullivan, 550 F.2d 229, 231 (5th Cir. 1977), the court said that in medical care situations, the widely recognized standard of deliberate indifference is best, but another standard could be used if the lack of medical care shocks the conscience or is intolerable to fundamental fairness. Id. at 231. The Court in Estelle v. Gamble, 429 U.S. 97 (1976), alluded in a footnote that the two tests were basically the same. Id. at 105 n.14.
99. Id. at 726.
100. Id.
101. Rogers v. Evans, 792 F.2d 1052, 1058 (11th Cir. 1986).
In *Wellman v. Faulkner*,\(^{102}\) the Seventh Circuit Court of Appeals held that repeated episodes of negligent mistreatment combined with evidence of general systemic deficiencies establishes the presence of deliberate indifference.\(^ {103}\) In *Ramus v. Lamm*,\(^ {104}\) the Tenth Circuit Court of Appeals said: “In class actions challenging the entire system of health care, deliberate indifference to inmates’ health needs may be shown by proving repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff.”\(^ {105}\)

In *Ancata v. Prison Health Service*,\(^ {106}\) the Eleventh Circuit Court of Appeals further clarified the meaning of deliberate indifference. The court held that intentional failure to provide service acknowledged as needed but not performed is evidence of deliberate indifference.\(^ {107}\) In *Ancata*, a private contractor who provided medical care to a county’s jails prescribed only Tylenol and Ben Gay to a patient who had leukemia and suggested further evaluations that were never made. Defendant contractor argued that it did not receive adequate funds from the county.\(^ {108}\) Rejecting the inadequate funding argument, the court said: “Lack of funds for facilities cannot justify an unconstitutional lack of competent medical care and treatment for inmates.”\(^ {109}\)

The Eleventh Circuit provided further guidance in *Waldrop v. Evans*.\(^ {110}\) “A prison inmate has the right under the Eighth Amendment to be free from deliberate indifference to serious physical or psychiatric needs.”\(^ {111}\) In the same year, the Ninth Circuit also held that merely providing access to medical care is not sufficient.\(^ {112}\) If the medical care provided is inadequate, the court will find deliberate indifference even if a health care worker has examined and diagnosed the prisoner.\(^ {113}\)

In *Cameron v. Metcuz*,\(^ {114}\) an inmate brought a deliberate indifference challenge against prison officials for failing to protect the inmate from attack by an HIV-infected inmate.\(^ {115}\) The court noted that while prison

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102. 715 F.2d 269 (7th Cir. 1983).
103. Id. at 272.
104. 639 F.2d 559 (10th Cir. 1990).
105. Id. at 575.
106. 769 F.2d 701 (11th Cir. 1985).
107. Id. at 704.
108. Id. at 702.
109. Id. at 705.
110. 871 F.2d 1030 (11th Cir. 1989).
111. Id. at 1033.
112. Ortiz v. City of Imperial, 884 F.2d 1312, 1314 (9th Cir. 1989).
113. Id.
115. Id. at 456.
officials may have been grossly negligent in failing to prevent the attack, gross negligence does not rise to the level of a constitutional violation.\textsuperscript{116}

\textbf{Cruel and Unusual Punishment.} A number of seropositive inmates have tried, without success, to bring more traditional Eighth Amendment claims based either on their segregation from the general prison population or the presence of seropositive prisoners in the general prison population. In dealing with these challenges, courts have used pre-HIV disease ideas as a basis for their analysis.

In \textit{Newman v. State of Alabama,}\textsuperscript{117} the Fifth Circuit Court of Appeals held that a state satisfies its Eighth Amendment obligations to prisoners when it furnishes the prisoners with reasonably adequate necessities of life.\textsuperscript{118} The prisoners need not have every amenity of life thought necessary to avoid mental, physical, or emotional deterioration, provided the state does not create conditions conducive to such deterioration.\textsuperscript{119} The court held that the prisoner’s Eighth Amendment rights were not violated, and that segregation of the prisoner from the rest of the prison population did not amount to cruel and unusual punishment.\textsuperscript{120}

The right of prisoners to be protected from threats, violence, or sexual assaults by other prisoners allows state prison officials to segregate those prisoners deemed dangerous.\textsuperscript{121} Continual segregation without notice or a hearing concerning the reason for the segregation can run afoul of the Due Process Clause.\textsuperscript{122} In \textit{Jackson v. Meachum,}\textsuperscript{123} an inmate who had been deemed dangerous was denied communication with fellow inmates. As a result, the inmate became depressed and despondent.\textsuperscript{124} The court held that the segregation did not amount to cruel and unusual punishment, even though the segregation denied the inmate freedom of communication that arguably led to depression.\textsuperscript{125}

Utilizing the same reasoning as the court in \textit{Jackson,} the Southern District Court of New York in \textit{Cordero v. Coughlin}\textsuperscript{126} held that segregating HIV disease prisoners did not amount to cruel and unusual punishment.\textsuperscript{127} Without any deprivation of adequate food, shelter, or clothing,

\textsuperscript{116} Id. at 459-60.
\textsuperscript{117} 559 F.2d 283 (5th Cir. 1977).
\textsuperscript{118} Id. at 291.
\textsuperscript{119} Id.
\textsuperscript{120} Id. at 286-87.
\textsuperscript{121} Ramos v. Lamm, 639 F.2d 559, 572 (10th Cir. 1980).
\textsuperscript{122} Jackson v. Meachum, 669 F.2d 578, 585 (1st Cir. 1983).
\textsuperscript{123} 699 F.2d 578 (1st Cir. 1983).
\textsuperscript{124} Id. at 579.
\textsuperscript{125} Id. at 582-83.
\textsuperscript{126} 607 F. Supp. 9 (S.D.N.Y. 1984).
\textsuperscript{127} Id. at 11.
inmates with HIV disease have little hope that segregation alone will support a cognizable cruel and unusual punishment claim.

2. **Equal Protection**

Seropositive inmates who have been segregated from the general population have also raised equal protection challenges. These challenges have met with little success.\(^{128}\)

The first known case concerning a seropositive inmate segregated from the general prison population was *Cordero v. Coughlin*.\(^{129}\) The court rejected the inmate's equal protection argument: "Because AIDS victims are not similarly situated to other prisoners the Equal Protection Clause simply does not apply here."\(^{130}\) The court reasoned that even if non-HIV disease prisoners and "disease-free" prisoners were similarly situated, the HIV disease prisoners were not a "suspect" class and "therefore as long as there is a legitimate government end and the means used are rationally related to that end, the Equal Protection Clause is not violated."\(^{131}\) The court upheld the segregation on the basis of the state's objective: the protection of prisoners with HIV disease and other prisoners from the fears and supposed harms of the HIV virus.\(^{132}\) The court, writing in 1984, realized that much was not known about the disease. Lack of knowledge led the court to uphold the state's objective as legitimate.\(^{133}\)

In *Powell v. Department of Corrections*,\(^{134}\) a seropositive inmate brought an equal protection challenge, arguing that the Department of Corrections segregated him because of his homosexuality and not because he had tested positive for the HIV virus.\(^{135}\) Once again, the court held that the state had a legitimate interest in segregating the inmate from the general prison population.\(^{136}\) The court characterized the legitimate interest as "prevent[ing] the possible spread of a deadly infectious disease and [protect[ing] Plaintiff from assault by other inmates."\(^{137}\) Based on this interest, the court upheld the segregation policy and found that the inmate was not treated differently from any other segregated inmate.\(^{138}\)


\(^{130}\) Id. at 10.

\(^{131}\) Id. (citing Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976)).

\(^{132}\) Id.

\(^{133}\) Id.


\(^{135}\) Id. at 971.

\(^{136}\) Id.

\(^{137}\) Id.

\(^{138}\) Id. The court's reasoning seems to miss the point that plaintiff was attempting to make. Plaintiff was arguing that he should not be treated differently from a member of the
3. Due Process

Like equal protection challenges, due process challenges have also met with little success. In *Powell v. Department of Corrections*, plaintiff inmate brought, *inter alia*, a due process challenge against a policy of segregating AIDS prisoners from the general population. The court rejected the prisoner's contention that he had a constitutional right to remain in the general prison population and that he had any due process claim. "As long as the conditions or degree of confinement is within the purview of the sentence imposed on him and is not otherwise violative of the [C]onstitution, the Due Process clause does not subject an inmate's treatment by prison authorities to judicial review."

4. Right to Privacy

Right to privacy challenges by seropositive inmates have been rare. It is still unclear how the courts will decide these challenges.

In 1977, the Supreme Court recognized the existence of two privacy interests in the Fourteenth Amendment. "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." The concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.' Prisoners have asserted their dual privacy rights with mixed success. In *Houchins, Sheriff of the County of Alameda, California v. KQED, Inc.* the Court held that although prisoners must have some rights restricted because of their status, they nevertheless retain some rights to privacy. Generally, privacy interests must be measured against any legitimate state objective.

The Court in *Turner v. Safley* defined the test for considering inmates' constitutional claims. The test is a "rationally related" test.

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140. *Id.* at 970.
141. *Id.*
142. *Id.*
144. *Id.*
147. *Id.* at 5 n.2.
150. *Id.* at 89.
"When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." The Court, in employing this low scrutiny test, clarified earlier decisions by the district court and court of appeals that misconstrued the Court's previous attempts to articulate a standard. A low scrutiny test is necessary if "prison administrators ..., and not the courts [are] to make the difficult judgments concerning institutional operations." The Court listed several factors that should be used to determine what causal relationship will be reasonable or rational. "First, there must be a 'valid, rational connection, between the prison regulation and the legitimate governmental interest put forward to justify it.' Thus, the relationship between the governmental interest and the regulation cannot be arbitrary or remote. Second, the court should consider whether the prisoner can exercise his rights in other ways. "Where 'other avenues' remain available for the exercise of the asserted right, ... courts should be particularly conscious of the 'measure of judicial deference owed to correction officials ... in gauging the validity of the regulation.' If a reasonable alternative will allow the prisoner to exercise the right, the court may give this factor greater weight. Third, the court should evaluate the impact of accommodating the right on the correctional institution. If the effect is great, the court should defer to prison officials. Finally, "the absence of ready alternatives is evidence of the reasonableness of a prison regulation." "This is not a 'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint."

Most segregated seropositive inmates who have brought right to privacy challenges have argued that segregation itself has deprived them of the right of disclosure, that is, the right to tell or not to tell about important happenings in their lives. In Cordero v. Coughlin, seropositive inmates argued that segregation from other prisoners revealed that they..."
had contracted HIV disease. The district court rejected the argument and held: "[Privacy] rights are limited by [t]he fact of [a prisoner's] confinement and the needs of the penal institution." Because New York had a "legitimate" reason for segregating the inmates, it could abridge the inmates' right to privacy.

Other cases concerning HIV disease and privacy interests have met with different results. In Woods v. White, a prisoner claimed that unauthorized disclosure of an inmate's HIV status by medical personnel to non-medical personnel violated the inmate's right to privacy. The court upheld this claim by denying defendant's motion for judgment on the pleadings. The court pointed out defendant's failure to state that disclosure served the public interest as a determining factor in its decision. Because defendant could not show a legitimate public interest in disclosing the inmate's condition, the inmate's privacy right did not have to be balanced against a competing state interest. In Doe v. Coughlin, the court granted a preliminary injunction to an inmate who alleged that prison officials violated his privacy rights by segregating sero-positive inmates from the general prison population. "Within the jurisprudence concerning the right to privacy, and in recognition of the particularly personal nature of the information potentially subject to disclosure under the state's program, the court determines that the prisoners subject to this program must be afforded at least some protection against that non-consensual disclosure." The preliminary injunction was to remain in effect until findings could show that the prisoners had some protection.

163. *Id.* at 11.
165. *Id.* Decided prior to Turner v. Safley, 482 U.S. 78 (1987), the court in *Cordero* appears to use analysis similar to the first *Turner* factor.
166. 689 F. Supp. 874 (W.D. Wis. 1988).
167. *Id.* at 877.
168. *Id.*
169. *Id.*
171. *Id.* at 1243.
172. *Id.* at 1238 (citing accord *Woods v. White*, 689 F. Supp. 874 (W.D. Wis. 1988)).
173. *Id.* at 1243. In distinguishing *Doe* and *Cordero* (see supra note 162), one should note the years in which the cases were decided. The advocates in *Doe* may have persuaded the court in a way the advocates in *Cordero* could not. Because the HIV disease research was in its infant stages in the early 1980s, the court in *Cordero* had to base much of its reasoning on public misconception and fear.
5. Rehabilitation Act

Inmates who have brought section 504 Rehabilitation Act actions may be more successful than those who have brought constitutional challenges. To recover under section 504, an individual must (1) be disabled, (2) be “otherwise qualified,” (3) be denied access to a program which receives federal assistance, and (4) show that the failure to provide such access subjects the individual to discrimination. A handicapped individual is “any person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment.” Major life activities include “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”

Once properly classified as handicapped, one must still be “otherwise qualified” before a court will entertain a section 504 action. To be “otherwise qualified,” a handicapped person must meet the “essential eligibility requirements for the receipt of [the federally funded] services” and must not be a significant health risk to others. However, if one can make a reasonable accommodation that would protect others from any health risk, enable the disabled person to participate in the federal program, and not impose an undue hardship, one must make the accommodation.

The Court in School Board of Nassau County, Florida v. Arline held that the school board violated section 504 when it forced a school teacher with recurring bouts of tuberculosis to quit her job. This was the first time that a court applied section 504 to someone whose disability was her affliction with a contagious disease and its related physical impairments. The Court, in following Department of Health and Human Services regulations on the definitions of handicap and physical impairment, rejected appellant’s argument that “the contagious effects of a disease can

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181. Id. at 289. The Court affirmed the decision of the Eleventh Circuit Court of Appeals and remanded on the issue of whether Arline was “otherwise qualified.” Id.
182. Discussed supra text accompanying note 176.
183. 480 U.S. at 283 n.10. The regulations define physical impairment as: “[A]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; re-
be meaningfully distinguished from the physical effects on a claimant.\textsuperscript{184} However, the Court refused to hold that a person who has a contagious disease without exhibiting physical symptoms would be handicapped under section 504.\textsuperscript{185} Instead, the Court held that a person who exhibits contagiousness and physical impairment may be handicapped and therefore affirmed the decision of the court of appeals, remanding the case on the issue of "otherwise qualified."\textsuperscript{186} The Court's reasoning is unclear concerning whether a person who carries a contagious disease but exhibits no physical impairment could take advantage of section 504.\textsuperscript{187}

The Court left an unanswered question in \textit{Arline} that Congress and various lower courts (in later HIV disease cases) have answered. "It is clear from the debate on the 1987 amendment to the Rehabilitation Act that members of Congress assumed that both symptomatic and asymptomatic HIV [carriers] . . . were handicap[ped] . . . ."\textsuperscript{188} Additionally, the Ninth Circuit, the Southern District of Florida, and the Central District of California have said that section 504 of the Rehabilitation Act applies to people infected with HIV disease.\textsuperscript{189} Furthermore, the 1987 Rehabilitation Act amendment concerning the employment setting recognizes contagiousness as a handicap.\textsuperscript{190} The Americans with Disabilities Act ("ADA") embodies the concept as well.\textsuperscript{191}

While Congress and the courts have classified seropositive people as "handicapped" within the meaning of section 504, seropositive people may not be "otherwise qualified."\textsuperscript{192} If the seropositive person poses a significant risk to others which cannot be eliminated through reasonable

\textsuperscript{184} 480 U.S. at 282.
\textsuperscript{185} Id. at 289. "This case does not present, and we therefore do not reach, the questions of whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act." Id. at 289 n.7.
\textsuperscript{186} Id. at 277, 282.
\textsuperscript{187} Id. at 282 n.7. The United States argued in its amicus brief that this should be the result. The Court refused to rule on this issue because plaintiff was both physically impaired and contagious. Id.
\textsuperscript{188} Watson, supra note 30, at 107 n.166 (citing 134 Cong. Rec. H574 (daily ed. March 2, 1988)). "[S]ection 504 and the decisions that have addressed infectious diseases . . . have made it clear that people with AIDS and HIV infections are protected . . . ." Id. (statement of Representative Waxman).
\textsuperscript{191} See 42 U.S.C. §§ 12201(a)-(c) & 12102(b) (1991).
\textsuperscript{192} Watson, supra note 30, at 32.
measures, section 504 will bar that person from recovery under the Rehabilitation Act.™

The Ninth Circuit Court of Appeals is the only court thus far that has specifically stated that section 504 applies to prison programs which receive federal funds. In Bonner v. Lewis,™ a deaf inmate brought a section 504 claim against prison officials for failing to provide the inmate with a qualified sign language interpreter.™ The court rejected the prison official’s argument that Congress never intended for section 504 to apply to prisons.™ The court emphasized the plain language of the statute which provides that section 504 applies to “any program receiving federal assistance” and noted that the purpose of the act, to aid in independent living and rehabilitation, is the same purpose for prisons.™ “By ensuring that inmates have meaningful access to prison activities, . . . the goals of both the [correctional] institution and the Rehabilitation Act are served.”™

III. THE CASE

A. The Facts and Procedural History

In 1987 the Alabama Legislature passed a statute that makes HIV disease testing mandatory upon entry for all persons serving time in the state’s correctional facilities.™ If the first ELISA test was positive, the prisoner was given another ELISA test and a Western Blot test. If this series of tests came back positive, the correctional system sent the inmate to one of two segregated dormitories, Limestone Correctional Facility for males or Julia Tutwiler Prison for Women.™

Carmen Harris, an inmate at Tutwiler, filed a complaint challenging mandatory testing of all inmates and segregation of seropositive inmates. The district court consolidated similar cases with the complaint Harris filed. The court certified two classes: the plaintiff’s class, consisting of all inmates or future inmates of the correctional system who presently have or may contract HIV disease, and another class made up of inmates who oppose the relief plaintiffs request.™ Additionally, two nonseropositive inmates from the general prison population intervened as defendants.

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193. Id.
194. 857 F.2d 559 (9th Cir. 1988).
195. Id. at 560-61.
196. Id. at 562.
197. Id. (citing 29 U.S.C. § 794 (emphasis added)).
199. 941 F.2d at 1499 n.2 (citing Ala. Code § 22-11A-17(a) (1990)).
200. Id. at 1500.
201. Id.
Plaintiffs argued that the mandatory testing of all inmates coming into the correctional system and the subsequent segregation of those inmates who tested positive violated their First, Fourth, Eighth, and Fourteenth Amendment rights and section 504 of the Rehabilitation Act. The district court denied plaintiffs' request for relief on grounds that the mandatory testing did not amount to a First or Fourth Amendment violation, that insufficient evidence existed to support an Eighth Amendment claim, that the segregation practice did not violate the Fourteenth Amendment, and that defendants did not violate section 504.

Plaintiffs appealed citing four grounds. First, plaintiffs challenged the district court's assertion that no credible evidence existed upon which to base the Eighth Amendment claim of deliberate indifference to medical needs. Second, plaintiffs challenged the district court's finding that defendants had not violated their constitutional right to privacy. Third, plaintiffs challenged the district court's finding that defendants had not violated section 504. Fourth, plaintiffs challenged the district court's finding that access to the courts had not been denied.

B. The Eleventh Circuit's Opinion

Eighth Amendment Challenge. On appeal, the Eleventh Circuit first addressed the claim that the Alabama Department of Corrections ("DOC") was deliberately indifferent to plaintiffs' serious medical needs. On this issue, the court upheld the district court's findings: "[T]he preponderance of the evidence shows no violation of any prisoner's rights to medical or psychological or psychiatric care and no deliberate indifference to any serious medical or psychological need." Following the Supreme Court's reasoning in Estelle v. Gamble, the court of appeals affirmed the district court's findings and summarily rejected plaintiffs' arguments on deliberate indifference. First, plaintiffs presented expert medical testimony in an attempt to show deliberate indifference. By way of example, the court showed that although some improprieties in the treatment of prisoners may have existed, "the cases at most evidence isolated incidence of medical malpractice." The court noted that "[m]edical malpractice does not become a constitutional viola-

202. Id.
203. Id. at 1501 (citing Harris v. Thigpen, 727 F. Supp. 1564, 1583 (M.D. Ala. 1990)).
204. Id.
205. Id. at 1504.
206. Id.
208. 941 F.2d at 1504.
209. Id. at 1506.
tion merely because the victim is a prisoner."\textsuperscript{210} The testimony that the plaintiffs' experts presented called into question many of the treatments given to seropositive inmates. However, the experts' opinions did not take into account inmates' lack of cooperation in receiving treatments.\textsuperscript{211} Even if the testimony had taken the inmates' noncompliance into account, differing medical opinions do not warrant constitutional action.\textsuperscript{212}

Second, plaintiffs argued that insufficient medical staffing in the correctional system showed deliberate indifference.\textsuperscript{213} Though staffing was nonexemplary, it satisfied the constitutional standard. The court agreed with the district court in its conclusions on this argument, but rejected the district court's reasoning "'that financial considerations must be considered in determining the reasonableness of inmates [medical care]'."\textsuperscript{214} The court acknowledged that insufficient state funding may cause inadequate inmate medical care, but rejected this rationale because poor states could use it to justify a constitutional violation.\textsuperscript{215}

Plaintiffs further argued that the correctional medical staff did not adequately serve the inmates' mental needs.\textsuperscript{216} Though plaintiffs' expert testified that he considered the mental health services inadequate, the court found no constitutional violation.\textsuperscript{217} Health care need not be perfect, it need only be constitutionally sufficient.\textsuperscript{218} The court acknowledged the importance of educating the prison population about HIV disease and counseling seropositive inmates, but did not believe that any deficiencies in such education or counseling evidenced a constitutional violation.\textsuperscript{219} "[H]elping a terminally sick prisoner 'cope' psychologically with various aspects of a dread physical illness, while therapeutic, may be a more ex-

\begin{footnotesize}
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\item[210.] Id. at 1505 (citing Estelle v. Gamble, 429 U.S. 97, 106 (1976)).
\item[211.] Id. at 1506. By way of example, the court mentioned the case history of an inmate known as C.D., who in October 1988 began complaining about pain in his ears. After suffering seizures and being prescribed anti-seizure medication, C.D. was treated at Cooper-Green Hospital for toxoplasmosis, a common HIV disease complication which causes the development of brain abscesses. Doctors administered two drugs for his treatment: sulfadiazene and pyrimethamine. Two days after the diagnosis, C.D. had yet to receive the prescribed drugs though the nurses knew of C.D.'s need for the medication. He eventually received the proper medication. C.D. was then placed on AZT. As part of this treatment, the medical staff monitored C.D.'s blood count and bone marrow. C.D. objected to this monitoring and refused to take AZT. Id. at 1506-07.
\item[212.] See supra text accompanying notes 84-116.
\item[213.] 941 F.2d at 1507.
\item[214.] Id. at 1509 (quoting Harris v. Thigpen, 727 F. Supp. 1564, 1577-78 (M.D. Ala. 1990)).
\item[215.] Id. (citing Wellman v. Faulkner, 715 F.2d 269, 274 (1983)).
\item[216.] Id. at 1509-10.
\item[217.] Id. at 1510.
\item[218.] Id.
\item[219.] Id. at 1511.
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pansive view of mental health care than that contemplated by the eighth amendment.”

**Fourteenth Amendment Challenge.** The court addressed plaintiffs' right to privacy challenge and affirmed the district court's finding of no violation. On appeal, plaintiffs argued that mandatory testing and segregation disclose disease status, are unnecessary and stigmatizing, and prevent plaintiffs from choosing their own method of disclosure. The Eleventh Circuit found that the seropositive inmates retained a constitutional right to privacy in preventing nonconsensual disclosure of their seropositive status. The court nevertheless refused to define precisely the type of privacy right the inmates retained. Though the inmates may maintain some of their privacy rights, inmates can exercise these rights only to the extent the rights do not interfere with legitimate penological interests.

The court relied heavily on the standard and factors the Supreme Court enunciated in *Turner*. In finding a rational relationship between the stated goals of “reducing the transmission of HIV infection and reducing the level of violence” and the testing and segregation policy, the court rejected plaintiffs' position that no rational relationship existed. Recognizing an ongoing debate between a mass screening segregative program and an educational program, the court reasoned that it could not possibly determine that following a mass screening segregative program was arbitrary.

The court, in continuing its analysis under the *Turner* test, determined that no alternative means would allow seropositive inmates to exercise their privacy rights. Unlike most constitutional rights, plaintiffs' claimed right to privacy is a passive right when defendant can formulate no alternative affirmative activity. Either the prisoner has HIV disease and is segregated or not, leaving no middle ground. The court's inability to place the privacy right in this case on a continuum caused it to

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220. *Id.*
221. *Id.* at 1512.
222. *Id.*
223. *Id.* at 1513.
224. *Id.* at 1513 n.26.
225. *Id.* at 1514 (citing O'Lane v. Estate of Shabazz, 482 U.S. 342, 348 (1987)).
226. *Id.* at 1515-16 (citing Turner v. Safley, 482 U.S. 78, 85-92 (1987)).
227. *Id.* at 1516.
228. *Id.* at 1517 (citing Turner v. Safley, 482 U.S. 78, 89-90 (1987)).
229. *Id.*
230. *Id.*
dismiss this Turner factor as too problematic to aid in determining a rational relationship.\textsuperscript{231}

The third Turner factor the court discussed concerned the potential of a “ripple effect” if plaintiffs’ right to privacy claim was actionable.\textsuperscript{233} The court found that the “ripple effect” could be severe.\textsuperscript{233} Several factors proved conclusive. First, the presence of non-HIV intervenor-inmates in the action demonstrated that any reintegration could cause increased violence. Second, reintegration would have an impact on guards.\textsuperscript{234}

Finally, the court discussed the fourth Turner factor: the absence or presence of acceptable alternatives as evidence of rationality.\textsuperscript{236} The court could find no acceptable alternatives to Alabama’s segregative policy. “To be sure, alternatives exist.”\textsuperscript{236} The court realized that other correctional systems are trying reintegration of inmates into the general population combined with education and counseling. “Nevertheless, if the trend away from mandatory testing and segregation implies that it is perhaps a more extreme approach to the problem of managing HIV in prisons, we are not convinced that Alabama’s response can yet be dismissed as an unreasonable, ‘exaggerated’ one.”\textsuperscript{237} The Eleventh Circuit further justified its decision: “when prison officials are able to demonstrate that they have rejected a less restrictive alternative because of reasonably founded fears that it will lead to greater harm, they succeed in demonstrating that the alternative they in fact selected was not an ‘exaggerated’ response under Turner.”\textsuperscript{238}

Section 504 Claim. In addressing plaintiffs’ statutory claim, the court found insufficient evidence and remanded for further findings of fact.\textsuperscript{239} Plaintiffs claimed that the segregation of seropositive inmates violated section 504.\textsuperscript{240} Because seropositive inmates are separated from the general prison population in all aspects including housing, recreation, religious services, and family visitation, the inmates have been unable to participate in federally funded programs available to the general prison population.\textsuperscript{241}

\textsuperscript{231} Id.
\textsuperscript{232} Id. at 1518 (citing Thornburgh v. Abbott, 490 U.S. 401, 418 (1989)).
\textsuperscript{233} Id.
\textsuperscript{234} Id.
\textsuperscript{235} Id. at 1519 (citing Turner v. Safley, 482 U.S. 78, 90 (1987)).
\textsuperscript{236} Id.
\textsuperscript{237} Id. at 1527.
\textsuperscript{238} Id. (citing Thornburgh v. Abbott, 490 U.S. 401, 419 (1989)).
\textsuperscript{239} Id.
\textsuperscript{240} Id. at 1522.
\textsuperscript{241} Id. at 1521.
The Alabama DOC conceded that section 504 applies to prison programs subject to requirements that the individual be handicapped and be "otherwise qualified." In analyzing the handicapped or nonhandicapped status of the seropositive inmates, the Eleventh Circuit followed the recent opinions of members of Congress and forward-thinking courts.

Agreeing with the district court, the Eleventh Circuit said that seropositive inmates could qualify as "handicapped individuals" within the meaning of section 504. The court based its decision on the implementing regulations of section 504 which provide that a person who is treated as if he has a disability is handicapped within the meaning of the statute.

The court did not affirm the district court's conclusion that plaintiff-appellants were not "otherwise qualified." The court refused to endorse the district court's holding because the court did not make "individualized inquiries and findings of fact necessary to determine whether the members of the appellant class were 'otherwise qualified' for any of the programs or activities." The district court's generalized propositions were not sufficiently specific to support any finding on the issue of "otherwise qualified." Thus, the court remanded the section 504 claim for more particular inquiries to determine if reintegration could cause a substantial health risk or whether defendants could make reasonable accommodations to lessen the health risk.

242. Id. at 1522.
243. See supra text accompanying notes 188-91.
244. 941 F.2d at 1523.
246. 941 F.2d at 1526.
247. Id.
248. Id.
249. Id. at 1527.
IV. Analysis

The Eleventh Circuit Court of Appeals in *Harris v. Thigpen* grappled with a complex and morally difficult problem: what to do with inmates infected with HIV disease. In issuing its decision, the Eleventh Circuit maintained a status quo of segregating seropositive inmates despite the fact that forward-looking educational and prevention programs designed to fairly protect the rights of all prisoners, seropositive and non-seropositive alike, are replacing segregation programs.

In holding that defendants did not violate a Fourteenth Amendment right to privacy, the Eleventh Circuit relied heavily on factors enunciated in *Turner v. Safley*. The first Turner factor, a low scrutiny, rationally related analysis, gives extra deference to prison administrators who are furthering a legitimate penological objective. The Eleventh Circuit found two objectives: "[1] reducing the transmission of HIV infection and [2] reducing the level of violence [in the prisons]." Considering these two objectives separately, the segregation of HIV prisoners clearly satisfies either one.

Under current Alabama law, which tests prisoners only upon entry and prior to release, segregating infected inmates will not prevent the spread of HIV disease. At best, segregation will only lessen the spread of infection. Because of the various problems with the testing conducted, no one can be sure that all HIV disease infected inmates are segregated.

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250. This Casenote's analysis of Harris v. Thigpen is limited mainly to an analysis of the Eleventh Circuit's reasoning on the issue of right to privacy. A couple of reasons exist for limiting the analysis. First, the Eighth Amendment issue of deliberate indifference to medical care is largely a factual issue. Based on any given facts, one court may find a constitutional violation, and another court may find no constitutional violation. Second, the court has not yet decided the section 504 claim. To analyze the merits of the Eleventh Circuit's reasoning on that issue would be premature. The analysis will center on the factors enunciated in *Turner v. Safley*, 482 U.S. 78 (1987), as well as on general arguments concerning the unworkability of a segregating program.

251. 941 F.2d 1495 (11th Cir. 1991).

252. Recently, Massachusetts, Maryland, South Dakota, and Arizona have dropped their segregative policies. Tennessee, Wyoming, and Georgia are returning seropositive inmates to the general prison population. 6 Nat'l Prison Project J. 18 (Spring 1991). Oregon and Wisconsin have conducted studies which suggest that voluntary testing combined with effective education is the most effective way of combatting the problem in correctional facilities. 22 Nat'l Prison Project J. 18 (Winter 1990). Additionally, six states have started issuing condoms to prisoners even though sex in prison is illegal. Washington Post, supra note 51.


254. 482 U.S. at 89.

255. 941 F.2d at 1516.

256. Ala. Code § 22-11A-17(a) (1990). Furthermore, the statute provides that only those inmates who are to be incarcerated more than thirty consecutive days be tested. Id.

257. See supra text accompanying notes 27-37.
False negatives, the latency period of the disease from infection to sero-positivity, and the incubation period of the disease create a situation in which the only way segregation can be sure to prevent the spread of the HIV disease is to retest all the inmates constantly. In poorer states such as Alabama, this type of testing policy could be cost-prohibitive. A second rationale for segregation is nonconsensual sexual intercourse between male prisoners. While this may be a problem in prisons, the risk of transmission in these situations can be lessened if prison officials issue condoms to inmates.

Women pose a different problem for justifying segregation. Currently, HIV disease can be contracted only through limited means, one being through fluids passed during sexual intercourse. Since women cannot exchange bodily fluids in sexual intercourse, this cannot be a justification for segregating women.

The second Turner factor provides additional support for determining that a segregation program is archaic and unconstitutional. Under the second factor, the court must determine if an alternative means could adequately protect constitutional rights. The Eleventh Circuit found no alternative means in Harris. An educational and prevention program is such an alternative. While not foolproof, an education program does not violate one group's constitutional rights at the expense of another's group.

The third Turner factor appears to be the impetus for Alabama's second penological interest. Under this factor, the court should look to what effect any accommodation would have on the prison system. If the effect is great, the accommodation will not be implemented. Alabama stated that its segregation policy is designed to prevent violence in the correctional system, specifically violence directed toward infected inmates. Additionally, reintegration could have an adverse effect on the correctional staff who fear infection. While the potential for violence is undoubtedly present, prison officials have an affirmative duty to protect inmates from this violence. An aggressive education program could be the first step in that protection.

258. See supra text accompanying notes 24-37.
259. See supra text accompanying notes 38-39.
260. See supra text accompanying notes 20-23.
261. See supra text accompanying note 156.
262. See supra text accompanying notes 158-59.
263. 941 F.2d 1495, 1518-19 (11th Cir. 1991).
V. Conclusion

The Eleventh Circuit Court of Appeals in *Harris* upheld an Alabama statute allowing the segregation of prisoners infected with HIV disease.\(^{264}\) Largely basing its decision on a low scrutiny test, which found segregation rationally related to the prevention of transmission of the disease and lessening violence,\(^{265}\) the court did not adequately take into account the enormous strides being made in educating people about the threats of the disease nor did it adequately take into account the problems associated with the testing procedure.

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264. *Id.* at 1528.
265. *Id.* at 1501.