HIV AND MEDICAL PRIVACY: GOVERNMENT INFRINGEMENT ON PRISONERS' CONSTITUTIONAL RIGHTS

Karen E. Zuck

INTRODUCTION

The high rate of HIV infection among Americans, the ease with which the virus is transmitted, and the terminal nature of the virus have made its existence a vital national public health issue. Concern regarding HIV is heightened in U.S. correctional facilities, in which the prevalence of the virus is disproportionately high. As of December 31, 2003, 1.9% of the total U.S. prison population was known to be HIV positive. Furthermore, "[a]t yearend 2003 the rate of confirmed AIDS in State and Federal prisons was more than 3 times higher than in the total U.S. population."

Public reaction to those afflicted with HIV is often negative and isolating due to the high-risk activities that can contribute to the transmission of the virus. Because of the social stigmatization associ-
ated with HIV, privacy is of utmost importance for those infected. Privacy is necessarily infringed upon in correctional facilities more so than in the outside population. Ironically, however, prisoners covet their privacy more than most people because of the consequences of revealing sensitive personal information in the prison setting. Medical information, one of the most personal aspects of an individual’s life, is particularly private, and the unnecessary disclosure of such information can lead to avoidable, and often devastating, repercussions. Because of the tendency of prison officials to make HIV status known among officials and prisoners alike, and due to the measures subsequently undertaken to prevent the spread of the virus, “[t]here is little question but that the prisoner identified as having AIDS will be severely compromised in his ability to maintain whatever dignity and individuality a prison environment allows.”

Adherence to the constitutional right to privacy is particularly important with regard to HIV, and incarcerated individuals, for whom stigmatization associated with the disease is enhanced due to confinement, have been unjustly denied their due privilege to privacy.

This Comment focuses on the constitutional right to privacy and its application to medical information, in particular, HIV disclosure in the prison setting. Part I addresses the Supreme Court’s recognition of a constitutional right to privacy and its implications for medical information. Part II reviews the general rights of prisoners and how the right to privacy in medical information applies to prisoners in particular. Part III then discusses the methods and policies currently used in correctional facilities to address the issue of HIV and how those measures serve the penological interests of the institutions while infringing on the privacy interests of prisoners. The doctrine of qualified immunity will also be examined, as applied to cases in which the confidentiality of HIV status has been breached. Part IV concludes by reviewing possible alternate measures that could be taken by correctional institutions to protect their interests in maintaining

6 See Harris v. Thigpen, 941 F.2d 1495, 1513–14 (11th Cir. 1991) (“In the court’s view there are few matters of a more personal nature, and there are few decisions over which a person could have a greater desire to exercise control, than the manner in which he reveals that diagnosis to others. An individual’s decision to tell family members as well as the general community... is clearly an emotional and sensitive one fraught with serious implications for that individual.” (quoting Doe v. Coughlin, 697 F.Supp. 1234, 1237–38 (N.D.N.Y. 1988))).
7 See id. at 1514 (“Within the confines of the prison the infected prisoner is likely to suffer from harassment and psychological pressures.” (quoting Coughlin, 697 F.Supp. at 1237–38)).
8 Id. (quoting Coughlin, 697 F.Supp. at 1237–38).
9 See Kathleen Knepper, Responsibility of Correctional Officials in Responding to the Incidence of the HIV Virus in Jails and Prisons, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 45, 46 (1995) (“There may be no situs in which these concerns have greater significance than in our country’s jails and prisons. The incidence of the virus is more prevalent in these institutions than it is in the population as a whole.” (footnote omitted)).
security and reducing HIV transmission, while also preserving prisoners' rightful privacy in their HIV status.

I. THE CONSTITUTIONAL RIGHT TO PRIVACY

Although there is not an explicit right to privacy enumerated in the Constitution, the Supreme Court has repeatedly touched upon the idea of an implied right to personal privacy. Concluding that the government should not infringe upon a couple's choice to use contraceptives, the Court, in *Griswold v. Connecticut*, held that the right to privacy from governmental intrusion was implicit in the First Amendment.\(^{10}\) Taking the right to privacy a step further, the Court made a monumental decision in *Whalen v. Roe*, stating that the Fourteenth Amendment protects several "zone[s] of privacy."\(^{11}\) The appellees in *Whalen* claimed that one of those zones was "the individual interest in avoiding disclosure of personal matters," and the Court agreed.\(^{12}\) *Whalen* involved a group of New York citizens who argued that the State's mandatory filing system, which documented the names of individuals using controlled substances, infringed upon those individuals' privacy rights because the public disclosure stigmatized those who used the drugs.\(^{13}\) In recognizing a right to privacy, the Court acknowledged the importance of personal dignity and the need for confidentiality in personal information.\(^{14}\) However, the Court also determined that the right was not considered absolute and therefore could be compromised for reasonable state interests.\(^{15}\) The Court found that the patients' drug use information was disclosed as "an essential part of modern medical practice" and, even though the disclosure may have reflected "unfavorably on the character of the patient," it was not an unconstitutional infringement by the State upon the patients' privacy.\(^{16}\)

---

\(^{10}\) See *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) ("[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion.").

\(^{11}\) *Whalen v. Roe*, 429 U.S. 589, 598 (1977); see also id. at 598–99 (discussing the types of cases that protect privacy).

\(^{12}\) Id. at 599.

\(^{13}\) Id. at 595 ("Appellees offered evidence tending to prove that persons in need of treatment . . . will from time to time decline such treatment because of their fear that the misuse of the computerized data will cause them to be stigmatized as 'drug addicts.'").

\(^{14}\) See SHIRLEY M. HUFSTEDLER, THE DIRECTIONS AND MISDIRECTIONS OF A CONSTITUTIONAL RIGHT OF PRIVACY 15–16 (1971) ("It is an interest [in securing an individual's autonomy] that society shares, because a society cannot long endure that is unable to preserve to its members the autonomy of their personalities.").

\(^{15}\) See *Whalen*, 429 U.S. at 602 (explaining that because the State is responsible for the health and welfare of its citizens, disclosure of health information is necessary).

\(^{16}\) Id. ("Requiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy.").
In *Whalen*, the Supreme Court recognized that a constitutional right to personal privacy exists, but that the scope of the privacy protection depends on factors such as the necessity of the disclosure for health and public policy considerations and the harm that would result if the information is disclosed. The *Whalen* ruling has led to debate among the circuit courts regarding the extent of the personal right to privacy and whether protection of privacy in medical information and treatment is warranted. Those courts which have not extended such a right to medical information have concluded that governmental interests supersede any individual interest in maintaining privacy in medical information and that such a right to privacy would be burdensome to government activities. For example, in establishing that an inmate did not have a constitutional right to privacy in his HIV status, the Sixth Circuit Court of Appeals reasoned that "recognition of a constitutional right of nondisclosure would force courts to 'balance[e] almost every act of government, both state and federal, against its intrusion on a concept so vague, undefinable, and all-encompassing as individual privacy.'"

In contrast, those courts which have found a definitive right to an individual's privacy in medical information have been able to balance that right with governmental interests to ensure that one's privacy is not unnecessarily infringed. The court in *United States v. Westinghouse Electric Corp.* established factors to consider when determining whether an individual's right to privacy has been unreasonably infringed upon by the government. "The *Westinghouse* balancing test is the most appropriate test for determining whether an invasion into an individual's records is justified because the factors enumerated in *Westinghouse* are comprehensive and concretely encompass the rea-

---

17 Id. at 602-06.
18 See Alison M. Jean, *Personal Health and Medical Information: The Need for More Stringent Constitutional Privacy Protection*, 37 SUFFOLK U. L. REV. 1151, 1153 (2004) ("[T]he *Whalen* Court did not clarify many facets of the confidentiality branch's right to privacy. As a result, circuit court decisions inconsistently handle situations posing confidentiality issues." (footnote omitted)).
19 See e.g., J.P. v. DeSanti, 653 F.2d 1080, 1091 (6th Cir. 1981) ("[N]ot all rights of privacy or interests in nondisclosure of private information are of constitutional dimension, so as to require balancing government action against individual privacy.").
20 Doe v. Wigginton, 21 F.3d 733, 740 (6th Cir. 1994) (alteration in original) (quoting *DeSanti*, 653 F.2d at 1089-90).
21 See Doe v. City of New York, 15 F.3d 264, 267 (2d Cir. 1994) (holding that one's health is a personal issue that an individual would want to keep confidential); United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980) (concluding that a right to privacy in an individual's health can be maintained "within the 'private enclave where he may lead a private life'" (quoting United States v. Grunewald, 233 F.2d 556, 581-82 (2d Cir. 1956) (Frank, J., dissenting))).
22 638 F.2d at 570.
23 See Blayer, supra note 5, at 1192-98 ("Recognizing that information concerning one's body has a special character, the court reasoned that medical records which may contain intimate facts of a personal nature fall within a zone of privacy entitled to protection.").
HIV AND MEDICAL PRIVACY

HIV AND MEDICAL PRIVACY

soning of Whalen." This balancing test has been adopted by many subsequent court rulings. Included in the factors that the Westinghouse court deemed important in weighing governmental interests with an individual's interests were

the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest mitigating toward access.

These factors reflect a desire by the Westinghouse court to uphold an individual's privacy in medical information whenever it is not detrimental to the public interest, especially if disclosure would be injurious to the individual. However, in applying this and other balancing tests, courts have been inconsistent in determining the weight to be given to the governmental interests. The diverse and relatively ambiguous standards applied by courts have generally allowed the government excessive deference in infringing upon individuals' privacy interests. Virtually any kind of public policy interest claimed by the government has been accepted by courts as a valid reason for disclosing private information.

Despite the judicial history of allowing infringement of individuals' privacy, there are many benefits to preserving an individual's

24 Id. at 1202.
25 See, e.g., Nat'l Treasury Employees Union v. U.S. Dep't of Treasury, 25 F.3d 237, 244 (5th Cir. 1994) (citing "subsequent public disclosure" as a factor to consider in the balancing test); Planned Parenthood Fed'n of Am., Inc. v. Ashcroft, No. C 03-4872 PJH, 2004 U.S. Dist. LEXIS 3383, at *5-*6 (N.D. Cal. Mar. 5, 2004) (finding that, although the right to privacy in information is not absolute, where the government seeks to compel records of risky abortions, "a balancing of the relevant considerations supports nondisclosure"); Patients of Dr. Solomon v. Bd. of Physician Quality Assurance, 85 F.Supp. 2d 545, 547 (D. Md. 1999) (using the Westinghouse factors to weigh whether the public interest in an investigation of a physician outweighed individual patients' interests in the privacy of their medical records).
26 Westinghouse Elec. Corp., 638 F.2d at 578.
27 See e.g., Turner v. Safley, 482 U.S. 78, 87 (1987) (describing "legitimate penological objectives" that must be weighed against individual prisoner's privacy); Doe v. Delie, 257 F.3d 309, 333 (3d Cir. 2001) (applying a "compelling" government interest standard); Dunn v. White, 880 F.2d 1188, 1196 (10th Cir. 1989) (weighing the government's "substantial interest" against an individual's right to privacy).
28 See Jean, supra note 18, at 1153-54 ("Inconsistencies have a particularly grave effect on an individual's right to privacy in her medical records. . . . Courts in different jurisdictions use varied standards of review to determine whether the privacy interest outweighs the need for governmental intrusion. Moreover, the results of the various balancing tests seemingly favor governmental interests in every instance at the expense of individual privacy rights.") (footnotes omitted).
29 See Delie, 257 F.3d at 317 ("Courts must respect the administrative concerns underlying a prison regulation, without requiring proof that the regulation is the least restrictive means of addressing those concerns.").
right to privacy. Specifically with regard to medical information, an individual’s knowledge and assurance that his personal information will remain confidential can encourage him to seek health care treatment when he otherwise would not. Additionally, individuals may be more apt to divulge important information to their providers if they know that this information will remain confidential. By encouraging communication, privacy in medical information can result in an overall improvement in treatment and may also help to prevent the spread of infectious diseases, such as HIV, through earlier detection.

While there are certain circumstances in which medical information must be disclosed for health or safety reasons, information regarding an individual’s HIV status is information for which privacy is especially important and should be protected with the utmost care. "An individual revealing that she is HIV seropositive potentially exposes herself not to understanding or compassion but to discrimination and intolerance, further necessitating the extension of the right to confidentiality over such information." The sensitive nature of HIV and the public’s frequently disapproving perception of those with the virus necessitates that the constitutional right to privacy in that medical information be strictly protected.

II. THE CONSTITUTIONAL RIGHTS OF PRISONERS

The Supreme Court has repeatedly distinguished the constitutional rights of the general population from the lesser rights of incarcerated individuals. In reviewing the scope of a prisoner’s constitutional rights, the Court has held that “there must be mutual accommodation between institutional needs and objectives and the

30 See Harold Edgar & Hazel Sandomire, Medical Privacy Issues in the Age of AIDS: Legislative Options, 16 AM. J.L. & MED. 155, 160 (1990) ("Medical privacy... is valued for itself and is valued for the protection of other interests its waiver may implicate.").

31 See Pamela Sankar et al., Patient Perspectives on Medical Confidentiality, 18 J. GEN. INTERNAL MED. 659, 666 (2003) (reporting that HIV testing research studies show that "patients will delay or forego treatment, or alter stories about symptoms and onset of illness, to be sure those details never emerge publicly").

32 See John Balint, Issues of Privacy and Confidentiality in the New Genetics, 9 ALB. L.J. SCI. & TECH. 27, 32 (1998) ("The trust earned between the patient and physician as a result of the knowledge that private personal information will indeed be kept private is essential to effective patient-physician communication.").

33 Doe v. City of New York, 15 F.3d 264, 267 (2d Cir. 1994).

34 See Delie, 257 F.3d at 517 ("It is beyond question that information about one’s HIV-positive status is information of the most personal kind and that an individual has an interest in protecting against the dissemination of such information.").

35 See Price v. Johnston, 334 U.S. 266, 285 (1948) ("Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.").
provisions of the Constitution that are of general application." In particular, the Court has specified that maintaining security and preserving order and discipline are essential objectives which warrant a limitation on prisoners' rights. Accordingly, by ruling that prisoners have more limited rights than the general population, the Supreme Court has repeatedly afforded great deference to prison officials and correctional facilities in their determination of what constitutes a legitimate reason for infringing upon a prisoner's supposed constitutional rights. "This deference does not mean, however, that courts must abstain from reviewing the constitutional claims of prisoners." Whether inmates maintain the constitutional right to medical privacy and how this potential right is affected by courts' deference to prison officials is an issue that remains unresolved.

To determine when a prison regulation justifiably infringes on prisoners' rights, the Supreme Court in *Turner v. Safley* developed a four-prong test that resembles a government-favored version of the factors considered in *Westinghouse* to determine whether an individual's privacy interest trumps government concerns. The *Turner* standard of review "applies to all circumstances in which the needs of prison administration implicate constitutional rights." First, there must be a "valid, rational connection" between the challenged regulation and the government interest offered as a justification for it. If there is indeed a valid connection between the regulation and the interest, the Court then determines whether there are alternate means of allowing the prisoner to exercise the right that is being infringed. Further, the Court considers whether a "ripple effect" would occur by allowing the prisoner to exercise his right, meaning that if accommodating the prisoner's right would have a significantly detrimental effect on other inmates and prison staff, the Court should be particu-

---

37 See Bell v. Wolfish, 441 U.S. 520, 546 (1979) ("The fact of confinement as well as the legitimate goals and policies of the penal institution limits these retained constitutional rights.").
38 See Knepper, *supra* note 9, at 93 ("[R]egardless of the type of policies which are adopted by corrections institutions, these policies are rarely rejected by the courts that are asked to consider them, even though the policies are arguably inconsistent with the penological needs of the institution."). But see Wolff, 418 U.S. at 555-56 ("But though 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.").
39 Sheley v. Dugger, 833 F.2d 1420, 1423 (11th Cir. 1987).
43 Turner, 482 U.S. at 89.
44 Id. at 90.
larly deferential to the prison official’s discretion. Finally, the Court has ruled that the regulation should not constitute an “exaggerated response” to prison concerns, and if there is an alternative way to achieve the same end goals that does not impinge on a prisoner’s rights, this method should be undertaken.

"[T]he Turner v. Safley decision established a deferential reasonableness standard as the level of scrutiny to be applied when a prison regulation infringes an inmate’s constitutional interests. Although similar...to ordinary rational basis review, the Turner standard requires a more searching, four-part inquiry." Beard v. Banks established that this standard of reasonableness does not mean that a prison policy that is simply logically related to a legitimate goal will pass the Turner test; rather, “Turner requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective.” However, this has not made the Turner test easy to overcome, especially considering the significant deference that courts give to prison officials. The fourth prong is particularly difficult for prisoner plaintiffs to surmount as “prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant’s constitutional complaint,” but, rather, the prisoner has the burden of providing an alternative “that fully accommodates the prisoner’s rights at de minimis cost to valid penological interests...” As the Court pointed out in Overton v. Bazzetta, “[t]he burden...is not on the State to prove the validity of prison regulations but on the prisoner to disprove it.” Because of the extreme deference given to prison officials and the heavy burden on claimants to provide only alternatives that are “easy, obvious, and of ‘de minimis cost to valid penological interests,’” it is difficult to satisfy the “exaggerated response” requirement for overturning allegedly unfair prison regulations.

45 Id.
46 Id.
47 Williams v. Pryor, 240 F.3d 944, 950 (11th Cir. 2001).
49 See Johnson v. California, 543 U.S. 499, 529 (2005) (Thomas, J., dissenting) (“Well before Turner, this Court recognized that experienced prison administrators, and not judges, are in the best position to supervise the daily operations of prisons across the country.”).
50 Turner, 482 U.S. at 90-91.
51 Id. at 91.
53 Bahrampour v. Lampert, 356 F.3d 969, 976 (9th Cir. 2004) (quoting Turner, 482 U.S. at 90-91); see also Washington v. Harper, 494 U.S. 210, 247, 248 (1990) (Stevens, J., dissenting) (finding that a “rule that allows prison administrators to address potential security risks by forcing psychotropic drugs on mentally ill inmates for prolonged periods is unquestionably an ‘exaggerated response’ to that concern[,]” which the Court nevertheless upheld even though the inmate claimant presented alternatives that “would add no new costs...”); Thornburgh v. Abbott, 490 U.S. 401, 419 (1989) (concluding that “the administrative inconvenience of [a pro-
III. PRISONERS AND HIV

In the interest of protecting against physical abuse and discrimination within the prison population due to fear and ignorance, HIV-positive prisoners' privacy rights must be maintained. Despite the importance of privacy regarding one's HIV status, many correctional facilities have adopted policies that unnecessarily abolish inmates' privacy in this information. "Fear of the disease and of those who are infected with it has led to the promotion of simplistic solutions to its spread, such as placing those who are infected in quarantine or labeling them with tattoos [sic] or stamps." Common measures meant to reduce the transmission of HIV, improve medical care for HIV-positive inmates, or reduce prison violence include mandatory HIV testing upon incarceration and subsequent placement into segregated housing apart from the general prison population. Both of these measures serve to destroy HIV-positive inmates' privacy in their HIV status without providing evident benefits for them or their fellow prisoners. Furthermore, these policies arguably fail the fourth prong of the Turner test, as surely they are "exaggerated" responses to the HIV plight for which there are alternatives that do not infringe on prisoners' privacy. Even more devastating for HIV-positive prisoners, the lack of concern for inmates' medical privacy has led to the casual disclosure of inmates' HIV status by prison officials and other inmates without any penological justification.

A. Mandatory HIV Testing

Many states impose mandatory testing of all incoming inmates to determine their HIV status. Unlike the general population, prisoners are afforded no confidentiality regarding the results of the mandatory tests, and the testing necessarily infringes upon prisoners' medical privacy by disclosing their HIV status to whoever is administering the test. Whether it be through segregating the HIV-positive inmates
after determining the results of the test or by simply informing prison officials and other inmates of the test results, government officials administering the tests often blatantly violate prisoners' rights to privacy of medical information. 59

The violation of prisoners' privacy through HIV testing entails more than a simple violation of rights. "[S]creening of prisoners raises issues concerning inmate confidentiality and safety; inmates known to be infected may be targeted for harassment or violence by other inmates or corrections staff." 60 The consequence of revealing HIV status due to mandatory testing is not simply that a prisoner’s privacy rights may be infringed, but, more detrimentally, the prisoner’s life may be affected by having such information exposed to the prison environment. 61 "[T]he privacy interest in one’s exposure to the AIDS virus is even greater than one’s privacy interest in ordinary medical records because of the stigma that attaches with the disease. The potential for harm in the event of a nonconsensual disclosure is substantial . . . ." 62 As justification for mandatory testing, prison officials put forth several arguments, all of which are legitimate goals that can be better served through alternative means. One argument is that learning an inmate’s HIV status through mandatory testing is essential to provide the most appropriate medical care. 63 However, if the prisoner’s HIV status is known confidentially by only the prisoner’s healthcare provider, he still can receive appropriate medical care without having his HIV status needlessly exposed. Another explanation for mandatory testing is that it is needed in order to properly segregate those who are HIV positive from the rest of the prison population, as a way of protecting the HIV-positive inmates from physical abuse by other inmates because of the stigma attached to the virus. 64 On the other hand, without the mandatory testing and subsequent segregation, the rest of the prison population would not know of an inmate’s HIV status and, therefore, no physical abuse

59 See id. at 220 ("[S]tatutes requiring testing of prisoners are often vague as to the limits on disclosure of the results and what use can be made of them.").

60 Mary E. Clark, AIDS Prevention: Legislative Options, 16 AM. J.L. & MED. 107, 147 (1990).

61 See CORR. SERV. OF CAN., HIV/AIDS IN PRISONS: FINAL REPORT OF THE EXPERT COMMITTEE ON AIDS AND PRISONS 26 (1994) ("[B]enefits from such [mandatory] testing are very limited and questionable, while harms include breach of a person’s right to inviolability, self-determination, autonomy, privacy and confidentiality, and the risk of discriminatory and other harmful treatment.").


63 See Madrid v. Gomez, 889 F. Supp. 1146, 1204 (N.D. Cal. 1995) ("By examining inmates as they enter the facility, providers can identify those patients who need uninterrupted medication . . . . Providers can also prevent from being admitted to the prison’s general population those who pose a threat to the health and safety of others (such as inmates with communicable diseases.").

64 See Knepper, supra note 9, at 53 (concluding that correctional institutions sometimes justify their policies of mandatory testing and segregation based on the idea that HIV-positive prisoners are protected from violence by other inmates through segregation).
HIV AND MEDICAL PRIVACY

could arise from it. Mandatory testing may be promoted as a means of protecting prison officials and guards from the danger of contracting HIV. However, this is also unconvincing, because regardless of a prisoner’s HIV status, prison employees should use universal precautionary measures when dealing with all prisoners. Finally, prison officials may espouse mandatory testing as a method of curbing the transmission of HIV within the prison. Yet, “[c]ontrary to the public perception that AIDS must be spreading like wildfire in prisons, the disease actually appears to be spreading more slowly in the nation’s prison population than in the general population.” Despite the lack of concrete evidence that mandatory HIV testing for incoming prisoners effectively serves valid correctional interests—the first hurdle for passing the Turner test—courts maintain that testing does not unfairly infringe upon prisoners’ right to privacy in their medical information.

B. Segregation of HIV-Positive Inmates

U.S. correctional facilities continue to maintain segregated housing for HIV-positive inmates, despite the lack of conclusive evidence showing its effectiveness in reducing the transmission of HIV. Furthermore, the National Commission on Correctional Health Care specifically disapproves of segregation, finding that it “will lead quickly to stigmatization . . . .” Although there have been many inmate challenges to the constitutionality of HIV-positive inmate segre-

---

65 See Edgar & Sandomire, supra note 30, at 221 (“In prison, protection of private information yields protection from assaults by other prisoners.”).
66 See Dunn v. White, 880 F.2d 1188, 1195 (10th Cir. 1989) (finding that “the lack of any indication in the record that AIDS is communicable among prisoners who do nothing but live together does not diminish the prison’s interest in testing”); Christopher P. Krebs & Melanie Simmons, Intraprison HIV Transmission: An Assessment of Whether It Occurs, How It Occurs, and Who Is at Risk, 14 AIDS EDUC. & PREVENTION 53, 55 (Supp. B 2002) (noting that “data validly documenting instances of intraprison HIV transmission are rare”).
68 See Paramo v. Matthew, No. 92-3144, 1992 U.S. App. LEXIS 26256, at *5 (10th Cir. Oct. 10, 1992) (“When the custodial authority establishes a valid penological reason for a standard HIV screening for all incoming prisoners, as in this case, no individual has an expectation of privacy that can transcend the need to administer the test.”).
69 See CDC, supra note 56, at 425 (“[S]eparate housing of HIV-infected inmates is limited in that it 1) does not reduce the spread of other sexually transmitted, opportunistic, and bloodborne infections, 2) might increase the risk for tuberculosis outbreaks . . . ., 3) raises concerns about disclosure of inmates’ HIV status and access to prison programs, and 4) does not prevent transmission by inmates who are unaware that they are infected or by HIV-infected corrections staff.”).
gation, they have been largely unsuccessful. In *Harris v. Thigpen*, the Eleventh Circuit Court of Appeals found that segregation was a legitimate way to reduce HIV transmission, even though there was no evidentiary proof that it was effective, and that the disclosure of prisoners’ HIV status was simply an inherent by-product of the necessary segregation. To buttress the weak foundation upon which the government’s argument stood, the court noted that there was an intervening class of inmate defendants who opposed the release of the HIV-positive inmates into the general prison population and that the existence of these defendants indicated that there would be a significant risk of violence if the segregation were ended. This opinion concluded that although segregation was not necessarily an effective means of reducing HIV transmission, it was acceptable to infringe on HIV-positive prisoners’ right to privacy in this way because the government’s intentions were good and the potentially violent recourse by other prisoners resulting from desegregation might be difficult to handle.

In reviewing the four-step *Turner* test, the court acknowledged that the appellants had presented an alternative approach to the problem that “implies that [the current segregation] is perhaps a more extreme approach . . . .” However, the court dismissed the idea that this “extreme approach” was an “exaggerated” response by pointing out that the *Turner* test is “not a least restrictive means test . . . .” In this way, more reasonable and potentially efficient ways of satisfying the goal of reduced HIV transmission are being ignored because of courts’ deference to existing prison policies.

In *Camarillo v. McCarthy*, the Ninth Circuit Court of Appeals upheld an inmate segregation policy by simply stating that it had not

---

71 See *Camarillo v. McCarthy*, 998 F.2d 638, 640 n.1 (9th Cir. 1993) (finding that segregation fulfills “legitimate penological interest[s]” and therefore may impinge on an inmate’s constitutional rights); *Harris v. Thigpen*, 941 F.2d 1495, 1519 (11th Cir. 1991) (holding that although segregation is a “more extreme approach” to reducing the transmission of HIV, it passes the *Turner* test and therefore is constitutional); *Cordero v. Coughlin*, 607 F. Supp. 9, 10 (S.D.N.Y. 1984) (finding that separating HIV-positive inmates from the rest of the population “bears a rational relation” to reducing HIV transmission).

72 See *Harris*, 941 F.2d at 1517 (admitting that “[e]ven if Alabama’s approach in this case is now a minority position among state correctional systems, we simply are unable to say at this point that the DOC’s use of combined mass screening and segregation is so remotely connected to the legitimate goals of reducing HIV transmission and violence . . . .”).

73 See id. at 1518 (noting that the “ripple effects” of eliminating the segregation could be great because of the concern of the general prison population over the proposed integration).

74 See id. at 1519 (“The Supreme Court has emphasized that the consideration of other alternatives to assess a current prison policy or restriction’s reasonableness is not a least restrictive means test: ‘prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant’s constitutional complaint.’” (quoting *Turner v. Safley*, 482 U.S. 78, 90-91 (1987))).

75 *Harris*, 941 F.2d at 1519.

76 Id.
been clearly established "that a prison policy segregating HIV-positive inmates from the general prison population is unconstitutional."\textsuperscript{77} The court, in this case, applied the doctrine of qualified immunity and held that since there was no precedent affirmatively establishing that segregation was unconstitutional, segregation could be considered a permissible institutional act.\textsuperscript{78}

By contrast, the district court in \textit{Doe v. Coughlin} found that segregation of HIV-positive prisoners for the purpose of improving medical care was both unconstitutional and unnecessary. The court held that forced housing segregation was severely detrimental to individual prisoners, remarking that "[t]here is little question but that the prisoner identified as having AIDS will be severely compromised in his ability to maintain whatever dignity and individuality a prison environment allows."\textsuperscript{79} Applying the \textit{Turner} test, the court found that although improved medical care for inmates with AIDS is a "desirable" and "highly commendable" objective, this objective was "served in a constitutionally impermissible manner."\textsuperscript{80} The court concluded that the noble goal of improving medical care "could be provided equally well, with no more than \textit{de minimis} costs to the program’s objectives, in a program designed to allow the prisoner to choose whether he wishes to be housed in [the segregated dormitory]."\textsuperscript{81} With this holding, \textit{Coughlin} stands for the idea that if there are alternate methods to promote the goals of a correctional institution, which do not violate prisoners’ constitutional rights, the institution has a duty to seek out those alternative measures instead of maintaining unconstitutional "exaggerated responses."

\textbf{C. Casual Disclosure of HIV Status and Qualified Immunity}

More distressing than the disclosure of HIV status as a by-product of mandatory testing and segregation is the casual disclosure that sometimes occurs without apparent purpose. Unfortunately, suits brought by inmates against prison officials due to casual and unwarranted disclosures of HIV status have been largely unsuccessful. Unlike other medical information, "[t]he sensitive nature of medical information about AIDS makes a compelling argument for keeping this information confidential . . . . The potential for harm in the

\begin{footnotesize}
\textsuperscript{77} Camarillo v. McCarthy, 998 F.2d 638, 640 (9th Cir. 1993).
\textsuperscript{78} \textit{Id.} at 640 n.3. ("Our research convinces us that the right Camarillo asserts was not clearly established in June 1987.").
\textsuperscript{80} \textit{Id.} at 1240.
\textsuperscript{81} \textit{Id.} at 1243. The \textit{Coughlin} court rejected the unconstitutional policy, although it acknowledged "the oft-stated admonition concerning the limited role courts should take when the administration of prisons is at issue." \textit{Id.} at 1241.
\end{footnotesize}
event of a nonconsensual disclosure is substantial . . . \textsuperscript{82} Therefore, courts have held HIV status to a higher standard of privacy than other medical concerns.\textsuperscript{83} However, in reviewing the disclosure of HIV status, courts generally evaluate the conduct of prison officials under the doctrine of qualified immunity, which provides a shield from personal liability for government officials for certain actions done within the scope of their employment.\textsuperscript{84} There are three factors to consider in the application of qualified immunity: (1) whether the right has been defined with "reasonable specificity"; (2) whether applicable case law supports the existence of the right; and (3) whether the official under review would have reasonably understood that his acts were unlawful under preexisting law.\textsuperscript{85}

Correctional officers have successfully applied the doctrine of qualified immunity to defend their disclosure of inmates' HIV status, even when the disclosure was unnecessary (for example, through simple gossip)\textsuperscript{86} and even in cases in which the courts explicitly recognize the right of the inmate to privacy in his medical information.\textsuperscript{87} The doctrine of qualified immunity is meant "to alleviate frivolous lawsuits and allow the [government] official to complete her work without needless interference."\textsuperscript{88} However, in the medical information context, this doctrine has instead relieved prison officials of liability when they infringe on prisoners' privacy because of the great deference that courts afford prison officials and due to the difficulty

\textsuperscript{82} Doe v. Borough of Barrington, 729 F. Supp. 376, 384 (D.N.J. 1990); see also Doe v. Delie, 257 F.3d 309, 323 (3d Cir. 2001) (condoning prison officials' casual disclosure of an inmate's HIV status among themselves as protected under qualified immunity even though "the Fourteenth Amendment protects an inmate's right to medical privacy"); Anderson v. Romero, 72 F.3d 518, 520 (7th Cir. 1995) (affording qualified immunity to prison guard who told another inmate that Anderson was "a homosexual and a faggot" and that the other inmate could "catch AIDS from him").

\textsuperscript{83} See Franklin v. McCaughtry, 110 F. App'x. 715, 719 (7th Cir. 2004) (comparing "fairly pedestrian maladies" that do not need protection from public dissemination with "intensely private medical information," like HIV-positive status, which requires a higher level of privacy).

\textsuperscript{84} 2 AM.JUR. 2D Administrative Law § 586 (2006).

\textsuperscript{85} Powell v. Schriver, 175 F.3d 107, 113 (2d Cir. 1999).

\textsuperscript{86} Id. at 112.

\textsuperscript{87} Compare Herring v. Keenan, 218 F.3d 1171, 1184 n.5 (10th Cir. 2000) (Seymour, J., dissenting) ("It is true that where a constitutional deprivation is determined by balancing opposing factors, this mitigates against a finding of clearly established law . . . . However, we have stated on numerous occasions that qualified immunity is nevertheless abrogated if it was "sufficiently clear that Defendants should have known the [governmental] interests would not survive a balancing inquiry." (quoting Patrick v. Miller, 953 F.2d 1240, 1246 (10th Cir. 1992) (alteration in original))), with Maia R. Albrecht, Comment, Defining Qualified Immunity: When Is the Law "Clearly Established?," 40 WASHBURN L.J. 311, 332 (2001) ("[T]he court must . . . be mindful of not defining the right in such a narrow manner so as to insulate the government official from liability inherent in not upholding the laws they are charged with abiding.").

\textsuperscript{88} Albrecht, supra note 87, at 318; see also supra Part II (describing prisoners' privacy rights).
that prisoners have in overcoming the "exaggerated response" hurdle of the *Turner* test.\(^8^9\)

The tendency of courts to defer to prison officials' discretion in their actions, and to refrain from penalizing officials when their actions are clearly unjust, is illustrated in *Powell v. Schriver*\(^9^0\). In *Powell*, the court weighed the correctional facility's penological interests against the prisoner's interest in maintaining confidentiality and found that "the gratuitous disclosure of an inmate's confidential medical information as humor or gossip—the apparent circumstance of the disclosure in this case—is *not* reasonably related to a legitimate penological interest . . . ."\(^9^1\) However, the court then deemed the official who disclosed the information to be protected from punishment under the doctrine of qualified immunity because "the right of a prisoner to maintain the privacy of medical information was not clearly established" when the disclosure occurred.\(^9^2\) Although in some circuits the right to privacy has now been "clearly established," it remains to be seen whether courts will continue to protect officials' disclosures of important medical information through qualified immunity.

Fortunately, some courts have recognized that, in employing the *Turner* test, a regulation that infringes on inmates' rights cannot be justifiably sustained, even through applying qualified immunity. They reason that officials employing the regulation should be held responsible for infringing on inmates' rights if the logical connection between the right and the penological goal is so remote as to render the policy arbitrary and irrational.\(^9^3\) In *Nolley v. County of Erie*, the court found that putting red stickers on the medical charts of HIV-positive inmates did not rationally further the goal of protecting inmates from the spread of HIV; therefore, the court rejected this governmental "interest" and held that the inmates' rights were being unjustly infringed.\(^9^4\) Similarly, in *Woods v. White*, the court found that because an inmate's HIV status was disclosed in a conversation that did not serve any significant public interest, there was no reason to undergo a balancing review of the government's interest and the in-

\(\text{\textsuperscript{89}}\) *Turner v. Safley*, 482 U.S. 78, 90 (1987); *see also id.* at 332 ("The defense of qualified immunity, while intended to encourage efficient operation of the government, is not a defense that is without limits; otherwise, there would be no distinction between absolute immunity and qualified immunity.").

\(\text{\textsuperscript{90}}\) See *Powell*, 175 F.3d at 112 (commenting on the ease with which courts can come up with "circumstances under which disclosure of an inmate's HIV-positive status *would* further legitimate penological interests.").

\(\text{\textsuperscript{91}}\) *Id.*

\(\text{\textsuperscript{92}}\) *Id.* at 113.

\(\text{\textsuperscript{93}}\) See Albrecht, *supra* note 87, at 320 ("Often, the result of examining an official's claim to qualified immunity is that a balancing test is necessary to weigh the rights of the individual against the needs of the government which the official was charged to fulfill.").

mate's right and instead simply found in favor of the inmate. By employing the *Turner* test to examine whether the government had a truly legitimate concern and whether the methods undertaken by the government had a valid relation to the ultimate goal, these courts successfully upheld inmates' privacy rights when they were being unfairly violated.

IV. ALTERNATIVE HIV PREVENTION MEASURES

Alternative measures, such as voluntary HIV testing and increased HIV education for inmates and staff, can reduce the transmission of HIV in the prison population just as effectively as the approaches currently used in U.S. prisons that deny prisoners their medical privacy rights. With available alternatives promising to be as effective as more infringing approaches and more suitable to the prison setting, correctional facilities should refrain from employing privacy-infringing policies that arguably constitute an "exaggerated response" under the *Turner* test. However, since "many prison officials are slow to embrace HIV prevention messages (e.g., the consistent use of condoms, the use of sterile syringes) that they perceive as directly contradicting policies that prohibit anal sex, condom use, and injection drug use in prisons," the judicial system must play a role in facilitating the development of new policies by employing a more "balanced" test for weighing correctional facility interests against prisoners' privacy rights, as addressed above.

A. Voluntary HIV Testing

The World Health Organization (WHO) has developed universal guidelines for correctional facilities on how to deal with prisoners with HIV and how to contain the transmission of HIV within prison walls. The guidelines emphatically reject the use of mandatory test-

---

56 See Ralf Jürgens, *Developments in Criminal Law and Criminal Justice: Sentenced to Prison, Sentenced to Death? HIV and AIDS in Prisons*, 5 CRIM. L.F. 763, 786 (1994) ("[P]rovision of bleach and sterile needles, and often even of condoms, is strongly opposed. Acknowledging that drug use and sex are a reality in prisons would, in the eyes of many, be to acknowledge that prison authorities have failed; similarly, providing bleach, sterile needles, and condoms would mean condoning prohibited behavior in prisons. Given the devastating consequences of HIV infection, the problematic aspects of making bleach, sterile needles, and condoms available in prisons, when both drug use and sexual activity are prohibited, should be tolerated.").
57 Braithwaite & Arriola, supra note 2, at 761.
58 UNAIDS, WHO GUIDELINES ON HIV INFECTION AND AIDS IN PRISONS 4 (1999), available at http://data.unaids.org/Publications/IRC-pub01/JC277-WHO-Guidel-Prisons_en.pdf (providing standards "which prison authorities should strive to achieve in their efforts to prevent HIV transmission in prisons and to provide care to those affected by HIV/AIDS").
ing as unethical and ineffective.\footnote{See id. at 7. In addition, the WHO suggests that “[i]nformation regarding HIV status may only be disclosed to prison managers if the health personnel consider, with due regard to medical ethics, that this is warranted to ensure the safety and well-being of prisoners and staff, applying to disclosure the same principles as those generally applied in the community.” Id.} Elimination of mandatory HIV testing and implementation of a voluntary testing program in which inmates would have a choice about whether to be informed of their HIV status would both promote their right to privacy and also maintain the goal of providing medical care to those who need it.\footnote{See Anne S. De Groot et al., Setting the Standard for Care: HIV Risk Exposures and Clinical Manifestations of HIV in Incarcerated Massachusetts Women, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 353, 363 (1998) (recommending voluntary and confidential HIV testing of inmates as a means toward identifying and treating individuals with the disease).}

"Through voluntary testing, an inmate may become aware of his own seropositive status and may seek appropriate medical care or request segregation for his own protection."\footnote{Knepper, supra note 9, at 94.}

Eliminating mandatory testing would necessarily affect the ability of correctional facilities to maintain and enforce segregated HIV-positive inmate housing. However, “[a]utomatic isolation of persons with HIV infection is neither necessary nor appropriate as a means of preventing the spread of HIV infection within facilities.”\footnote{Clark, supra note 60, at 147; see also Krebs & Simmons, supra note 66, at 56 (“Of the studies that definitively document cases of intraprison HIV transmission, few actual cases are identified and little is known about those inmates or how they contracted HIV.”).} Therefore, the only true purpose segregation would seem to serve is to provide optimal health care for HIV-positive prisoners. This legitimate goal can just as easily be achieved through voluntary HIV testing at an arguably “de minimis” cost. With confidential and voluntary testing, inmates could get the health care they need without being subjected to the consequences of having their HIV status known by other prisoners and prison officials.

\section*{B. Universal Precautions and Education}

Like the WHO, the Centers for Disease Control and Prevention recommends that prisons use “universal precautions and education” to reduce HIV transmission rather than mandatory testing and segregation.\footnote{Knepper, supra note 9, at 45; see also De Groot et al., supra note 100, at 356 (“Through HIV education and prevention strategy sessions provided by health care and social support staff, high risk HIV seronegative women may learn to reduce their risk of HIV infection while HIV seropositive women may learn self-care skills to improve their clinical prognosis and harm reduction strategies to reduce the risk of HIV transmission to their partners.”).} However, as documented above, many American prisons do not follow this suggestion.\footnote{Elizabeth Kantor, HIV Transmission and Prevention in Prisons, HIV INSITE KNOWLEDGE BASE CHAPTER, Apr. 2006, http://hivinsite.ucsf.edu/InSite?page=kb-07-04-13 (“In 2003, 19 state prison systems and the Federal Bureau of Prisons had mandatory HIV screening policies for their incoming inmates.”).} The Canadian federal penitentiary sys-
tem, by contrast, has developed a universal precaution strategy of measures to prevent exposure and transmission of HIV, regardless of whether an inmate is known to be infected or not, thereby eliminating the need for mandatory testing and segregation of HIV-positive inmates. Canada also prohibits disclosure of HIV status to prison officials and inmates, unless it proves to be the only means possible to avoid harm that cannot otherwise be prevented.

One of the most effective ways in which correctional facilities can promote the reduced transmission of HIV and also continue to provide optimal care for HIV-positive inmates is through educating healthcare staff, prison officials and guards, and even the prisoners themselves about the HIV virus.\textsuperscript{105} "Education regarding the nature of the HIV virus and the means of its transmission should be required for all corrections officials and inmates, regardless of the policies which are adopted by the institution."\textsuperscript{106} As many of the problems associated with disclosure of prisoners' HIV status stem from the prison staff's reaction to news of the disease, education of all individuals involved in the prison system would encourage a more accepting environment for HIV-positive inmates and a safer atmosphere for everyone.\textsuperscript{107} Education of inmates would also promote a safer prison atmosphere: "The anticipated violent reaction by some general population prisoners to integration is likely predicated on fear, some of it irrational and magnified by misinformation; such fear might or might not be allayed with more education about the disease than is already being provided."\textsuperscript{108} By creating awareness of the virus, and hopefully thereby reducing virus-related violence, the threat of violence will no longer be a legitimate reason for maintaining segregated housing. Likewise, by implementing universal precautionary measures and educating all staff about the virus and the precautionary measures to use, mandatory testing of inmates to determine their HIV status will no longer be a legitimate method to control the spread of the virus under the \textit{Turner} test, as the universal precautions would prove to be a preferable alternative measure at a de minimis cost.

\textsuperscript{105} See Harris v. Thigpen, 941 F.2d 1495, 1519 (11th Cir. 1991) ("The importance of AIDS education in both prisons and the population at large is immense, and, for that matter, not disputed.").

\textsuperscript{106} Knepper, \textit{supra} note 9, at 95.

\textsuperscript{107} HIV education offered in prison can also promote continued HIV management for HIV-infected prisoners who are released back into the community. See Kantor, \textit{supra} note 104 ("Prisoners represent a crucial and huge target population for HIV education programs; prisons concentrate persons at risk who are not easily reached in the community by such efforts.").

\textsuperscript{108} Harris, 941 F.2d at 1520.
HIV AND MEDICAL PRIVACY

C. Condoms and Sterile Needles

The Joint United Nations Programme on HIV/AIDS (UNAIDS) cites drug use through shared, non-sterile equipment as the greatest factor in the transmission of HIV in prison, with unprotected sex being a close second. Accordingly, in order to curb transmission, UNAIDS suggests that correctional facilities implement needle exchange programs offering sterilized needles and provide access to free condoms. Although "[p]roviding condoms to sexually active persons is an integral part of HIV prevention interventions," most prisons do not allow for free condom distribution because doing so would promote sexual activity in prison, which constitutes a crime in most prison settings.

Providing free sterile needles to prisoners raises the same concerns as providing condoms. However, free-needle programs in Europe and Iran have led to documented declines in HIV transmission between prisoners. Tattooing and body piercing are other virus-spreading activities that take place behind bars, which can be rendered safe by dispersing clean needles.

CONCLUSION

Although an individual’s right to personal medical privacy is not explicitly enumerated in the Constitution, “[a]n individual’s medical records should fall within the array of materials entitled to privacy protection because information about one’s body and state of health is a matter which the individual is ordinarily allowed to retain privately.” Privacy relating to an individual’s HIV status in particular should be a closely coveted right due to the negative impact that disclosure of HIV-positive status can have on an individual and the peo-

---

110 Id.
111 CDC, supra note 56, at 423.
112 See Jürgens, supra note 96, at 768 (“Studies undertaken in the United States suggest that 10-30 percent of inmates engage in homosexual activity, but many prison systems, including the vast majority of U.S. systems, still oppose making condoms available to inmates.”); Kantor, supra note 104 (noting that sexual activity within prison walls is often a “punishable crime”).
113 See Joseph Hall, A Breeding Ground for Communicable Disease, TORONTO STAR, Aug. 16, 2006, at A06 (“Free-needle programs offered inside jails by a handful of liberal European countries—as well as in some repressive states like Iran—have led to huge declines in HIV transmission between prisoners . . . . In Switzerland, a long-standing prison needle program has virtually eliminated transmission of HIV and hepatitis in jails.”).
114 Kantor, supra note 104 (“Tattooing is a widespread activity in prisons and usually is performed without fresh or sterile instruments.”). Kantor notes that body piercing would benefit from clean instruments as well. Id.
115 Blayer, supra note 5, at 1200.
Although "prisoners' constitutional rights are necessarily subject to substantial restrictions and limitations in order for correctional officials to achieve legitimate correctional goals and maintain institutional security," courts must act as regulators of the purported correctional goals to ensure that prisoners' rights are not being unnecessarily infringed, and they should apply the Turner test accordingly. Like the general population, prisoners have an interest in keeping their HIV status private, an interest that should be valued and protected to the greatest extent possible. To enable prisoners to uphold their dignity, correctional facilities should prevent the unnecessary disclosure of HIV status through transmission reduction and health promotion tactics that respect individuals' privacy. At the same time, courts should no longer defer to correctional officials' authority when the officials are using their authority to unnecessarily and unfairly violate prisoners' rights through "exaggerated responses."

Finally, in order to "reduce the transmission of HIV in the United States, comprehensive and credible programs of interactive education, counseling, testing, partner notification, and practical risk-reduction techniques (e.g., safer sex and safer drug injection) should be implemented for adult inmates in prisons and jails and for juveniles in confinement facilities." In addition, to both reduce HIV transmission through education and alleviate the stigma associated with HIV, mandatory training and education programs should be implemented nationally for correctional facility staff.

By employing such techniques, the government can achieve its penological goals while at the same time preserving prisoners' personal rights, thereby reducing the need for court interference in the operation of correctional facilities.

---

116 See Albrecht, supra note 87, at 316 ("Perhaps nowhere is the task of balancing the individual's need for privacy as opposed to the government's need for information and status reporting more evident than in the area of HIV and AIDS. When an individual's HIV status is involuntarily communicated, the repercussions are often enormous.").

117 Harris v. Thigpen, 941 F.2d 1495, 1514 (11th Cir. 1991).


119 See Braithwaite & Arriola, supra note 2, at 762 ("There is thus an apparent need for increased staff training and education designed to modify attitudes about HIV among correctional personnel. Such in-service training should be required of all correctional staff and administrators as a certification for employment.").