Out of Sight, Out of Danger?: Procedural Due Process and the Segregation of HIV-Positive Inmates

By LYNN S. BRANHAM*

> Are they not excluded from public assemblies and feastdays like murderers, parricides, fated to be perpetual exiles, and even more unhappy than these! For murderers are at least permitted to live with other men; these are driven away like enemies. They are denied the same roof, the same table, the same utensils with others. Moreover they are barred from the cleansing waters for public usage, and there is fear that even the rivers may be infected with their malady. If a dog should lap water with a wounded tongue, we should not consider the water to have been contaminated by the brute; but let one of these afflicted ones approach it and we believe the water is rendered impure by this human being.[1]

Introduction

Although the scourge of leprosy has disappeared from most parts of the world, what many view as the modern equivalent of leprosy, AIDS, continues to rampage from person to person, city to city, and country to country. AIDS was not even identified in this country until 1981,[2] but by August of 1989, according to government figures, it had claimed the lives of at least 61,655 Americans.[3]

The statistics on AIDS fatalities in the United States, however, actually mask the enormous dimensions of the health threats posed by AIDS. Public health officials have estimated that up to one and one-half million Americans may be infected with human immunodeficiency virus (HIV),

* Associate Professor, Thomas M. Cooley Law School; B.A. 1976, University of Illinois; J.D. 1980, University of Chicago Law School.

1. S. BRODY, THE DISEASE OF THE SOUL: LEPROSY IN MEDIEVAL LITERATURE 80 (1974) (quoting St. Gregory of Nysse) (description of lepers in the Middle Ages).

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

3. CENTERS FOR DISEASE CONTROL, PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, HIV/AIDS SURVEILLANCE REPORT 12 (Sept. 1989).

the virus that causes AIDS.[4] Although officials are unsure how many of these seropositive individuals will develop AIDS, present estimates range from sixty-five to one hundred percent.[5] In addition, even if some seropositive individuals do not become ill themselves, they may continue to spread the virus if they do not refrain from what is referred to as "the exchange of bodily fluids" with others.

The fear of AIDS has prompted hysterical demands by some who wish to avoid all contacts with persons who have contracted HIV. Children who have tested positive for the virus have been hounded from schools across the country.[6] Employers have summarily fired employees believed to be HIV-positive.[7] AIDS-afflicted persons charged with crimes have languished in jail because of the refusal of jail officials to transport them to court,[8] and judges have barred defendants infected with the virus from their courtrooms, requiring them to enter guilty pleas and be sentenced over the telephone.[9]

The clamoring to isolate those infected with HIV from the uninfected population has perhaps reached its zenith in the prison setting. Prisons are viewed as potential hotbeds for the spread of HIV because of the high number of incarcerated intravenous drug abusers and

4. Centers for Disease Control, Public Health Service, U.S. Dep't of Health and Human Services, *Human Immunodeficiency Virus Infection in the United States: A Review of Current Knowledge*, 36 MORBIDITY AND MORTALITY WEEKLY REP. 14-15 (1987). At least five million people worldwide may already be infected with HIV. 3 AIDS Pol'y & Law (Buraff Pubs.) No. 11, at 3 (1988).

5. *Id.*, No. 12, at 5 (1988).

6. In one case that attracted much media attention, a school board in Arcadia, Florida prohibited three brothers, all of whom were hemophiliacs who had contracted HIV, from attending a public elementary school. After the parents of the boys brought suit against the school board, an injunction was issued prohibiting the school board from barring the boys from the school. When the boys began attending the school, however, half of the other students were kept home by their parents. A week later, the trailer where the family of the three boys lived burned down; the cause of the fire was later determined to be arson. *Id.*, No. 18, at 7 (1988).

7. *See, e.g., id.*, No. 24, at 2 (1989) (reporting on charges filed by the Maryland Commission on Human Relations alleging that a 7-Eleven store required an employee to take an HIV-antibody test and forced him to resign when he tested positive). *See also id.*, No. 12, at 6 (1988) (reporting the results of a survey of executives of 1100 companies in Philadelphia in which 10% said they would fire an employee infected with HIV, 16% would not work with such an employee, and 38% would take steps to limit the amount of contact between the seropositive employee and other employees).

8. Joint Subcomm. on AIDS in the Criminal Justice System of the Comm. on Corrections and the Comm. on Criminal Justice Operations and Budget, *AIDS and the Criminal Justice System: A Preliminary Report and Recommendations*, 42 REC. OF THE A. OF THE BAR OF THE CITY OF NEW YORK, 921 n.27 (1987).

9. N.Y. Times, Dec. 14, 1988, at A21, col. 1.

the perceived frequency of sexual contacts between prisoners.[10] As a result, not only prison staff members, but many inmates have begun to demand that seropositive inmates be segregated from the general prison population.[11] The specter of HIV prison units and even HIV prisons looms.

The segregation of inmates believed to be HIV-positive raises a number of constitutional questions. Inmates confined in prison HIV units have argued, often unsuccessfully, that their confinement impinges on their equal protection and due process rights as well as their right not to be subjected to cruel and unusual punishment.[12]

Another potential constitutional objection to the segregation of seropositive inmates exists, one that focuses not on the segregation policy itself, but on the procedures used when implementing such a policy. Assuming that the segregation of HIV-positive inmates is otherwise constitutional, a question arises as to what procedural safeguards, if any, must attend a prisoner's transfer to an HIV unit. This Article focuses upon that issue. Before turning to that question, however, this Article presents some basic information about HIV infection—how it is transmitted and how it is detected.

I. The Transmission and Detection of HIV Infection

AIDS is caused by a virus known as human immunodeficiency virus (HIV).[13] This virus weakens the body's immune system, the system through which the body combats disease.[14] As a result, people with

10. The sharing of a needle with a seropositive intravenous drug-abuser and exchanging bodily fluids with a seropositive person while engaging in anal, oral, or vaginal sex are the two primary ways in which the AIDS virus is transmitted. *See infra* notes 22-23 and accompanying text.

11. NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, AIDS IN CORRECTIONAL FACILITIES: ISSUES AND OPTIONS 103-04 (3d ed. 1988) [hereinafter NIJ REPORT].

12. *See, e.g.*, Harris v. Thigpen, 727 F. Supp. 1564 (M.D. Ala. 1990) (finding that constitutional rights of inmates were not violated because authorities' actions were reasonably related to legitimate penological interests); Cordero v. Coughlin, 607 F. Supp. 9 (S.D.N.Y. 1984) (finding no violation of Eighth Amendment because segregated inmates not denied adequate food, clothing, or shelter, and finding no violation of Fourteenth Amendment Equal Protection Clause because inmates with AIDS are not a suspect class and are not "similarly situated" as other inmates). *But cf. Settlement Improves Medical, Psychiatric Care for CMF Prisoners; Ends Isolation of HIV Inmates*, ACLU NEWS (ACLU of Northern California), March-Apr. 1990 at 2 (reporting on settlement of Gates v. Deukmejian, No. S-87-1636 LKK-JFM (E.D. Cal.), a prisoners' rights class action suit alleging, *inter alia*, discriminatory segregation of HIV-infected inmates in the California Medical Facility at Vacaville).

13. SURGEON GENERAL'S REP., *supra* note 2, at 9.

14. *Id.* at 10.

AIDS are susceptible to and contract diseases that they would not normally contract and from which they eventually die.

Fortunately, the modes of transmission of HIV are limited. Documented cases of transmission have been confined to instances in which an infected person exchanged blood, semen, or vaginal secretions with an uninfected person.[15] Medical authorities also suspect that HIV may be transmitted through breast milk.[16]

Although only certain bodily fluids have been implicated in the spread of HIV, the virus has been found in other bodily fluids, including saliva, tears, and urine.[17] Still, public health officials and the vast majority of doctors emphatically insist that HIV is not transmitted through the types of nonsexual, casual contacts that occur between people in their daily lives.[18] These views are grounded on the results of a number of studies of persons living with individuals who have AIDS.[19] None of these studies revealed any uninfected person becoming infected because of having had casual contacts with an infected person.[20] The absence of any evidence of the AIDS virus being transmitted through casual contact is believed by medical authorities to be particularly significant since many of the uninfected participants in the studies shared eating utensils, toilets, and even toothbrushes with infected household members.[21]

A person may become infected with HIV by engaging in certain high-risk behaviors. Sexual activity involving the exchange of semen, blood, or vaginal secretions with an infected partner is one form of high-risk behavior that may lead to the transmission of the virus.[22] The sharing of needles by intravenous drug abusers is also a common mode of transmission, since infected blood may remain in an unsterilized needle, permitting the virus to be transmitted to an uninfected drug abuser who subsequently uses the needle to inject himself or herself with drugs.[23]

---

15. Centers for Disease Control, Public Health Service, U.S. Dep't of Health and Human Services, *Recommendations for Prevention of HIV Transmission in Health-Care Settings*, 36 MORBIDITY AND MORTALITY WEEKLY REP. 3 (1987).

16. *Id.*

17. *Id.*

18. *See, e.g.*, Centers for Disease Control, Public Health Service, U.S. Dep't of Health and Human Services, *Public Health Service Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS*, 36 MORBIDITY AND MORTALITY WEEKLY REP. 514 (1987) [hereinafter *CDC HIV-Antibody Testing Guidelines*]; AM. HOSPITAL ASS'N, AIDS/HIV INFECTION POLICY: ENSURING A SAFE HOSPITAL ENVIRONMENT 4 (1987) [hereinafter HOSPITAL ENVIRONMENT REP.]; SURGEON GENERAL'S REP., *supra* note 2, at 13.

19. SURGEON GENERAL'S REP., *supra* note 2, at 13; NIJ REP., *supra* note 11, at 15.

20. *Id.*

21. *Id.*

22. SURGEON GENERAL'S REP., *supra* note 2, at 16.

23. *Id.* at 19.

The virus is also transmitted through transfusions of infected blood or blood products, and perinatally from a mother to a fetus.[24]

Infected persons can spread the virus even though they may not have any symptoms.[25] For this reason, the control of the spread of AIDS has proven particularly difficult. Many asymptomatic HIV carriers are totally unaware that they are spreading the virus; the Centers for Disease Control (CDC), the federal agency responsible for disease control, estimated in August of 1987 that most of the one to one-and-a-half million Americans infected with HIV were unaware of their HIV positivity and might unwittingly be transmitting the virus to others.[26] Even when HIV carriers are aware of their positive status, some persist in engaging in activities that pose a high risk of transmitting the virus.[27] Their potential victims, duped by the healthy appearance of their sexual or needle-sharing partners, often fail to take the necessary steps to protect themselves. As a result, more people become infected with the virus, more people develop AIDS, and more people die.

At present, tests developed to determine HIV status do not detect the presence of the virus itself in a person.[28] The tests instead are antibody tests, ones that detect whether a person's body has produced certain antibodies in an attempt to thwart the infiltrating HIV.[29] Experts presume that persons who test positive for HIV antibodies are infected with the virus and capable of transmitting it.

One problem with antibody tests is that there is a lapse of time between infection with the AIDS virus and the body's discernible production of HIV antibodies.[30] Although most people produce antibodies within six to twelve weeks after contracting the virus,[31] experts have reported much longer time lapses, ranging up to fourteen months between

24. *Id.* at 19-20.

25. *Id.* at 11.

26. *CDC HIV-Antibody Testing Guidelines, supra* note 18, at 509.

27. *See* R. SHILTS, AND THE BAND PLAYED ON, 198 *passim* (1987) (recounting the sexual behavior of one seropositive man who, immediately after having sex one time with another man, showed his partner some purple lesions on his chest and announced, "Gay cancer. Maybe you'll get it too."); *see also* 3 AIDS Pol'y & Law (Buraff Pubs.) No. 15, at 2 (1988) (reporting court martial of a soldier who was seropositive, had unprotected sex with three other soldiers, and did not tell any of them about his HIV status).

28. *See* NIJ REP., *supra* note 11, at 3-4.

29. *See id.* at 3. Tests for the virus itself are, however, in the process of being developed. *Id.* at 3-4.

30. *CDC HIV-Antibody Testing Guidelines, supra* note 18, at 509-10.

31. *Id.* at 509.

the date of infection and the time when seropositivity becomes evident.[32] A person may therefore be an HIV carrier and capable of spreading the virus, but test negative on an antibody test.

In addition to the possibility of false-negative test results, some persons who are not infected with the virus have tested positive for HIV antibodies. Under "optimal laboratory conditions," repeat antibody testing, which is recommended by the CDC if a person tests positive on an initial antibody test, can be at least 99% accurate in identifying persons who are actually seropositive.[33] But in practice, the percentage of persons falsely identified as seropositive is quite high.[34]

Not only is there a lapse of time between infection with HIV and when a person tests positive for antibodies, but there is also a lapse of time between the infection and the development of AIDS. The CDC estimates that an average of over seven years will elapse between the time of HIV infection and the advent of AIDS.[35] All persons who are HIV carriers, however, may not necessarily develop AIDS. Although the CDC presently estimates that at least 99% of the persons who are HIV-positive will develop AIDS, these estimates may prove to be high.[36]

Some HIV-positive persons who do not have AIDS are still not healthy. Some develop AIDS-Related Complex (ARC), suffering such symptoms as fever, weight loss, diarrhea, and swollen lymph nodes.[37] Many, but possibly not all persons with ARC eventually develop AIDS.[38] With AIDS comes the potpourri of "opportunistic diseases," such as Kaposi's sarcoma, a form of skin cancer, and *pneumocystis carinii* pneumonia, from which persons with AIDS may eventually succumb.[39]

---

32. *Quality AIDS Testing: Hearings before the Subcomm. on Regulation and Business Opportunities of the House Comm. on Small Business*, 100th Cong., 1st Sess. 4 (1987) (statement of Dr. Lawrence Miike) [hereinafter *Hearing on AIDS Testing*].

33. *CDC HIV-Antibody Testing Guidelines*, *supra* note 18, at 510.

34. *See infra* notes 286-94 and accompanying text.

35. Centers for Disease Control, Public Health Service, U.S. Dep't of Health and Human Services, *Human Immunodeficiency Virus Infection in the United States*, 36 MORBIDITY AND MORTALITY WEEKLY REP. 801 (1987). Researchers at the San Francisco Department of Public Health have estimated that the incubation period between the time of HIV infection and the onset of AIDS may range anywhere from one to thirty-five years. 3 AIDS Pol'y & Law (Buraff Pubs.) No. 11, at 5 (1988).

36. *See supra* text accompanying note 5.

37. SURGEON GENERAL'S REP., *supra* note 2, at 11.

38. NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, THE CAUSE, TRANSMISSION, AND INCIDENCE OF AIDS 2 (1987).

39. SURGEON GENERAL'S REP., *supra* note 2, at 10. AIDS is presently considered a fatal disease. Of the persons diagnosed with AIDS in 1981, at least 90% have died. The fatality rate for those diagnosed with AIDS in 1984 is 80 percent. NIJ REP., *supra* note 11, at 7.

II. Procedural Due Process and the Segregation of Seropositive Inmates

Legislators and correctional officials have devised a number of different segregation schemes in response to the problem of AIDS. Some correctional facilities segregate only inmates with AIDS,[40] while others segregate inmates with AIDS and those with ARC.[41] Other facilities go further, also segregating seropositive, but asymptomatic prisoners.[42] Still other correctional institutions are more selective, considering the need for segregation on a case-by-case basis.[43]

An analysis of the constitutionality of segregating an inmate because of his or her HIV status must consider the nature of the segregation scheme. Is the inmate segregated because he has AIDS or ARC, because he has tested positive for HIV antibodies, or because he is seropositive and has engaged in activities posing a substantial risk of spreading the AIDS virus? Since the segregation of inmates solely because they are seropositive has engendered the most controversy, on both legal and policy grounds, this Article will focus on procedural due process issues stemming from this type of segregation.

A. Liberty Interests

The Fourteenth Amendment to the United States Constitution declares that the states may not "deprive any person of life, liberty, or property, without due process of law."[44] The Fifth Amendment contains a similar prohibition applicable to the federal government.[45] Before determining whether the due process rights of a prisoner are violated when the prisoner is removed from the prison's general population unit because of

40. A survey conducted by the National Institute of Justice in October of 1988 revealed that 14% of the state and federal prison systems segregated all inmates with AIDS, but only those seropositive inmates, from the rest of the prison population. NAT'L. INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, 1988 UPDATE: AIDS IN CORRECTIONAL FACILITIES 35 (1989) [hereinafter NIJ UPDATE].

41. In October of 1988, 2% of the country's prison systems segregated all inmates with AIDS or ARC, but not asymptomatic carriers of HIV. *Id.*

42. Twelve percent of the prison systems in the country reported in October of 1988 that they segregated all seropositive inmates. *Id.*

43. In October of 1988, 69% of the state and federal prison systems decided on a case-by-case basis whether to segregate seropositive inmates. *Id.* Under these ad hoc segregation schemes, an inmate might be segregated for medical reasons, when continued confinement in the general prison population could pose an undue risk to an inmate with AIDS or ARC of contracting a potentially life-threatening infection. Seropositive inmates might also be segregated for other reasons. Promiscuous inmates, for example, might be segregated to prevent them from further spreading HIV.

44. U.S. CONST. amend. XIV, § 1.

45. U.S. CONST. amend. V.

HIV-positivity, one must address the question whether the prisoner has been deprived of a liberty interest, thereby triggering the protections of the Due Process Clause. In answering that question, this Article will consider several Supreme Court cases that discuss liberty interests in the prison context—*Meachum v. Fano*,[46] *Vitek v. Jones*,[47] *Hewitt v. Helms*,[48] and *Kentucky Department of Corrections v. Thompson*.[49]

1. Supreme Court Cases

In *Meachum v. Fano*, several prisoners contended that they had been deprived of liberty without due process of law when they were transferred from a medium- to a maximum-security prison in Massachusetts.[50] A state statute vested the Commissioner of Corrections with unconfined discretion to decide whether and to what prison an inmate should be transferred.[51] In this case, the prisoners had been transferred because of their alleged involvement in setting fires at the medium-security prison.[52]

Although acknowledging that the conditions at the maximum-security prison were "substantially less favorable" than those at the medium-security prison,[53] the Supreme Court concluded that the prisoners had not been deprived of a protected liberty interest when they were transferred from one to the other.[54] Hence, an analysis of whether the prisoners had been afforded due process of law was unnecessary.

In concluding that no liberty interests were implicated by the interprison transfers, the Court discussed the two possible sources of protected liberty interests—the United States Constitution and state law.[55] The Court observed that no constitutionally derived liberty interest was at issue, since any liberty interest of a convicted felon sentenced to prison was abrogated upon conviction to the extent that the state could incarcerate the felon within any prison in the state.[56] In other words, a convicted felon could not claim any right to be initially placed in any particular prison since the conviction and the sentence imposed implicitly authorized the state to incarcerate the prisoner in whatever prison

46. 427 U.S. 215 (1976).
47. 445 U.S. 480 (1980).
48. 459 U.S. 460 (1983).
49. 109 S. Ct. 1904 (1989).
50. 427 U.S. at 222.
51. *Id.* at 227 n.7.
52. *Id.* at 216.
53. *Id.* at 218.
54. *Id.* at 224.
55. *Id.* at 223-27; *see* Hewitt v. Helms, 459 U.S. 460, 466 (1983).
56. *Meachum*, 427 U.S. at 224.

the state saw fit. Similarly, a prisoner had no recognizable liberty interest in remaining in a particular prison because of the elimination of any such interest upon conviction.[57] In the words of the Court, "[c]onfinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose."[58] The fact that the conditions of confinement at the prison to which a prisoner is transferred are more onerous than those at the prison in which the prisoner was previously confined does not mean that the prisoner, because of the transfer, has been deprived of a liberty interest that would require taking steps to ensure that the transfer was warranted.[59]

The Court in *Meachum* recognized, however, that liberty interests are not confined to those created by the Constitution; according to the Court, constraints placed on governmental discretion by state law might also give rise to a liberty interest.[60] Nonetheless, the Court observed that the prisoners contesting their transfer in *Meachum* could not invoke any state-created liberty interest since under the laws of Massachusetts, the decision to transfer prisoners fell within the unmitigated discretion of the Commissioner of Corrections.[61]

Meachum was subsequently distinguished by the Supreme Court in *Vitek v. Jones*.[62] In *Vitek*, a Nebraska prisoner contested his transfer from a prison to a state mental hospital, arguing that the transfer had been effected without due process of law.[63] A state statute authorized such a transfer upon the finding of a physician or psychologist that a prisoner had a mental disease or defect that could not be adequately treated at the prison.[64]

57. *Id.* at 225.
58. *Id.*
59. *Id.*
60. *Id.* at 226.
61. *Id.* at 226-27 & n.7. The statute provided in relevant part:
> The commissioner may transfer any sentenced prisoner from one correctional institution of the commonwealth to another, and with the approval of the sheriff of the county from any such institution except a prisoner serving a life sentence to any jail or house of correction, or a sentenced prisoner from any jail or house of correction to any such institution except the state prison, or from any jail or house of correction to any other jail or house of correction. Prisoners so removed shall be subject to the terms of their original sentences and to the provisions of law governing parole from the correctional institutions of the commonwealth.

MASS. GEN. LAWS ANN. ch. 127, § 97 (West 1974).
62. 445 U.S. 480 (1980).
63. *Id.* at 484.
64. *Id.* at 483 & n.1. The statute provided in relevant part:
> When a physician designated by the Director of Correctional Services finds that a person committed to the department suffers from a physical disease or defect, or when a physician or psychologist designated by the director finds that a person com-

The Court noted that this statute confined the state's discretion to transfer prisoners to state mental hospitals.[65] Such transfers were contingent on dual findings that the prisoner had a mental disease or defect, and that he or she needed to be transferred to receive proper treatment.[66] As a result, a prisoner had an " 'objective expectation, firmly fixed in state law and official Penal Complex practice,' " that he or she would not be transferred to a mental institution unless these findings had been made.[67] This objectively justified expectation gave rise to a liberty interest that in turn subjected the transfer decision to the strictures of due process.[68]

Even if there had been no state statute in Nebraska conditioning the transfer of prisoners to state mental hospitals, the Supreme Court would still have concluded that the Nebraska prisoners were entitled under the Due Process Clause to certain procedural protections before being so transferred. That is because the Court also found that, independent of any state statute, prisoners have a liberty interest in not being transferred to a state mental hospital without the protection of minimum requirements of due process.[69] The Court noted that while a conviction may implicitly authorize a prisoner's placement in any penal institution in the state, the conviction does not mean that a prisoner may be sent to a state mental institution.[70] Confinement in a mental institution, the Court observed, leads to more than the loss of freedom that attends incarceration in prison.[71] As a result of being confined in such an institution, a person will also suffer the stigma of being labelled mentally ill,[72] and may also be subjected, as the prisoner was in *Vitek*, to compulsory treatment of his mental problems.[73] Because of these untoward consequences of confinement in a mental institution that do not normally follow from incarceration in prison, the Court concluded that the transfer of a prisoner to a mental hospital effects a deprivation of liberty subject to the constraints

---

mitted to the department suffers from a mental disease or defect, the chief executive officer may order such person to be segregated from other persons in the facility. If the physician or psychologist is of the opinion that the person cannot be given proper treatment in that facility, the director may arrange for his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available.

NEB. REV. STAT. § 83-180(1) (1976).

65. 445 U.S. at 489-90.

66. *Id.*

67. *Id.* (quoting Miller v. Vitek, 437 F.Supp 569, 572-73 (D. Neb. 1977)).

68. *Id.* at 490-91.

69. *Id.* at 491.

70. *Id.* at 493.

71. *Id.*

72. *Id.* at 494.

73. *Id.*

of due process.[74]

In *Hewitt v. Helms*,[75] the Supreme Court was again confronted with the question whether the transfer of a prisoner from one location to another had infringed on the prisoner's due process rights. The prisoner in that case challenged his transfer from the general prison population to the administrative segregation unit pending investigation of his alleged participation in a prison riot.[76] The prisoner objected to his placement in administrative segregation because the work, educational, recreational, and other privileges of those incarcerated in the unit were substantially curtailed.[77]

In addressing the threshold question whether the prisoner's transfer implicated a liberty interest falling within the protection of the Due Process Clause, the Court dismissed the argument that the Due Process Clause itself created a liberty interest to remain in the general population.[78] The Court observed that when a person is sentenced to prison, it is "ordinarily contemplated" that the person at some point may be housed in sections of a prison with less favorable conditions.[79] Since placement in administrative segregation is well within the conditions of confinement that prisoners should "reasonably anticipate" sometime during the time they are incarcerated, no constitutionally derived liberty interest is affected by a prisoner's placement in administrative segregation.[80]

The Court went on, however, to conclude that the state had created a protected liberty interest by enacting certain statutes and regulations constraining correctional officials' discretion to place prisoners in administrative segregation.[81] The Court identified two factors underlying this conclusion.[82] First, the pertinent statutes and regulations required that certain procedures be followed when a prisoner was transferred to administrative segregation.[83] One statute, for example, mandated the giving of a designated notice to inmates confined in administrative segregation while an investigation of their alleged misconduct was con-

74. *Id.*; *see also* Washington v. Harper, 58 U.S.L.W. 4249, 4252 (1990) (inmate has a constitutionally derived liberty interest in avoiding the involuntary administration of antipsychotic drugs).

75. 459 U.S. 460 (1983).

76. *Id.* at 463-64.

77. *Id.* at 479 n.1 (Stevens, J., dissenting).

78. *Id.* at 466-68.

79. *Id.* at 468.

80. *Id.*

81. *Id.* at 471-72.

82. *Id.*

83. *Id.*

ducted.[84] The statute also commanded that any such investigation commence immediately upon the inmate's confinement, and specified when inmates not involved in misconduct must be released from the special unit.[85] In addition, a regulation of the state's correctional department outlined certain instances when a person confined in administrative segregation was to be afforded a hearing complying with certain statutory requirements.[86]

The second factor identified by the Court was the presence of substantive state law provisions dictating when a prisoner could be sent to administrative segregation.[87] One of what the Court called "specified substantive predicates,"[88] such as " 'the need for control' " or " 'the threat of a serious disturbance,' " had to exist before correctional officials could transfer a prisoner to administrative segregation.[89]

Since *Hewitt v. Helms*, the Supreme Court has further elaborated on when actions of the state create a liberty interest protected by the Due Process Clause. Of particular importance is the Court's decision in *Kentucky Department of Corrections v. Thompson*.[90] In that case, Kentucky inmates challenged the constitutionality of the procedures that the prison administration followed when restricting inmates' visiting privileges. The inmates contended that due process mandated they be afforded additional procedural safeguards before their visiting privileges were suspended or revoked.[91]

---

84. *Id.* at 470 n.6.

85. *Id.*

86. *Id.*

87. *Id.* at 472. The court in *Hewitt* discussed the following Pennsylvania statutes governing administrative segregation:

> An inmate who has allegedly committed a Class I Misconduct may be placed in Close or Maximum Administrative Custody upon approval of the officer in charge of the institution, not routinely but based upon his assessment of the situation and the need for control pending application of procedures under § 95.103 of this title.

37 PA. CODE § 95.104(b)(1) (1978).

> An inmate may be temporarily confined to Close or Maximum Administrative Custody in an investigative status upon approval of the officer in charge of the institution where it has been determined that there is a threat of a serious disturbance, or a serious threat to the individual or others. The inmate shall be notified in writing as soon as possible that he is under investigation and that he will receive a hearing if any disciplinary action is being considered after the investigation is completed. An investigation shall begin immediately to determine whether or not a behavior violation has occurred. If no behavior violation has occurred, the inmate must be released as soon as the reason for the security concern has abated but in all cases within ten days.

Id. at § 95.104(b)(3).

88. 459 U.S at 472.

89. *Id.* at 470 n.6, 471-72 (quoting the statutes at issue).

90. 109 S. Ct. 1904 (1989).

91. *Id.* at 1907.

The debate before the Court centered on the question whether certain state prison regulations and policies created a liberty interest in visiting privileges that would trigger due process safeguards. One of the pertinent policies of the Kentucky Bureau of Corrections provided that "[c]ertain visitors who are either a threat to the security or order of the institution or nonconducive to the successful re-entry of the inmate to the community may be excluded."[92] The policy then listed some of the grounds warranting the exclusion of a visitor from a correctional facility.[93] The policy made it clear, however, that the list was not an exhaustive one.[94]

In an opinion written by Justice Blackmun, the Court observed that for a state-created liberty interest to exist, the state must have placed " 'substantive limitations on official discretion.' "[95] The Court noted that these limitations might be imposed by the state in a variety of ways,[96] the most common entailing two steps.[97] The state first establishes "substantive predicates" or criteria that delimit the way in which official discretion is to be exercised,[98] and then requires that a certain decision be made if the criteria are found to exist.[99]

Applying this two-part test to the regulations and policies governing visiting privileges that were at issue in the case before it, the Court concluded that they did not create a liberty interest falling within the protection of the Fourteenth Amendment. Although the regulations and policies outlined certain "substantive predicates" or bases for excluding visitors from a correctional institution, they did not require a visitor's

92. *Id.* at 1906 n.1.

93. *Id.*

94. The policy provided as follows:

> Certain visitors who are either a threat to the security or order of the institution or nonconducive to the successful re-entry of the inmate to the community may be excluded. These are, but not restricted to:
> A. The visitor's presence in the institution would constitute a clear and probable danger to the institution's security or interfere with the orderly operation of the institution.
> B. The visitor has a past record of disruptive conduct.
> C. The visitor is under the influence of alcohol or drugs.
> D. The visitor refuses to submit to search, if requested to do so, or show proper identification.
> E. The visitor is directly related to the inmate's criminal behavior.
> F. The visitor is currently on probation or parole and does not have special written permission from both his or her Probation or Parole officer and the institutional Superintendent.

95. *Thompson*, 109 S. Ct. at 1909 (quoting Olim v. Wakinekona, 461 U.S. 238, 249 (1983)).

96. *Id.*

97. *Id.*

98. *Id.* (quoting Hewitt v. Helms, 459 U.S. 460, 472 (1983)).

99. *Id.*

exclusion if the predicates were met.[100] A visitor falling within one of the categories could be excluded from the institution, but did not have to be. In addition, visitors not falling within any of the categories could be denied entry into a correctional facility, since the list of excludable visitors was not a comprehensive one. The Court therefore concluded that because of the language of the regulations and policies governing visiting privileges, inmates could not reasonably believe that they could force prison officials to abide by them.[101] The inmates' claim that the regulations and policies created a liberty interest was therefore without merit.[102]

Ironically, the test set forth in *Thompson* for state-created liberty interests may not have been met in either *Vitek v. Jones*[103] or *Hewitt v. Helms*.[104] The statutes and regulations discussed in those cases provided that an inmate "may" be transferred to a mental hospital or to an administrative segregation unit if certain requirements were met, but the regulations did not mandate that such transfers occur.[105] Nonetheless, the Supreme Court concluded in both cases that the governing statutes and regulations gave rise to a protected liberty interest.[106] The results in these two cases seem to conflict with the Court's subsequent admonition in *Thompson* that for statutes or regulations to create liberty interests, they must contain "the requisite relevant mandatory language."[107] The statutes or regulations must "requir[e] that a particular result is to be reached upon a finding that the substantive predicates are met."[108]

Nevertheless, *Vitek* and *Hewitt* can be reconciled with *Thompson*. The statutes and regulations at issue in *Vitek* and *Hewitt*, when specifying when transfers to a mental hospital or administrative segregation might be ordered, implicitly indicated when such transfers would be prohibited. The "substantive predicates," such as the requirement in the Nebraska statute (*Vitek*) of a mental disease or defect for which treatment is unavailable in the prison, or the "need for control" in the Pennsylvania statute (*Hewitt*), would have to be present for a transfer to be permissible. The statutes and regulations were thus, in a sense, mandatory, because they implicitly mandated that no transfers occur un-

100. *Id.* at 1910.
101. *Id.* at 1911.
102. *Id.*
103. 445 U.S. 480 (1980); *see supra* notes 62-74 and accompanying text.
104. 459 U.S. 460 (1983); *see supra* notes 75-89 and accompanying text.
105. The applicable statutes and regulations are cited *supra* in notes 64 and 87.
106. *Vitek*, 445 U.S. at 489-90; *Hewitt*, 459 U.S. at 472.
107. *Thompson*, 109 S. Ct. at 1910.
108. *Id.*

less the conditions set forth in the statutes and regulations were present. In the words of the Court in *Thompson*, the prisoner in *Vitek* could "reasonably expect" that he would not be transferred to a mental hospital unless he suffered from a mental disease or defect for which he could not receive appropriate treatment in prison.[109] Similarly, the prisoner in *Hewitt* could "reasonably expect" that he would not be transferred to administrative segregation unless one of the preconditions outlined in the regulations for such a transfer existed.

2. Segregation of Seropositive Inmates—Deprivation of a Liberty Interest?

This Article next explores the question whether a liberty interest is implicated when a prisoner is transferred to administrative segregation because of his or her seropositivity. Two issues are subsumed within that question: first, is a constitutionally derived liberty interest affected by such a transfer, and second, is a state-created liberty interest at stake? These issues will be discussed in turn below.

a. Deprivation of a Constitutionally Derived Liberty Interest?

Prison officials would obviously point to *Meachum v. Fano*[110] and *Hewitt v. Helms*[111] in support of their argument that asymptomatic seropositive inmates have no constitutionally derived right to remain in the general population. Citing *Meachum*, they would argue that a conviction implicitly authorizes the confinement of a prisoner in a portion of a prison or even in a special prison for medical reasons; such confinement, in other words, is "within the normal limits or range of custody."[112] Since confinement in an AIDS unit is a form of administrative segregation, prison officials might also parrot the Court's remarks in *Hewitt* that prisoners should "reasonably anticipate" being placed in administrative segregation sometime during their period of incarceration.[113]

Vitek v. Jones,[114] however, arguably supports the contrary argument that inmates transferred to a special unit solely because of their seropositivity can invoke the protections of the Due Process Clause. The inmate who brought suit in *Vitek* had also been transferred for medical reasons, yet the Supreme Court concluded that the transfer implicated a liberty interest.[115] According to the Court, a conviction alone did not give the

109. *Id.* at 1911.
110. 427 U.S. 215 (1976).
111. 459 U.S. 460 (1983).
112. *Meachum*, 427 U.S. at 225.
113. *Hewitt*, 459 U.S. at 468.
114. 445 U.S. 480 (1980).
115. *Id.* at 494.

state license to subject a person to the "stigmatizing consequences" of being labelled mentally ill, and to require him to receive unwanted mental health treatment.[116] Similarly, it could be argued with some force that a conviction alone does not permit a state to subject a person to the "stigmatizing consequences" of being labelled an HIV carrier, and to institute quarantine measures opposed not only by the prisoner but perhaps by medical authorities as well.[117]

To be sure, prison officials would contend that *Vitek* is distinguishable. They would note that the Court in *Vitek* took pains to emphasize that two factors underlay the Court's conclusion that a prisoner transferred to a mental hospital had been deprived of a liberty interest—both the stigma attending such a transfer and the "mandatory behavior modification" to which a prisoner transferred to a mental institution would be subjected.[118] Nowhere in its opinion does the Court suggest that the onus of being labelled mentally ill through a transfer to a mental hospital will suffice to create a liberty interest.

On the flip side, however, *Vitek* did not say that the onus of being labelled mentally ill when transferred to a mental institution will *not* suffice to create a liberty interest. The Court simply did not address the issue of the sufficiency of this type of stigma to the finding of a liberty interest because it did not have to, and also probably because it did not want to unless necessary. Had the Court held that the stigma of being labelled mentally ill because of one's isolation with others who are mentally ill would suffice to trigger the protections of the Due Process Clause, its opinion would potentially have had a more far-ranging impact than has its more narrow ruling. Not only could a prisoner transferred to a mental institution invoke the protections of the Due Process Clause, but so might a prisoner transferred to a mental health unit within the prison itself. Through its carefully chosen language, the Court avoided commenting on the constitutional significance of the latter type of transfer.

Despite the Court's commendable restraint in refusing to proffer views on an issue not before it, it would seem that the result in *Vitek* did not and should not have hinged on the fact that the prisoner transferred to the mental institution was subjected to compulsory psychiatric treatment. Had the prisoner been involuntarily transferred to a mental institution where he was not subject to compulsory psychiatric treatment, he would still have been deprived of a liberty interest.

116. *Id.*
117. *See infra* note 138 and accompanying text.
118. *Vitek*, 445 U.S. at 494.

In *Vitek*, the Court rationalized its conclusion that a prisoner transferred to a mental institution and subjected to involuntary psychiatric treatment is deprived of a liberty interest by observing that "[s]uch consequences visited on the prisoner are qualitatively different from the punishment characteristically suffered by a person convicted of crime."[119] A conviction, without more, therefore does not implicitly authorize the infliction of those consequences on a prisoner. Similarly, involuntary confinement in a mental institution, as a result of which one may forever after be labelled "crazy," is a consequence different in kind from those customarily experienced by persons convicted of a crime; a conviction may officially denominate a person as criminally inclined, but not necessarily as mentally ill. Otherwise, persons, upon conviction, could be summarily carted away to mental institutions.

What is in effect the quarantining of seropositive prisoners also arguably inflicts consequences upon those prisoners that are "qualitatively different" from those normally attending a criminal conviction. Not only are such prisoners isolated from the general prison population as are inmates transferred to a mental hospital, but they also suffer stigma, the effects of which can equal or surpass the stigmatizing consequences of being categorized as mentally ill.

News stories are replete with accounts of the discrimination faced by identified carriers of the AIDS virus.[120] Persons whose seropositivity has become known have been fired, evicted, kicked out of school, assaulted, and otherwise socially isolated and scorned.[121] Many have lost their medical insurance,[122] a particular concern since so many will incur monumental medical expenses while they are ill. Like their seropositive counterparts on the outside, prisoners have been vilified because of their seropositivity by both prison staff and other prisoners.[123] Indeed, some prisoners have even rioted in an attempt to enforce their demands that seropositive prisoners be isolated.[124]

119. *Id.* at 493.

120. *See supra* notes 6-9 and accompanying text.

121. *Id.*

122. *See, e.g.*, 3 AIDS Pol'y & Law (Buraff Pubs.) No. 22, at 7 (1988) (describing lawsuit alleging that insurance company denied application for disability insurance after testing the applicant's blood sample for HIV without his consent); *id.*, No. 15 (1988) at 8 (describing health insurance program of one convenience store chain that excludes from coverage any employee with AIDS who contracted the disease other than from his or her spouse or through a blood transfusion).

123. AIDS AND THE LAW 241 (H. Dalton, S. Burris & Yale Law Project eds. 1987).

124. *See, e.g., Belgian Prisoners Mutiny to Demand Transfer of AIDS Sufferers*, Reuters Ltd., May 2, 1987 (available on NEXIS) (reporting riot of 100 Belgian prisoners demanding the transfer of inmates with AIDS).

Prison officials would probably rejoin, however, that *Hewitt* has already resolved that confinement in administrative segregation for nondisciplinary reasons is envisioned when a prison sentence is imposed.[125] Since prisoners should "reasonably anticipate" placement in administrative segregation sometime during their terms of incarceration, no liberty interest is implicated by a transfer to administrative segregation, whatever the reason for the transfer.[126]

Even assuming, however, that the Court in *Hewitt* was not misguided in its assessment of the implications of the transfer to administrative segregation at issue in that case, *Hewitt* arguably does not and should not govern transfers of seropositive prisoners to AIDS units pursuant to a blanket policy of isolating such prisoners from the general prison population. To be sure, *Hewitt* justified transfers to administrative segregation to protect the transferred prisoner's safety or to protect other prisoners from the prisoner who was transferred,[127] but prison officials also might purport to justify the segregation of seropositive inmates on the grounds that such segregation is necessary to protect the transferred inmates from being killed by inmates fearful of contracting AIDS,[128] or to protect other inmates or staff from becoming infected with the virus. Protective impulses also generally underlie the transfer of mentally ill prisoners to mental hospitals. If such prisoners remained in prisons where they could not receive adequate mental health care, they might pose a threat to their own or others' safety. Yet the Supreme Court in *Vitek* still concluded that placement in a mental institution falls outside the authorized confines of a prison sentence.[129] In other words, persons sent to prison, even if mentally ill, would not "reasonably anticipate" summary placement in a mental institution as part of the sentence imposed. Consequently, before being transferred to a mental institution, prisoners are entitled to the benefit of certain procedural protections designed to ensure that such institutionalization is indeed warranted.

Because of the *Vitek* decision, the claim that seropositive prisoners transferred as a matter of course to AIDS units or prisons have been deprived of a liberty interest cannot be summarily dismissed with the argument that prisoners should "reasonably anticipate" at the time they are sent to prison being subjected at some later time to more restrictive

125. Hewitt v. Helms, 459 U.S. 460, 468 (1983).

126. *Id.*

127. *Id.*

128. *See Prison Cell of AIDS-Exposed Inmate is Burned*, United Press Int'l, Feb 18, 1987 (available on NEXIS) (reporting burning of seropositive inmate's cell by other inmates who learned of his HIV status).

129. Vitek v. Jones, 445 U.S. 480, 494 (1980).

confinement for nonpunitive reasons. Rather, *Vitek* suggests that the reasons for and the nature of the administrative confinement need to be examined to determine if the mal-effects of the confinement are different in kind, rather than simply in degree, from the types of adverse consequences that normally attend many forms of administrative confinement.[130] If the detrimental consequences of the administrative confinement are sufficiently different from those experienced by most prisoners segregated from the general prison population for administrative reasons, then a prisoner so confined will have been deprived of a liberty interest and be entitled to the protections of due process.

Proponents of the segregation of seropositive inmates would probably point out that the removal of sick inmates, particularly the carriers of infectious diseases, from the general prison population is a routine practice in the nation's prisons.[131] Consequently, they would argue, the medical segregation of seropositive inmates who are capable of transmitting HIV does not inflict the type of unusual and cataclysmic consequences that would support the finding of a liberty interest.

Nevertheless, the segregation of asymptomatic, seropositive prisoners can be distinguished from the frequent transfer of sick inmates to the prison infirmary for medical care and treatment. First of all, asymptomatic, seropositive prisoners may not be sick in the sense that they need medical care or treatment.[132] To the extent that medical treatment in the form of medication is available to guard against the onset of AIDS,[133] this medication can, like most medication prescribed for inmates, be dispensed to them in their cells or during a brief visit to the prison infirmary. To argue that the segregation of seropositive inmates implicates no liberty interest because transfers of inmates for medical reasons are quite common is therefore disingenuous, since transfers of inmates who are not presently sick, who cannot readily infect others, and who can easily receive any needed medication through standard prescription drug distribution procedures are not common at all.

130. *Id.* at 493.

131. *See* NAT'L COMMISSION ON CORRECTIONAL HEALTH CARE, STANDARDS FOR HEALTH SERVICES IN PRISON 35 (1987) (requiring that prisons develop procedures for handling inmates with communicable diseases, including provisions for isolation of such inmates when "medically indicated") [hereinafter STANDARDS].

132. SURGEON GENERAL'S REP., *supra* note 2, at 11.

133. The National Institute of Allergy and Infectious Diseases has recommended that the AIDS-fighting drug AZT be made available to asymptomatic HIV-infected persons who have low T4 cell levels. 4 AIDS Pol'y & Law (Buraff Pubs.) No. 16, at 1-2 (1989). Clinical trials have revealed that the administration of AZT to such individuals may substantially delay the onset of AIDS or ARC. *Id.*

Second, the segregation of HIV-positive inmates in a special unit of a prison inflicts consequences not only different in degree, but different in kind from the consequences that generally ensue when sick prisoners are housed in the prison infirmary. When inmates are transferred to the prison infirmary for medical care and treatment, their stay will generally be temporary and often for only a short period of time; when they recover, they will usually be transferred back to the general prison population. By contrast, if a prison adopts a policy of segregating seropositive inmates, this so-called "medical segregation" will continue as long as the prisoners remain incarcerated, perhaps for many years or even a prisoner's lifetime.

In addition, a prisoner transferred to a prison infirmary usually will not be stigmatized by the transfer. Such maladies as a broken leg, a lacerated forehead, or a diseased heart simply do not invite the opprobrium of a sexually transmitted disease. In any event, even if a prisoner were sent to the infirmary for treatment of a disease such as syphilis, the diagnosis would normally be kept confidential,[134] so the prisoner could generally avoid the stigmatic effects that occur when one is known to have a venereal disease.

A seropositive prisoner transferred to an AIDS unit, on the other hand, cannot avoid these stigmatic effects since the transfer itself serves to disclose the prisoner's HIV status. In addition, the revelation that a prisoner is HIV-positive would likely be considered more stigmatizing than the disclosure that a prisoner has some other sexually transmitted disease. Because HIV is communicable and AIDS is presently virtually always fatal,[135] the specter of the disease will engender more fear and even hysteria than will the accusation that a person has some other nonfatal and perhaps curable sexually transmitted disease. The stigma that attends one's identification as a carrier of the AIDS virus is further aggravated by the fact that HIV disease has thus far been mainly concentrated in two groups traditionally disfavored by society as a whole—homosexuals and intravenous drug abusers.[136] Consequently, when a prisoner is segregated because of HIV-positivity, the prisoner may be further scorned as assumptions are drawn about the prisoner's sexual proclivities or use of illegal drugs.

The third reason that the mass segregation of seropositive prisoners cannot be treated as simply one of many forms of special confinement for

134. *See* STANDARDS, *supra* note 131, at 44 (mandating confidentiality of medical records).

135. *See supra* note 39.

136. NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, THE CAUSE, TRANSMISSION, AND INCIDENCE OF AIDS 3 (1987).

medical reasons is that the decision to segregate asymptomatic, seropositive inmates has not been, and in the future will likely not be, a medical decision.[137] While prison doctors normally decide whether or not a prisoner needs to be housed in a prison hospital unit for medical reasons, doctors are not the ones instituting mass segregation policies. In fact, because of the limited ways in which the AIDS virus is transmitted, most medical authorities are adamant in their opposition to the isolation of individuals, whether inside or outside prison, simply because of their HIV-positivity.[138]

The decision to segregate seropositive inmates has been a policy, rather that a medical, decision. This policy question has often been considered by legislatures despite the opposition not only of medical authorities but of correctional authorities as well.[139] Accordingly, while one might blithely attempt to lump the segregation of seropositive inmates with other medical confinement decisions, a closer examination reveals critical distinctions between the segregation decision, which is made by legislatures or correctional officials, and other decisions made by doctors concerning the medical care and treatment of ill prisoners. Although prisoners can safely assume that at some point while they are incarcerated they will be hospitalized for medical reasons, they should not necessarily "reasonably anticipate" "medical" isolation that is not medically indicated, is extremely stigmatizing, and will last the duration of their prison sentences.

Vitek confirms that even transfers of prisoners that are medically based may effect a deprivation of a liberty interest.[140] Under the statute before the Court, transfers of prisoners to mental institutions occurred only upon the recommendation of a physician or a psychologist.[141] Yet the Court concluded that the consequences of being transferred to a mental institution were onerous enough and different enough from those normally experienced by prisoners to require that prisoners transferred to such institutions be afforded the benefits and protections of due

137. *See* NIJ UPDATE, *supra* note 40, at 36.

138. *See, e.g,* AM. CORRECTIONAL HEALTH SERVICES ASS'N CORRECTIONAL INFORMATION BULLETIN: ACQUIRED IMMUNE DEFICIENCY SYNDROME 10 (1988); NAT'L COMMISSION ON CORRECTIONAL HEALTH CARE, POL'Y STATEMENT REGARDING THE ADMIN. MANAGEMENT OF INMATES WITH HIV POSITIVE TEST RESULTS, ARC, OR AIDS 2 (Nov. 8, 1987).

139. *See, e.g.*, Gongwer News Service Rep. No.102, at 5 (May 26, 1988) (reporting opposition of Michigan Department of Corrections to proposed legislation to segregate all HIV-positive prisoners).

140. Vitek v. Jones, 445 U.S. 480, 494 (1980).

141. *Id.* at 483 n.1.

process.[142]

So, too, are the consequences of being segregated in the AIDS unit of a prison. In fact, in some ways, the adverse consequences of being confined in a special AIDS unit are greater than those experienced by prisoners confined in a mental hospital. First, while a seropositive inmate will never become nonseropositive, and thus eligible for release from the AIDS unit, mentally ill prisoners can be returned to prison once they become well or their mental problems become controllable. Thus, prisoners confined under a mass segregation policy will often be incarcerated in special AIDS units much longer than mentally ill prisoners are confined in mental hospitals.

In addition, the stigmatizing effects of being labelled HIV-positive are arguably greater than those suffered by prisoners officially categorized as mentally ill. The pronouncement that a prisoner is mentally ill and must be transferred to a mental hospital will likely come as no surprise to correctional staff, other prisoners, and even family members, who will often have deduced from the prisoners's aberrational behavior that he or she has mental problems. The decision to transfer the prisoner to the mental institution will only put an official imprimatur on a diagnosis fully anticipated by others. The stigmatizing consequences of this official action are therefore somewhat limited.[143]

By contrast, since one's HIV status is not readily apparent to others, most people will be unaware that a person is seropositive. Consequently, if seropositive prisoners are transferred to a special AIDS unit in a prison, the stigmatizing consequences of being identified as HIV-positive will be attributable to the government's actions in transferring the prisoners.

In *Muhammad v. Carlson,*[144] the Eighth Circuit Court of Appeals addressed a prisoner's claim that his transfer to an AIDS unit violated his procedural due process rights, and rejected the argument that a constitutionally derived liberty interest was at stake.[145] The court stated that any stigma arising out of the transfer was due to the public's fears, many of which are irrational, about the disease and was not attributable to the government.[146] This view of liberty interests, however, if adopted by the Supreme Court, would have doomed the prisoner's claim in *Vitek.* The stigma that attaches when one is officially denominated mentally ill

142. *Id.* at 493-94.

143. Parham v. J.R., 442 U.S. 584, 601 (1979).

144. 845 F.2d 175 (8th Cir. 1988).

145. *Id.* at 178-79.

146. *Id.* at 178.

also "arises primarily from public fear of, and misunderstanding about, the disease."[147] Yet the Supreme Court in *Vitek* underscored the significance of this stigma to its conclusion that a prisoner was deprived of a liberty interest when transferred to a mental institution.[148] In addition, there is a bit of irony in the Eighth Circuit's cavalier dismissal of the significance of the stigma of being identified as HIV-positive by the government on the grounds that this stigma is really the product of unfounded public fears, since governmental quarantine decisions will certainly help to produce, encourage, and flame such fears.

This criticism of *Muhammad v. Carlson* is not meant to imply that the stigma engendered by governmental action will by itself effect a deprivation of a liberty interest. Whether rightly or wrongly, the Supreme Court in *Paul v. Davis* rejected that notion.[149] In that case, the plaintiff contended that he was deprived of liberty without due process of law when law enforcement officials listed the plaintiff as an "active shoplifter" and included his photograph in a flyer distributed to local merchants.[150] At the time the flyer was distributed, the plaintiff had not been, nor was he ever, convicted of shoplifting.[151] But despite the obvious disrepute that follows when one is labelled a thief, the Court found that the plaintiff had not been deprived of any liberty interest protected by the Due Process Clause.[152]

In explaining its decision,[153] the Court distinguished its previous analysis in *Wisconsin v. Constantineau*.[154] The plaintiff in *Constantineau* brought suit against a police chief after the police chief had had notices posted in all local stores where liquor was sold announcing that no alcoholic beverages were to be sold to the plaintiff for one year.[155] The plaintiff maintained that through this governmental action, resulting in her being labelled an alcoholic, she was deprived of liberty without due process of law.[156] The Court agreed, observing that

> [w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. "Posting" under the Wisconsin Act may to some be merely the mark of illness, to others it

147. *Id.*
148. Vitek v. Jones, 445 U.S. 480, 494 (1980).
149. 424 U.S. 693 (1976).
150. *Id.* at 695.
151. *Id.* at 696.
152. *Id.* at 712.
153. *Id.* at 708-09.
154. 400 U.S. 433 (1971).
155. *Id.* at 435.
156. *Id.* at 434-36.

> is a stigma, an official branding of a person. The label is a degrading one.[157]

One might wonder why circulating notices that in effect announce that a person is an alcoholic deprives that person of a liberty interest while circulating notices that describe a person as a thief does not. The Supreme Court in *Paul v. Davis* attempted an explanation by pointing out that the governmental action at issue in *Constantineau* had done more than stigmatize the plaintiff.[158] Because of the notices distributed to liquor stores, the plaintiff had also lost the "right" that she had had previously to buy liquor.[159] By contrast, the allegedly calumnious notices at issue in *Davis* had at most stigmatized the plaintiff; despite the circulation of the notices, the plaintiff could still shop and avail himself of all of the rights that he held under the laws of the state.

Davis thus stands for the proposition that a person stigmatized by actions of the government has not necessarily been deprived of a liberty interest. According to the Court, the person must have suffered some additional loss before he or she will be afforded the protections of the Due Process Clause.[160] What additional loss is necessary is the problematic question.

In *Davis*, the Court in its discussion of the additional loss suffered by the plaintiff in *Constantineau* emphasized that the plaintiff had been deprived of a "right" that she had previously enjoyed under state law—the right to buy liquor.[161] Prison officials defending a suit challenging the mass segregation of seropositive inmates would presumably focus on this language, pointing out that prisoners often have no "right" under the law of a state to remain in a particular prison or part of a prison. It follows, the officials would argue, that such segregation effects no deprivation of a liberty interest since segregation at most stigmatizes prisoners and deprives them of privileges that they enjoy only at the pleasure of correctional officials.

This line of thinking is misguided, however, for several reasons. First, to have the finding of a liberty interest hinge on whether the stigma engendered by governmental action is accompanied by the loss of a "right" or a "privilege" is to resurrect the much-maligned "right-privilege" distinction that once governed the Court's handling of due process claims, but that has since been explicitly and emphatically rejected by the

157. *Id.* at 437.
158. Paul v. Davis, 424 U.S. 693, 708-09 (1976).
159. *Id.* at 708.
160. *Id.* at 711-12.
161. *Id.* at 708.

Court.[162] As the Court has recognized, to extend the protections of due process to the loss of "rights" alone inadequately guards against the arbitrary and abusive exercise of governmental authority that the Due Process Clauses were designed to avert.[163]

Second, to require the loss of a state-created right before a constitutionally derived liberty interest will be recognized confuses constitutionally derived liberty interests with the quite distinct state-created liberty interests. As discussed earlier, the Supreme Court has recognized that state-imposed substantive limitations on the discretion of government officials may lead to the creation of a liberty interest.[164] But determining whether enough substantive constraints have been placed on official decisionmaking to create a liberty interest seems closely allied with deciding whether the government has deprived a person of a right. Consequently, the focusing on the deprivation of "rights," if appropriate at all, would appear best suited to the inquiry whether a deprivation of a state-created liberty interest has occurred.

The question remains whether the mass segregation of seropositive prisoners does anything more than stigmatize the prisoners since, according to *Paul v. Davis,*[165] stigmatization alone will not support the finding that a person has been deprived of a liberty interest. The obvious answer to that question is "yes." Prisoners who have been segregated because of their HIV-positivity have complained about the onerous conditions of their confinement as compared to the conditions existing in the general prison population units.[166] Certain common threads permeate the complaints of these prisoners. They have almost uniformly claimed that as a result of their segregation, their freedom of movement within the prison has been substantially curtailed.[167] Because of this limited mobility, their work, educational, and recreational opportunities have been substantially reduced.[168] This inhibition of their educational and work opportunities may in turn affect their prospects for parole, since a favorable work or school record enhances their chances of being released on parole. Other complaints abound, with segregated, seropositive prisoners protesting such segregation effects as limited visiting privileges, curtailed opportunities to worship with other prisoners, and restricted access to prison li-

162. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 262 (1970).

163. Daniels v. Williams, 474 U.S. 327, 331-32 (1986).

164. *See supra* note 60 and accompanying text.

165. *See supra* notes 149-59 and accompanying text.

166. *See, e.g.*, Cordero v. Coughlin, 607 F. Supp. 9, 10 (S.D.N.Y. 1984); *see also* cases cited in NIJ REP., *supra* note 11, at 100; and NIJ UPDATE, *supra* note 40, at 47-48.

167. AIDS AND THE LAW, *supra* note 123, at 241.

168. *Id.*

braries, including law libraries.[169] It would seem then that the stigmatizing effects of being officially characterized as a carrier of HIV and the substantially less favorable conditions of confinement that generally attend incarceration in an HIV unit of a prison should lead to a finding that the mass segregation of seropositive inmates deprives them of liberty, thereby entitling them to the protections of due process.

The somewhat more difficult question is whether the concentration of all HIV-positive prisoners in one prison where only such prisoners are incarcerated implicates a liberty interest. It is possible that since those prisoners might not be thought to pose a risk of transmitting the AIDS virus to any uninfected prisoner,[170] they would be afforded the same privileges that are afforded prisoners in the general population units in other prisons in the prison system. Such a possibility seems remote, however, since correctional officers and staff probably would fear the threat of contagion. The same mentality, or lack thereof, that would prompt the mass segregation of seropositive inmates in the first place would likely lead correctional officials to capitulate to those fears and severely restrict the freedom of movement and privileges of inmates incarcerated in HIV prisons.

b. Deprivation of a State-Created Liberty Interest?

Whether seropositive inmates transferred to a special AIDS unit of a prison as part of a mass segregation policy have been deprived of a state-created liberty interest will depend on the language of the pertinent statutes and administrative provisions governing such transfers. Most likely, however, a state-created liberty interest will be implicated by such a transfer.

Statutes dealing with the segregation of all HIV-positive inmates might mandate such segregation. Prison officials would not be left with the option of not implementing a mass segregation scheme. Thus, "substantive limitations" would be imposed on the discretion of prison officials, limitations that are necessary before a state-created liberty interest can be found.[171] The prison officials would have to segregate seropositive inmates, and they could not segregate uninfected inmates in the HIV unit.

169. *Id.*; NAT'L GAY RIGHTS ADVOCATES & NAT'L LAWYERS GUILD AIDS NETWORK, AIDS PRACTICE MANUAL: A LEGAL AND EDUCATIONAL GUIDE VII-6 (2d ed. 1988).

170. *But see infra* note 202 and accompanying text.

171. Olim v. Wakinekona, 461 U.S. 238, 249 (1983); *see also* Kentucky Dep't of Corrections v. Thompson, 109 S. Ct. 1904, 1909 (1989).

Even if a statute or regulation were couched in language simply permitting such mass segregation of seropositive inmates, an argument exists that a liberty interest would still be implicated if the segregation of seropositive inmates were instituted pursuant to the statute or regulation. If a statute said, for example, that the director of the department of corrections "may" direct the segregation of all seropositive inmates, the statute would in effect be saying that inmates have the right not to be placed in the HIV unit unless they test positive for the AIDS virus. Under such a statute, HIV-negative inmates would have more than a "unilateral expectation" or hope that they would not be shunted off to the HIV unit of the prison; rather, they would have "a legitimate claim of entitlement" not to be transferred to that unit unless they met the statutory condition for such a transfer.[172]

The Supreme Court's analysis of state-created liberty interests in *Vitek v. Jones*[173] supports the view that the authorized mass segregation of HIV-positive inmates under state law may create a liberty interest, even if the language of the pertinent statute or regulation is permissive rather than mandatory. In *Vitek*, the statute controlling the transfer of prisoners to mental hospitals provided in part as follows:

> When a physician designated by the Director of Correctional Services finds that a person committed to the department suffers from a physical disease or defect, or when a physician or psychologist designated by the director finds that a person committed to the department suffers from a mental disease or defect, the chief executive officer may order such person to be segregated from other persons in the facility. If the physician or psychologist is of the opinion that the person cannot be given proper treatment in that facility, the director *may* arrange for his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available.[174]

Although the decision to transfer a mentally ill prisoner to a mental hospital fell within the director's discretion under the statute, the Court still found a liberty interest rooted in state law because a prisoner in the state had an " 'objective expectation, firmly fixed in state law and official Penal Complex practice,' that a prisoner would not be transferred unless he suffered from a mental disease or defect that could not be adequately

172. Greenholtz v. Inmates of the Neb. Penal and Correctional Complex, 442 U.S. 1, 7 (1979) (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

173. 445 U.S. 480 (1980).

174. *Id.* at 483 n.1 (emphasis added) (quoting NEB. REV. STAT. § 83-180(1) (1976).

treated in the prison."[175] Similarly, even if correctional officials had the option under state law of instituting or not instituting a policy of segregating all HIV-positive inmates, and chose to adopt such a policy, prisoners would have an "objective expectation, firmly fixed in state law and official penal practice" that they would not be segregated in the HIV unit unless they were infected with the AIDS virus. Consequently, a transfer of a prisoner to a special AIDS unit in a prison as part of a mass segregation policy would in all likelihood deprive the prisoner of not only a constitutionally derived liberty interest but a state-created one as well.

B. Procedural Safeguards

Deciding that inmates transferred to administrative segregation because of their seropositivity have been deprived of a liberty interest is only the first step in the constitutional inquiry, for the Due Process Clauses do not wholly proscribe deprivations of liberty. If they did, the malefactions of criminals would often go unpunished by the government. What the Due Process Clauses prohibit are governmental deprivations of liberty effected without due process of law. In the words of the Supreme Court, we must therefore determine "what process is due"[176] when asymptomatic, seropositive inmates are isolated from the rest of the prison population.

The Court has enunciated several general principles when analyzing the dictates of due process. First, the Court has said that a fundamental requirement is that the person being deprived of an interest protected by the Due Process Clause receive notice of and an opportunity to object to the government's deprivatory action.[177] Such notice and opportunity to object are considered essential in guarding against unfounded governmental deprivations of life, liberty, or property.

Second, the Court has emphasized that affording an opportunity to object to the government's action means providing an "opportunity to be heard 'at a meaningful time and in a meaningful manner.' "[178] If the person aggrieved by the actions of the government is able to voice opposi-

175. *Id.* at 489-90 (quoting Miller v. Vitek, 437 F. Supp. 569, 572-73 (D. Neb. 1977)); *see also* Hewitt v. Helms, 459 U.S. 460 (1983), *discussed supra* in notes 81-89 and accompanying text. In *Hewitt*, the applicable regulation said only that a prisoner "may" in certain circumstances be transferred to administrative segregation. *Id.* at 463 n.1 *See supra* note 87 (Pennsylvania statutes).

176. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

177. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 13 (1978).

178. Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

tion only perfunctorily to what is really a *fait accompli*, then the protection from arbitrary governmental action afforded by the so-called opportunity to object is only illusory.

Finally, the Supreme Court has repeatedly emphasized that due process is a flexible concept, and that its meaning will depend on the context in which its protections are invoked.[179] Consequently, the procedures adopted by the government to ensure the reliability of decisions made effecting deprivations of interests protected by the Due Process Clauses will not necessarily have to mirror the types of elaborate procedural safeguards attending criminal trials.[180] The exact procedures required will depend instead on the results of applying the balancing test propounded by the Court in *Mathews v. Eldridge*.[181] Under this test, the following three factors are considered and weighed:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[182]

Before considering what procedural safeguards must attend the transfer of a prisoner to an HIV unit of a prison, one must resolve the question of the extent to which a prisoner's seropositivity must be confirmed *before* his or her transfer to an HIV unit. Some prison officials would presumably contend that a summary transfer of a prisoner suspected of being seropositive is constitutional provided that at some point following the transfer, steps are taken to confirm the prisoner's seropositive status. Prisoners transferred to HIV units, on the other hand, would probably argue that some sort of hearing at which a prisoner's seropositivity is established must precede the prisoner's transfer to an HIV unit. Resolution of the question raised by this debate requires the weighing of the three factors outlined in *Mathews v. Eldridge*.

1. The Private Interest at Stake

The first factor to be considered under the Court's due process balancing approach is the private interest affected by the governmental action[183]—here, the private interest at stake is the prisoner's interest in

179. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 560 (1974); *Morrissey*, 408 U.S. at 481.
180. *Morrissey*, 408 U.S. at 480.
181. 424 U.S. 319 (1976).
182. *Id.* at 335.
183. *Id.*

remaining in the general prison population unit rather than being confined in the prison's HIV unit.

Prison officials would dismiss the significance of this interest by pointing to *Hewitt v. Helms*.[184] In *Hewitt*, the Court addressed the question of what procedural safeguards must attend a prisoner's transfer to administrative segregation. In answering this question, the Court observed that the prisoner's interest in remaining in the general population unit was "not one of great consequence" since the prisoner was "merely being transferred from one extremely restricted environment to an even more confined situation."[185] Likewise, prison officials would probably contend, the interest affected by a prisoner's transfer to an HIV unit is "not one of great consequence" since the prisoner is merely being transferred from one restricted environment to an even more confined one.

The transfer of a prisoner to an HIV unit, however, can be distinguished from the confining of a prisoner in a conventional administrative segregation unit as was done in *Hewitt*. First, a prisoner transferred to an HIV unit will suffer the opprobrium of being labelled an AIDS carrier. This label will in turn cause many to treat the prisoner as a pariah—a person to be scorned, shunned, and avoided. The end result may be prisoners whose marriages and other family and social ties have disintegrated, whose future job prospects upon release have vanished, and whose ability to acquire housing and health insurance upon release from prison is impeded because they have been typecast as HIV-positive.

The stigmatic effects of being labelled an AIDS carrier will be further exacerbated because of the ways in which the AIDS virus is usually transmitted.[186] Most people will assume that the inmates confined in the HIV unit are either drug addicts or gay; consequently, such inmates will then face additional contempt, ridicule, and differential treatment when confronted by members of a society which not only condemns drug abuse but is largely homophobic.

By contrast, prisoners placed in traditional administrative segregation units to protect themselves or others do not suffer stigma in the amount or with the frequency that accompanies placement in an HIV unit. Prisoners' confinement in administrative segregation normally will not affect the willingness of others in the future to associate with them or, upon release, to hire, house, or insure them. And even if a prisoner is on occasion somewhat stigmatized by a transfer to administrative segregation, such stigmatization does not automatically attend such transfers, in

184. 459 U.S. 460 (1983); *see supra* notes 75-89 and accompanying text.

185. *Id.* at 473.

186. *See supra* notes 22-23 and accompanying text.

contrast to transfers to HIV units, since so many different reasons may prompt a prisoner's placement in administrative segregation. For example, inmates may be removed from the general prison population because prison officials are concerned for their safety, a reason that would hardly cause most people to spurn the segregated inmates.

That the stigma attending an inmate's transfer to an HIV unit would be considered significant by the Supreme Court when assessing the private interest affected by such a transfer is apparent from the Court's discussion in *Hewitt*,[187] in which the Court emphasized the absence of any stigma accompanying a transfer to administrative segregation in Pennsylvania prisons.[188] In depreciating the importance of the private interest at stake in *Hewitt*, the Court also took pains to note that there was no evidence that confinement in administrative segregation would have any "significant effect" on an inmate's parole prospects.[189] By contrast, it is conceivable that some states will conclude that the release of at least some seropositive prisoners, such as those convicted of rape and other sex offenses, should be deferred as long as legally possible. These inmates will have a particularly acute interest in ensuring that the determination of seropositivity is a reliable one.

In addition, prisoners transferred to an HIV unit most likely will lose coveted work assignments, and their educational opportunities often will be diminished.[190] As a result, their chances of procuring parole release may be lowered by their inability to demonstrate that they are ready to take on the responsibilities of the outside world. In addition, the prisoners may lose the opportunity to earn good-time credits for their participation in work and educational programs.[191]

Prison officials might rejoin that although prisoners transferred to administrative segregation may forfeit jobs or school placements, the Court in *Hewitt* was still unimpressed with the private interest affected by a prisoner's transfer to administrative segregation.[192] The degree, however, to which a prisoner's placement in an HIV unit will interfere with work and educational opportunities and in turn a prisoner's parole prospects will generally be much greater than the interference which results when prisoners are subjected to more traditional forms of administrative segregation. For example, under the prison regulations at issue in *Hewitt*, prisoners had to be released from administrative segregation

187. *Hewitt*, 459 U.S. at 473.
188. *Id.*
189. *Id.*
190. AIDS AND THE LAW, *supra* note 123, at 241.
191. *See, e.g.*, LA. REV. STAT. ANN. § 15.571.3B (West 1981).
192. *Hewitt*, 459 U.S. at 473.

within ten days unless they were charged with a disciplinary infraction and confined in segregation pending a disciplinary hearing.[193] By contrast, under a prison policy of segregating seropositive prisoners, seropositive inmates will be confined in an HIV unit as long as they are in prison, which for some prisoners will be for the rest of their lives.

The more extended confinement of prisoners in HIV units will make more substantial their interest in avoiding transfers to such units, not only because of the impact that this confinement may have on their chances of being released on parole, but also because of the longer period of time that they will suffer the loss of privileges enjoyed by the general prison population. As discussed earlier, similarities abound among the complaints of prisoners confined in HIV units.[194] These prisoners have almost uniformly complained about curtailed visiting privileges, limited access to prison libraries, including law libraries, the dearth of recreational activities, and the loss, upon transfer, of educational and work opportunities.[195] While the Supreme Court may have been willing to cavalierly ignore these kinds of negative consequences when a prisoner will be confined only temporarily in administrative segregation, these consequences make more weighty the private interest at stake when prisoners will experience the more onerous conditions of confinement for the duration of their stay in prison.

Another distinction between confinement in an HIV segregation unit and the type of administrative segregation experienced by the prisoner in *Hewitt* is that a seropositive prisoner, once having contracted the AIDS virus, is unable to take any steps through which he or she can avoid confinement in the HIV unit. By contrast, the prisoner in *Hewitt* was transferred to administrative segregation because of his suspected involvement in a prison riot, clearly conduct within his control.[196] To the extent that a prisoner can readily avoid the deleterious consequences of administrative segregation, the gravity of the harm ensuing from such segregation is less significant.[197] In other words, the private interest with which the government interferes is less weighty than the private interest affected when a prisoner is confined in administrative segregation for an immutable characteristic over which he or she now has no control.

193. *Id.* at 470 n.6.

194. *See supra* notes 166-69 and accompanying text.

195. *Id.*

196. *Hewitt*, 459 U.S. at 463-64.

197. *Cf.* Tennessee v. Garner, 471 U.S. 1, 28-29 (1985) (O'Connor, J., dissenting) (observing, in a fourth amendment case, that the intrusiveness of a police officer's use of deadly force to apprehend a fleeing burglar is diminished because the suspect can forestall this use of force by complying with the officer's direction to halt).

Prison officials might argue, however, that seropositivity is a condition over which prisoners have control. They can avoid contracting the AIDS virus by refraining from the high risk activities, such as homosexual sexual encounters and sharing of needles when using intravenous drugs, through which the virus is spread.[198]

This facile view of prisoners' ability to avoid confinement in an HIV unit ignores the fact that most prisoners unwittingly become infected with the virus before their incarceration in prison.[199] Many of these individuals are probably unaware of or do not fully appreciate the risks of becoming HIV-infected when they engage in the activities through which the virus is transmitted.[200] To suggest that these prisoners, not fully understanding the risks of AIDS to which they are exposing themselves and probably not anticipating their future incarceration, have the same ability to avoid administrative segregation as does the prisoner who punches a correctional officer in the nose is to ignore the difference between intentionally assuming a risk and inadvertently encountering a risk.

A final reason a prisoner might have a greater stake in avoiding confinement in an HIV unit than in avoiding other types of administrative segregation is that he or she may face a greater chance of contracting HIV when confined in that unit than when confined in the general prison population. Prisoners identified as seropositive might assume that they have nothing to lose by engaging in sex with other seropositive prisoners. In fact, however, medical experts have indicated that repeated exposures to HIV may enhance the risk that seropositivity will eventually culminate in AIDS.[201]

In addition, prisoners transferred to an HIV unit may not actually be HIV carriers; they may simply have been incorrectly identified as seropositive.[202] If these nonseropositive prisoners then voluntarily or involuntarily engage in high risk activities with prisoners who are actually HIV-positive, the nonseropositive inmates may become infected for the first time with HIV and eventually die from AIDS.

198. *See supra* notes 22-23 and accompanying text.

199. NIJ REP., *supra* note 11, at 29-31 (reporting data suggesting low rates of transmission of HIV in prison).

200. JOINT COMM. ON AIDS IN THE CRIM. JUSTICE SYS. OF THE COMM. ON CORRECTIONS AND THE COMM. ON CRIM. JUSTICE OPERATIONS AND BUDGET OF THE A. OF THE BAR OF THE CITY OF N.Y., AIDS AND THE CRIM. JUSTICE SYS.: A FINAL REP. AND RECOMMENDATION 92 (1989) (citing the difficulty of locating intravenous drug abusers and educating them about HIV transmission).

201. 3 AIDS Pol'y & Law (Buraff Pubs.) No. 19, at 10 (1988).

202. *See infra* notes 286-94 and accompanying text.

The extent to which prisoners will have a greater chance of contracting HIV because of their isolation in an HIV unit and the concomitant effect on the weight of the private interest at issue will depend on several factors. Prison officials can diminish the risk by, for example, taking steps to ensure that the results of HIV tests are reliable. They can also educate prisoners about the risks, even when they are already seropositive, of having sex with other inmates in the HIV unit. And, of course, they can take precautions to ensure that prisoners do not have the opportunity to engage in the sort of high-risk activities that will further expose them to the AIDS virus. If the precautions taken confine the prisoners in their cells virtually all day, however, the harm inflicted on inmates confined in HIV units will be exacerbated, accentuating the significance of the private interest at stake when prisoners are transferred to those units.

For a number of reasons, then, the private interest affected by a prisoner's transfer to an HIV unit is much more substantial than the interest of the prisoner in *Hewitt* in avoiding confinement in administrative segregation. As compared to the prisoner in *Hewitt*, prisoners transferred to HIV units will suffer greater stigma and face a more substantial risk that their parole prospects will be impaired. They will also be forced to endure for a much longer period of time than the prisoner in *Hewitt* the onerous conditions of confinement that customarily attend administrative segregation. In addition, while the prisoner in *Hewitt* could presumably have avoided the government's interference with his interest in remaining in the general prison population by refraining from rioting, seropositive prisoners can do nothing to forestall their transfer to an HIV unit when a prison policy is in effect requiring the isolation of all seropositive inmates. Finally, the consequences of being transferred to an HIV unit will be particularly severe, certainly more so than those experienced by the prisoner in *Hewitt*, if prisoners become infected with the AIDS virus or develop AIDS because of the risks to which they were exposed in an HIV unit.

2. *The Risk of an Erroneous Deprivation of the Private Interest and the Value of Additional Safeguards*

The degree of risk that a prisoner will be erroneously deprived of his interest in remaining in the general prison population unit and not being transferred to an HIV unit depends on the particulars of the prison segregation policy. Obviously, if prison officials summarily transfer homosexuals and drug addicts to an HIV unit and only later test them for HIV, the risk of an erroneous deprivation will be great. In 1987, the Centers

for Disease Control reported that the prevalency of HIV antibodies among homosexual and bisexual men ranged from 10% to 70%, depending on the part of the country where the tests were conducted.[203] The percentage of intravenous drug abusers testing positive for the HIV antibody has reached as high as 50% to 65% in New York City and surrounding areas, but is below 5% in most other areas of the country.[204] If similar seropositivity rates exist among prisoners, a policy of segregating all prisoners who are homosexuals or intravenous drug abusers would ensnare a high percentage of prisoners who are not actually HIV-positive.

Prison officials inclined to segregate seropositive inmates would likely opt to segregate a prisoner in an HIV unit only after an HIV test has been administered and yielded a positive result.[205] Constitutional problems might arise, however, if a single positive result on an HIV-antibody test were enough to prompt such a transfer. Medical authorities agree that repeat testing is necessary in order to be confident that a person initially testing seropositive is indeed seropositive.[206] At present, the medical consensus is that a person must test positive two different times on an antibody test known as the enzyme immunoassay (EIA or ELISA) and then test positive on an antibody test known as the Western blot before the conclusion that the person is seropositive can be considered reliable.[207]

Assuming that HIV-antibody tests are conducted under "optimal laboratory conditions," the extent to which false-positive and false-negative readings are eliminated by repeat antibody testing is revealed by the following chart:

---

203. Centers For Disease Control, Public Health Service, U.S. Dep't of Health and Human Services, *Human Immunodeficiency Virus Infection in the United States*, 36 MORBIDITY AND MORTALITY WEEKLY REP. 801 (1987).

204. *Id.*

205. *See* TEX. GOV'T CODE ANN. § 500.054 (Vernon Supp. 1990) (authorizing segregation of inmates testing positive for HIV).

206. *Hearing on Aids Testing*, *supra* note 32, at 22-23 (statement of James R. Carlson); HOSPITAL ENVIRONMENT REP., *supra* note 18, at 16 (1987).

207. *CDC HIV-Antibody Testing Guidelines*, *supra* note 18, at 510.

Predictive Value of Positive HIV-Antibody Tests in Hypothetical Populations with Different Prevalences of Infection

	Prevalence of Infection	Predictive Value of Positive Test*
Repeatedly reactive enzyme immunoassay (EIA)+	0.2%	28.41%
	2.0%	80.16%
	20.0%	98.02%
Repeatedly reactive EIA followed by positive Western blot (WB)†	0.2%	99.75%
	2.0%	99.97%
	20.0%	99.99%

* Proportion of persons with positive test results who are actually infected with HIV.
\+ Assumes EIA sensitivity of 99.0% and specificity of 99.5%.
† Assumes WB sensitivity of 99.0% and specificity of 99.9%.[208]

This data confirms the value of repeat testing in ensuring that people are accurately categorized as either seropositive or nonseropositive. Deciding whether such repeat testing is constitutionally mandated before a prisoner is transferred to an HIV unit, however, requires scrutiny of the third factor to be taken into account in the procedural due process balancing analysis[209]—the governmental interests furthered by isolating seropositive inmates and the extent to which those interests would be adversely affected by requiring positive readings on several HIV-antibody tests before a prisoner could be transferred to an HIV unit.

Before turning to an examination of this factor, however, we need to recognize that prisoners transferred to HIV units will demand more in terms of procedural safeguards than just repeat antibody testing preceding such transfers. As noted earlier, the reliability of HIV-antibody tests can be quite high if the tests are repeated following an initial positive result and are performed under "optimal laboratory conditions."[210] Studies have revealed, however, that testing conditions and procedures are often less than "optimal," leading to high false-positive as well as false-negative rates.[211]

The potentially high false-positive rates will cause prisoners to contend that before they are transferred to an HIV unit because they tested positive for HIV antibodies, they must be afforded the opportunity to challenge the accuracy of the test results. To ensure that this opportunity is a meaningful one, prisoners might claim entitlement to a pot-

208. Centers for Disease Control, Public Health Service, U.S. Dep't of Health and Human Services, *Recommendations for Prevention of HIV Transmission in Health-Care Settings*, 36 MORBIDITY AND MORTALITY WEEKLY REP. 14 (1987).

209. *See supra* text accompanying notes 181-82.

210. *See supra* text accompanying note 208.

211. See *infra* notes 282-94 and accompanying text.

pourri of procedural safeguards, such as (1) notice of and access to the test results before the transfer; (2) a formal hearing at which the reliability of the test results could be challenged; (3) additional HIV antibody tests, paid for by the government when the prisoner is indigent;[212] (4) the opportunity to present the testimony of witnesses and documentary evidence; (5) the opportunity to confront and cross-examine witnesses on the issues of the prisoner's HIV status and the procedures followed to determine that status; (6) the assistance of a lawyer or other qualified expert in contesting the test results; and (7) notice of the above rights.

Each of the above safeguards could enhance the reliability of the transfer-decisionmaking process. The question, however, is whether the benefit reaped from a particular procedural safeguard is outweighed by its cost; the resolution of this question requires an examination of the third factor considered under the due process balancing test.

3. Governmental Interests

The governmental interests factor[213] has two component parts: first, the governmental interests furthered by the government's actions depriving someone of an interest falling within the protection of the Due Process Clause,[214] and second, the burdens on the government, including the adverse effects on the interests alluded to above, which will follow if additional procedural safeguards are put in place.[215]

Prison officials will argue that the segregation of HIV-positive inmates is necessary to prevent those inmates from infecting other inmates and correctional staff members with the virus. This interest in protecting the health of inmates and correctional officials, the prison officials will maintain, is a particularly compelling one since many if not all persons who contract HIV will develop AIDS, and since AIDS is at present generally fatal.[216]

Prison officials may also invoke institutional security in defending their actions. Officials most likely will argue that seropositive inmates need to be isolated from the rest of the prison population for their own protection and to prevent prison disruptions. This argument will rest on the assumption that if seropositive inmates remain in the general prison population and their seropositivity becomes known to other prisoners, they may be attacked and even killed.

212. *Cf.* Little v. Streater, 452 U.S. 1 (1981) (indigent inmate defending against paternity suit was entitled to blood grouping test paid for by the state).

213. *See supra* text accompanying note 182.

214. *Id.*

215. *Id.*

216. *See supra* note 39 and accompanying text.

Few will quarrel with the notion that the governmental interests in protecting inmates and staff from a lethal disease and in maintaining institutional security are extremely important. Yet the importance of the interests served by actions impinging on individual liberty does not necessarily mean that the government can act in a summary fashion in furtherance of those interests. This is particularly true when the impingement on individual liberty is great, the risk of erroneous government action is high, and certain safeguards could substantially reduce the risk without unduly burdening the interests purportedly underlying the government's actions.

Let us turn, then, to the question of the effect of certain procedural safeguards on the governmental interests underlying a policy of segregating seropositive inmates. As mentioned earlier, one dispute between prison officials and the segregated prisoners might center on the need for confirmatory antibody testing before a prisoner's transfer to the HIV unit. Some prison officials no doubt would argue that requiring such repeat testing before a prisoner's transfer would undermine the interests served by the transfer. While awaiting the results of further antibody tests, a seropositive prisoner could infect other inmates or correctional staff members with the AIDS virus. In addition, other inmates might learn of the test results and try to eliminate any perceived risk to themselves by killing the inmate who initially tested seropositive.

Prisoners could respond, however, that a policy under which prisoners are immediately transferred to HIV units as soon as they have tested positive on one HIV-antibody test would actually subvert the institutional goals of protecting inmates and correctional staff from harm and of maintaining institutional security. If such a policy were implemented, prisoners remaining in the general prison population might assume that they were free of HIV. They might then dispense with all caution and participate in the types of activities through which the virus is spread.

As mentioned earlier, however, people may be infected with the AIDS virus and yet test negative.[217] Consequently, a policy of immediately transferring prisoners to an HIV unit as soon as they have tested positive on one antibody test will leave some prisoners in the general prison population who are actually infected with the virus and can transmit it. To the extent then that an immediate transfer policy lulls prisoners remaining in the general prison population into a false sense of security and diminishes their incentive to avoid activities posing a risk of

217. *See supra* notes 30-32 and accompanying text.

spreading HIV, the spread of the contagion within the prison population will be facilitated rather than forestalled.

Prisoners would also most likely point out that the risk of seropositive prisoners transmitting HIV to correctional staff during the time between the initial positive test results and the confirmatory tests is extremely low. In fact, prisoners would argue, the risk that seropositive prisoners will *ever* infect correctional staff with the virus is quite low.

The AIDS virus is not airborne and, as mentioned earlier, is not transmitted through the types of casual encounters that typify everyday life, such as talking to someone or shaking hands.[218] Instead, the virus follows unique routes into the body, generally entering via contaminated needles shared with intravenous drug abusers, contaminated blood during blood transfusions, contaminated semen, blood, or vaginal secretions during anal, oral, or vaginal sex, and perinatally during pregnancy.[219] It is unlikely that correctional staff will be shooting drugs with inmates or having sex with them. Therefore, the chances that they will contract the virus from a prisoner are very low. These risks are further diminished when the relevant time period of potential exposure to HIV is the short time between the obtaining of the initial positive test results and the results of the follow-up tests.[220]

Prison officials may argue that inmates are often injured during fights and scuffles with other inmates or correctional officers and that an injured seropositive prisoner might bleed on and spread the AIDS virus to a correctional officer involved in or intervening in a fight. A report of the Centers for Disease Control recounting three instances in which health-care workers apparently contracted HIV from patients whose blood had come in contact with the health-care workers' skin lends some support to this argument.[221] In each one of these cases, however, the health-care worker had fairly extensive contact with the blood of a seropositive patient.[222] In one case, the health-care worker had the blood on her chapped hands for twenty minutes.[223] In the second case, the hands and forearms of the health-care worker were saturated with contami-

218. *See supra* note 18 and accompanying text.

219. SURGEON GENERAL'S REP., *supra* note 2, at 16, 19-21.

220. The entire laboratory screening process in the military testing program takes three days to complete. *Hearing on AIDS Testing, supra* note 32, at 13 (statement of Colonel Donald S. Burke).

221. Centers for Disease Control, Public Health Service, U.S. Dep't of Health and Human Services, *Update: Human Immunodeficiency Virus Infections in Health-Care Workers Exposed to Blood of Infected Patients*, 36 MORBIDITY AND MORTALITY WEEKLY REP. 285 (1987) [hereinafter *Update: HIV in Health-Care Workers*].

222. *Id.*

223. *Id.*

nated blood, and she may have touched a patch of skin on her ear where she had dermatitis.[224] And in the third case, the patient's blood splashed into the health-care worker's face and mouth.[225]

Although a few health-care workers have apparently contracted the AIDS virus through exposure of their broken skin or mucous membranes to HIV-infected blood, the risk that they will become infected from their patients is considered quite low. In studies conducted by the CDC, the National Institute of Health, and the University of California, of 435 health-care workers who had open wounds or mucous membranes exposed to HIV-infected blood, none became infected.[226] Even when health-care workers had been exposed to HIV-infected blood through needlestick or other puncture wounds, which would heighten their risk of contracting the virus,[227] only a small number later tested positive. Of the 812 health-care workers in the CDC, NIH, and California studies who were exposed to HIV through needlestick or other puncture wounds, only four seroconverted.[228]

It would seem that health-care workers, who are constantly exposed to the blood of patients when extracting blood samples and when touching bleeding patients, face a greater risk of contracting HIV through exposure to infected bodily fluids than do correctional officers.[229] Indeed, not one case has been documented in which a correctional staff member has become HIV-infected from an inmate, although many correctional officers are regularly doused with the saliva, urine, and feces of unruly inmates.[230] The risk that correctional officers might somehow contract the virus because a seropositive inmate was not segregated while repeat antibody tests were conducted is palpably low and provides weak support for dispensing with confirmatory testing before a prisoner is transferred to an HIV unit.

---

224. *Id.*

225. *Id.* at 286.

226. NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, RISK OF INFECTION WITH THE AIDS VIRUS THROUGH EXPOSURES TO BLOOD 2 (1987) [hereinafter RISK OF INFECTION]; *see also* 4 AIDS Pol'y & Law (Buraff Pubs.) No. 12, at 6-7 (1989) (reporting findings of Centers for Disease Control's Cooperative Needlestick Surveillance Group that of 1,449 health-care workers exposed to HIV-infected blood, none of those with mucous membrane exposures became seropositive).

227. *Update: HIV in Health-Care Workers, supra* note 221, at 287.

228. RISK OF INFECTION *supra* note 226, at 2 (1987).

229. The risk that a health-care worker exposed to HIV-infected blood will seroconvert has been estimated at less than 1% and may be as low as .4%. 4 AIDS Pol'y & Law (Buraff Pubs.) No. 12, at 6 (1989).

230. NIJ REPORT, *supra* note 11, at 22.

The argument that an immediate transfer to an HIV unit is warranted once an inmate tests positive on one HIV-antibody test because that inmate might be harmed by other inmates who learn of his or her seropositivity also lacks force. Prison officials can avoid this potential problem by simply taking steps to ensure the confidentiality of the preliminary test results.[231]

Since requiring confirmatory antibody testing before a prisoner is transferred to an HIV unit would not greatly undermine the government's interest in maintaining institutional security and preventing the spread of AIDS, and indeed might further the latter interest, the third factor considered under the due process balancing test points towards constitutionally requiring confirmatory testing before such a transfer. As noted earlier, however, prisoners will insist on procedural safeguards extending far beyond confirmatory testing.[232] The impact of these safeguards on the governmental interests purportedly served by the transfer of seropositive inmates to HIV units needs to be examined.

The safeguards of notifying inmates of and letting them see their test results before a transfer and providing them with a written notice describing any rights that they might have during the transfer process would not encumber the governmental interests underlying the transfer of seropositive prisoners to HIV units. In fact, letting an inmate review a laboratory report stating that he or she is seropositive would help to ensure that these governmental interests are indeed being served—that is, that the prisoner being transferred is actually the prisoner who tested HIV-positive. Affording inmates these rights would not be overly burdensome from either a cost or an administration standpoint, particularly since inmates can be provided with both types of notice at the same time. Delivering notices to prisoners in their cells or rooms, whether notices about disciplinary hearings[233] or other administrative transfers,[234] is part of the prison routine.

231. The prison officials themselves may not even have access to this information. One expert testified before Congress that because ELISA test results are often inaccurate, a laboratory should not even report the positive results of an ELISA test until a confirmatory Western blot test has been performed. *Hearing on AIDS Testing, supra* note 32, at 21 (statement of Patricia A. Watson).

232. *See supra* text following note 211 (sought-after safeguards might include notice of and access to test results, a hearing to challenge results, additional tests, presentation of evidence and witnesses, cross-examination, right to counsel or other expert assistance, and notice of the above rights).

233. In Wolff v. McDonnell, 418 U.S. 539, 564 (1974), the Supreme Court held that a prisoner who will lose good-time credits if found guilty of a disciplinary infraction must receive written notice of a pending disciplinary charge at least 24 hours before the disciplinary hearing where the charge will be adjudicated. In dicta, the Court observed that the procedures mandated by due process, including written notice, must be extended to prisoners who may be

The other procedural safeguards sought by prisoners, on the other hand, would entail substantial costs. If the transfer of a prisoner who has tested positive three times on HIV-antibody tests and is truly seropositive were deferred pending additional testing and a hearing on the question of the inmate's HIV status, the primary purpose of such a transfer, protecting the health of other inmates and correctional staff, could be somewhat subverted. If seropositive inmates remained in the general prison population pending the execution of these procedures, they could further spread the AIDS contagion.

This risk, as mentioned earlier, would also be present if inmates testing positive on one ELISA test remained in the general prison population pending confirmatory tests. The risk that a prisoner is actually HIV-positive and will transmit the virus is greater, however, when the prisoner has tested positive not only on one, but on three antibody tests. Consequently, the government's interest in protecting the health and safety of other inmates and correctional staff through the isolation of seropositive prisoners would be accentuated at this point. In addition, the delay attending even further testing and a formal hearing would be longer than the relatively short time involved in conducting a second ELISA test and a Western blot test.[235] This extended delay would increase the likelihood of seropositive prisoners spreading the virus to others between the time of the initial test and the time of transfer to an HIV unit. As a result, the more elaborate procedural safeguards advocated by prisoners would arguably pose a greater threat to the government's interest in curtailing the spread of AIDS than would the administration of more routine confirmatory tests before a prisoner's transfer to an HIV unit.

The additional procedural safeguards favored by prisoners would also impose financial and administrative burdens on the government. Additional HIV-antibody tests would cost money as would the lawyers or other qualified experts assisting prisoners in contesting their transfers to an HIV unit. In addition, at a time when prisons are already notoriously understaffed, present staff members might have to be re-allocated or new staff members hired to implement a hearing process. Staff members would be needed to review a transfer decision, and if prisoners were

placed in disciplinary segregation if they are found to have violated prison rules or regulations. *Id.* at 571-72 n.19.

234. In Vitek v. Jones, 445 U.S. 480, 494, 496 (1980), the Supreme Court held that a prisoner must receive written notice of his or her contemplated transfer to a mental institution.

235. *See supra* note 220.

represented at the hearing, staff members would presumably also be needed to act as proponents for the prison officials.

Other inconveniences would attend added procedural safeguards, particularly if prisoners could confront and cross-examine laboratory personnel about the procedures employed during the testing process. Summoning these people to a hearing would divert them from their important work in the lab and could potentially cause huge backlogs in the testing process. The end result would be further frustration of the prison officials' attempts to halt the spread of AIDS in prisons through a segregation policy.

The costs of the safeguards of additional HIV-antibody testing and a formal hearing before a prisoner's transfer to an HIV unit are therefore fairly substantial. Yet incursion of these costs may be constitutionally mandated if the disadvantages of adopting procedural safeguards are outweighed by the advantages. Before conducting a final balancing of the factors considered under the due process balancing test, however, this Article will examine the way the Supreme Court has applied the balancing test in several pertinent cases.

4. Supreme Court Cases

In *Hewitt v. Helms*,[236] the Supreme Court addressed the question of the procedural safeguards that must attend a prisoner's transfer to an administrative segregation unit.[237] In *Hewitt*, the prisoner-plaintiff, whom authorities suspected of participating in a riot, was transferred to administrative segregation for two reasons. First, prison officials believed the prisoner was dangerous and might harm other inmates or correctional staff or otherwise disrupt the security of the institution if he were allowed to remain in the general prison population unit.[238] Second, prison officials wanted to isolate the prisoner from other inmates while his suspected role in the riot was investigated.[239] The prison officials feared that if the prisoner were allowed to commingle with the other prisoners during the investigation, he might threaten or harm certain witnesses to the riot to ensure that his role in the riot was not revealed.[240]

In embarking on the balancing analysis, the Supreme Court first concluded that the private interest at stake, the prisoner's interest in remaining in the general prison population unit, was "not one of great con-

236. 459 U.S. 460 (1983).
237. *Id.* at 462.
238. *Id.* at 473.
239. *Id.*
240. *Id.*

sequence."[241] The prisoner was simply being moved from one "extremely restricted environment" to another.[242] In addition, the transfer to administrative segregation was neither stigmatizing nor damaging to the prisoner's parole prospects.[243]

On the other hand, the Court described the governmental interests served by the prisoner's transfer to administrative segregation as "of great importance."[244] The Court characterized the government's responsibility to ensure that correctional officers and inmates are safe as "perhaps the most fundamental responsibility of the prison administration."[245] In addition, the Court deemed "important" the government's interest in preserving the integrity of an investigation of a prisoner's alleged misconduct.[246]

Turning to the final factor of the due process analysis, the Court observed that a "detailed adversary proceeding" would not prove helpful in averting unwarranted transfers of prisoners to administrative segregation.[247] The decision to transfer an inmate to administrative segregation is based on a number of factors, many of which involve predictions about the future behavior of both the prisoner whose transfer is contemplated and other prisoners. According to the Court, these subjective evaluations of the temperament of prisoners and predictions about their future behavior would not be significantly aided by "trial-type procedural safeguards" designed to yield objective factual findings.[248]

What is striking about the Court's analysis in *Hewitt* is its unacknowledged departure from the due process balancing test as it was enunciated in *Mathews v. Eldridge*.[249] In *Mathews*, the Court said that the importance of the governmental interests furthered by the government's actions is to be considered under the balancing test.[250] But the Court also said that the extent to which a procedural safeguard will adversely affect these interests is to be weighed in the calculus.[251]

In *Hewitt*, however, the Court focused only on the centrality of the government's interests in maintaining institutional security and prevent-

241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.* at 473-74.
248. *Id.* at 474.
249. 424 U.S. 319 (1976).
250. *Id.* at 335.
251. *Id.*

ing the disruption of investigations of prisoners' suspected misconduct.[252] In doing so, the Court skewed the balancing test against a finding that certain procedures are constitutionally mandated. For if the sole concern of this part of the balancing analysis is the importance of the governmental interests furthered by the government's actions, then this factor would weigh against requiring additional procedural safeguards as long as the government interest furthered is an important one. But if the impact of a procedural safeguard on the government were also taken into account, this factor would weigh in favor of a finding that a safeguard is constitutionally required if the detrimental consequences of implementing this safeguard were slight.

The Supreme Court further revealed its bias against the prisoner's due process claim in *Hewitt* when it discussed the value of additional procedural safeguards. The Court rejected the notion that a "detailed adversary proceeding" would prove helpful in averting unwarranted transfers to administrative segregation.[253] But focusing on the value of a "detailed adversary proceeding," which would include a whole mix of procedural safeguards, masked the question of the value of individual safeguards in ensuring that the government was not acting arbitrarily or capriciously. For example, had the Court specifically considered the value of permitting inmates to appear before the persons making the transfer decisions to explain why they should not be transferred, the Court might have found this safeguard of great value in protecting inmates from unfounded transfer decisions. During this personal appearance, inmates could explain why they should not be transferred to administrative segregation, and the official making the transfer decision could assess their demeanor and their apparent need for special confinement. By collapsing this procedural safeguard and others into the general category of "detailed adversary proceeding," however, the Court was able to ignore the value of this and other specific safeguards.

The end result of the Court's skewed application of the due process balancing test in *Hewitt* was that the Court concluded that the plaintiff was entitled to few procedural safeguards surrounding his transfer to administrative segregation.[254] According to the Court, the prisoner had to be afforded the protection of only the following procedural safeguards: (1) notice of the reason for the transfer;[255] (2) a chance to explain to the

252. *See supra* notes 244-46 and accompanying text.

253. Hewitt v. Helms, 459 U.S. 460, 473-74 (1983); *see supra* notes 247-48 and accompanying text.

254. *Id.* at 476.

255. *Id.*

person making the transfer decision why he should not be transferred;[256] (3) review of the evidence supporting a transfer by the person making the transfer decision within at least a "reasonable time" after the transfer;[257] and (4) periodic reconsideration of the need for continuing to confine the prisoner in administrative segregation.[258] Noteworthy among the omitted safeguards was the right of the prisoner to explain in person to the decisionmaker why a transfer was unwarranted. The Court simply said that "ordinarily" a written statement from the prisoner would suffice.[259] The Court further eviscerated the procedural protections purportedly afforded prisoners when it observed that prisoners may not "necessarily" have the right even to submit a written statement on the question of the propriety of their segregative status when their administrative confinement is being periodically reviewed.[260]

The Court's niggardly approach to the procedural due process rights of prisoners in *Hewitt* is to be contrasted with its generous extension of procedural rights to inmates in *Vitek v. Jones*.[261] In *Vitek*, the Court held that before being involuntarily transferred to a mental institution, a prisoner must be afforded the following procedural protections: (1) written notice that such a transfer is being contemplated; (2) a hearing held a sufficiently long time after the prisoner received the notice to permit the inmate to adequately prepare for the hearing; (3) an opportunity to comment at the hearing on the contemplated transfer; (4) the opportunity to present documentary evidence; (5) the opportunity to call witnesses on the prisoner's behalf unless "good cause" exists for not affording the inmate this opportunity; (6) the right to confront and cross-examine the government's witnesses absent "good cause" for prohibiting such confrontation and cross-examination; (7) the making of the transfer decision by an "independent decisionmaker," someone other than the person who has recommended the prisoner's transfer to a mental institution; (8) a written statement by this decisionmaker outlining the reasons for the transfer and the evidence supporting the transfer decision; (9) assistance in defending against the transfer from someone who is both "qualified" and "independent;" and (10) notice of the above rights.[262]

In the course of explaining why a prisoner was entitled to such extensive procedural safeguards before being transferred to a mental insti-

256. *Id.*
257. *Id.* & n.8.
258. *Id.* at 477 n.9.
259. *Id.* at 476.
260. *Id.* at 477 n.9.
261. 445 U.S. 480 (1980).
262. *Id.* at 494-97; *id.* at 497 (Powell, J., concurring).

tution, the Court acknowledged that a state has a "strong" interest in isolating and treating prisoners who are mentally ill.[263] This strong interest is counterbalanced, however, by two other factors—the inmate's "powerful" interest in not being erroneously labelled mentally ill and subjected to unwanted behavioral modification treatment, and the not inconsiderable risk that an error will occur when the state is assessing an inmate's mental health and need for treatment.[264]

Unlike *Hewitt*, the Court in *Vitek* considered the impact on the state of the procedural safeguards invoked by the prisoner.[265] The Court emphasized that the limits that could appropriately be placed on the inmate's rights to call, confront, and cross-examine witnesses minimized any deleterious impact of the safeguards.[266] In addition, since the "independent" person making the transfer decision did not have to be an outsider totally unaffiliated with the prison or hospital, unwarranted interference with the exercise of medical and correctional expertise could be avoided.[267]

Other Supreme Court cases provide insights in determining the procedural safeguards that must attend a prisoner's transfer to an HIV unit. Of particular significance is *Barry v. Barchi*.[268] In that case, a horse-trainer from New York challenged on due process grounds the summary suspension of his license after a horse he had trained failed a post-race drug test.[269] Under a New York statute, the trainer was presumed responsible if drugs were detected in a post-race urinalysis of a horse he or she had trained.[270]

The plaintiff argued that to suspend his license without first affording him a hearing deprived him of property without due process of law.[271] The Supreme Court disagreed.[272] Conceding that the trainer's interest in not having his license suspended was a substantial one,[273] the Court found that two countervailing factors weighed against a finding that a predeprivation hearing is constitutionally required in this context. First, the state had a significant interest in maintaining the public's confidence in state-run horse races. The importance of this interest became

263. *Id.* at 495.
264. *Id.*
265. *Id.* at 496.
266. *Id.*
267. *Id.*
268. 443 U.S. 55 (1979).
269. *Id.* at 61.
270. *Id.* at 59.
271. *Id.* at 61.
272. *Id.* at 64-66.
273. *Id.* at 64.

accentuated once there was probable cause to believe that a horse had been drugged and, because of the statutory presumption, that the trainer had been at least negligent in failing to prevent the drugging.[274] Second, once this probable cause existed, the risk of an erroneous suspension of the trainer's license became sufficiently diminished that a predeprivation hearing was not constitutionally necessary.[275]

In another case, the Supreme Court stated that due process normally requires no more in terms of predeprivation procedures than what is necessary to ensure that there is a "reasonably reliable basis" for believing that the facts are what the government has portrayed them to be.[276] *Barry v. Barchi* is significant, however, because the Court held that the horse urine tester's opinion that the sample was positive, in conjunction with the statutory presumption that the trainer either had drugged the horse or was negligent in failing to prevent such a drugging, provided a "sufficiently reliable" basis for concluding that the horse had been drugged and that the trainer was responsible for the drugging.[277]

The question raised by the holding in *Barry v. Barchi* is whether the opinion of the person who interprets the results of HIV-antibody tests that a tested inmate is HIV-positive provides a "reasonably reliable basis" for believing that the inmate is in fact infected with the virus. Answering that question requires an examination of information regarding the reliability of HIV-antibody tests.

5. *The Reliability of HIV-Antibody Tests*

Two types of errors can occur in the interpretation of HIV-antibody test results. First, the laboratory personnel might fail to identify as seropositive someone who is actually a carrier of the AIDS virus. The resulting error is known as a false negative, a positive blood sample mistakenly reported to be negative for HIV antibodies. The other type of error occurs when the laboratory personnel report that a person is HIV-positive when in fact the person is not. This type of error is known as a false positive, the incorrect description of a person as HIV-positive.

The more sensitive an HIV-antibody test is, the fewer false negatives there will be.[278] In other words, the sensitivity rate measures the ability of a test to accurately identify who is HIV-negative. The specificity rate, on the other hand, refers to the extent to which persons identified as

274. *Id.* at 64-65.
275. *Id.* at 65.
276. Mackey v. Montrym, 443 U.S. 1, 13 (1979).
277. 443 U.S. at 65.
278. *Hearing on AIDS Testing*, *supra* note 32, at 4 (statement of Dr. Lawrence Miike).

seropositive are in fact seropositive.[279] The higher the specificity rate of the antibody tests, the fewer the number of uninfected persons incorrectly identified as HIV-positive.

HIV antibody tests can in theory be quite reliable. When performed under "optimal laboratory conditions," the ELISA test is at least 99% accurate in terms of both its sensitivity and its specificity.[280] Under ideal circumstances, the accuracy of the Western blot test is also quite high, with sensitivity and specificity rates both exceeding 99%.[281]

In practice, however, the accuracy rates of the tests are often lower.[282] Whether there is a problem with false positives or false negatives will depend in large part on the prevalence of HIV in the population being tested.[283] With high-risk populations, persons who are actually HIV carriers will be more likely to be misidentified as HIV-negative.[284] It has been estimated that when high-risk populations are tested for HIV, at least one out of ten people tested may be falsely described as HIV-negative.[285]

With low-risk populations, the recurrent problem is with false positives.[286] It has been estimated that even if every effort is made to ensure that an HIV-antibody test is performed and interpreted accurately, for every fifteen persons in a low-risk population identified as seropositive, five will be misidentified.[287] In other words, five people will actually not be infected with HIV.

The rate of error in HIV testing has been aggravated by the deficient performance of testing laboratories. This deficient performance was highlighted by a string of witnesses who testified before a congressional subcommittee in October of 1987.[288] One of these witnesses, Colonel Donald S. Burke, the Director of the Army's HIV screening program, described the performance of a large number of the laboratories conducting HIV-antibody tests as "grossly unacceptable" and "disconcert-

279. *Id.*

280. *CDC HIV-Antibody Testing Guidelines, supra* note 18, at 510; *see also Hearing on AIDS Testing, supra* note 32, at 4-5 (statement of Dr. Lawrence Miike) (under optimal conditions, 99.6% sensitivity rate and 99.0% specificity rate).

281. *CDC HIV-Antibody Testing Guidelines, supra* note 18, at 510; *see also Hearing on AIDS Testing, supra* note 32, at 5 (testimony of Dr. Lawrence Miike) (99.6% sensitivity rate and 99.5% specificity rate).

282. *Hearing on AIDS Testing, supra* note 32, at 6, 7, 11.

283. *Id.*

284. *Id.*

285. *Id.* at 11.

286. *Id.* at 6.

287. *Id.* at 7.

288. *Id.* at 8, 9.

ingly substandard."[289] He stated that ten out of nineteen laboratories that had submitted bids to do antibody testing for the Army had at some point failed to meet the government's proficiency standards.[290] What was truly alarming was that these proficiency standards were relatively lax since they permitted one misidentified sample for every twenty tested.[291]

Another witness disclosed that seven of eleven laboratories analyzed a blood sample from a person diagnosed as having AIDS and failed to correctly interpret the test results as positive.[292] Other witnesses testified about how the inept performance of laboratories exacerbates the problem with false positives when a low-risk population is tested.[293] According to Dr. Lawrence Miike, an AIDS laboratory testing analyst from the Office of Technology Assessment, the actual performance of HIV-antibody tests by laboratories has yielded a false positive rate of about 90% when low-risk populations are tested.[294]

6. *Applying the Balancing Test to the Segregation of Supposedly Seropositive Inmates*

As mentioned earlier, the Supreme Court in *Barry v. Barchi*[295] found no due process problems in immediately suspending the license of a horsetrainer once a horse that he or she had trained had failed a drug test. Though correctional officials wishing to avoid procedural constraints when transferring to an HIV unit an inmate who had tested HIV-positive might cite *Barry v. Barchi*, the summary suspension of a horsetrainer's license is clearly distinguishable from the summary placement in an HIV unit of an inmate who has tested seropositive.

To begin with, the interest affected when a prisoner is transferred to an HIV unit is for several reasons substantially more weighty than the interest affected when a license to train horses is suspended. First, the transfer of the inmate implicates a liberty interest, while only a property interest is affected by the license suspension.[296] Although property interests are important, the Court has generally considered liberty interests of even greater importance.[297]

289. *Id.* at 13-14.
290. *Id.* at 13-14, 16.
291. *Id.* at 16.
292. *Id.* at 21-22 (statement of Patricia A. Watson).
293. *Id.* at 8.
294. *Id.*
295. 443 U.S. 55 (1979).
296. *Id.* at 64.
297. *Cf.* Scott v. Illinois, 440 U.S. 367 (1979) (indigents have no right to appointed counsel unless the sanction imposed includes a period of incarceration).

Second, while the plaintiff in *Barry* suffered a suspension of his license for only fifteen days,[298] prisoners transferred to an HIV unit will remain there for the duration of their confinement, perhaps for many years or even the rest of their lives. Finally, while the temporary suspension for a short period of time of a horse training license may cause economic hardship and be somewhat stigmatizing, the adverse effects attending a transfer to an HIV unit are more pervasive. The segregated prisoner will likely lose or have curtailed a number of different privileges including work, educational, and recreational opportunities.[299] The restrictions in these opportunities may in turn adversely affect the inmate's chances of being released on parole.[300] In addition, because of common misperceptions regarding the communicability of AIDS, the stigma following a transfer to an HIV unit would far exceed the onus accompanying a license suspension, with the latter possibly suggesting no more than that the horsetrainer was negligent in his or her supervision of a horse.

A second major difference exists between a suspension of a horsetrainer's license because a horse tested positive for drugs and the segregation of an inmate in an HIV unit because the inmate tested positive for HIV antibodies. In *Barry v. Barchi*, the Court observed that the state's interest furthered by the license suspension, its interest in maintaining the integrity of the horse racing sport, becomes much more substantial once there is probable cause to believe a horse was drugged.[301] In *Barry*, the substantiality of this interest weighed in favor of the government's position that few procedural safeguards need attend the initial suspension of a horsetrainer's license.[302]

By contrast, it cannot be said at present that a positive result on an HIV-antibody test will necessarily establish probable cause to believe the person tested is infected with the AIDS virus; this probable cause may indeed be absent even though two ELISA tests and a Western blot have been performed on a blood sample with the test results all reported as positive. As discussed earlier, the problem with false positives is particularly acute when low-risk populations are being tested for HIV.[303] At best, up to five out of every fifteen persons in low-risk populations may be misidentified as HIV-positive, while at worst, the error rate can approach 90%.[304]

298. 443 U.S. at 59.
299. *See supra* note 168 and accompanying text.
300. *Id.*
301. 443 U.S. at 65.
302. *Id.*
303. *See supra* text accompanying notes 286-87.
304. *See supra* text accompanying notes 287, 294.

Experts agree that the number of persons erroneously reported as HIV-positive can be greatly reduced if certain quality-control measures are undertaken to decrease laboratory errors.[305] Such measures include regular laboratory inspections, the adoption of performance standards for laboratories, the adoption of standards for interpreting test results, and the implementation of a proficiency testing program under which blood samples with a previously determined HIV status are blind-tested, and the laboratory results are then compared with the actual results.[306] Other steps include accrediting laboratories or providing government funding only to those laboratories meeting certain performance and proficiency standards.[307]

Whether a reportedly positive result on an HIV antibody test will establish probable cause to believe that the person tested is really seropositive will depend at least in part on whether steps like the ones outlined above have been taken to reduce laboratory errors. If such measures have not been taken, the risk of error is high, particularly if low-risk populations are being tested. With the heightening of the risk of error comes a corresponding diminution in the importance of the government's interest in halting the spread of AIDS in prisons through the segregation of seropositive inmates. In fact, the government's interest in the effectuation of this purpose would actually be undermined if many HIV-positive inmates escaped detection during the testing process. Prisoners remaining in the general prison population unit might assume that they are all or for the most part HIV-free and then engage in the activities through which HIV could be spread.

Another interest to be considered in the procedural due process balancing analysis is the government's interest in ensuring that inmates that are truly HIV-positive, and only those inmates, are removed from the general prison population. While the government always has an interest in ensuring that the actions it is taking are warranted,[308] this interest would seem particularly substantial in this context because of the psychological trauma that attends being publicly identified as HIV-positive.

305. *Hearing on AIDS Testing, supra* note 32.

306. *Id.* at 25-27 (statement of James R. Carlson); *id.* at 34-38 (statement of Dr. Herbert F. Polesky).

307. *Id.* at 16 (statement of Colonel Donald S. Burke); *id.* at 34 (statement of Dr. Herbert F. Polesky).

308. *Cf.* Ake v. Oklahoma, 470 U.S. 68, 79 (1985) (describing as "compelling" the government's interest in an accurate verdict at a criminal trial); Lassiter v. Department of Social Servs., 452 U.S. 18, 27 (1981) (state has interest in ensuring that the correct result is reached in proceedings to terminate parental rights).

The final difference between the license suspension at issue in *Barry v. Barchi* and the segregation of seropositive inmates concerns the third factor considered under the three-part due process balancing test—the value of additional safeguards,[309] in these cases ones preceding the initial governmental deprivation, and the risk of an erroneous deprivation of the private interest at stake if such additional safeguards are not provided. In *Barry*, the Court emphasized that a positive result on a drug test created probable cause to believe a horse had been drugged.[310] Consequently, the positive test result provided "substantial assurance" that the plaintiff's interest in retaining his license was not being "baselessly compromised."[311] In other words, the risk of an erroneous deprivation of his license was sufficiently low and the value of additional presuspension safeguards not that great.

By contrast, as noted earlier, a positive result on an HIV-antibody test may establish nothing approaching probable cause to believe the person tested is HIV-positive.[312] In fact, depending on the prevalency of HIV in the population being tested and the steps taken to reduce laboratory error, the risk of transferring an uninfected prisoner to an HIV unit may be very high.[313] Certain safeguards therefore might be valuable in terms of their ability to avert an unfounded transfer of an uninfected prisoner to an HIV unit.

The substantiality of the private interest affected by a transfer to an HIV unit, the diminished importance of the governmental interest purportedly furthered by a transfer policy when the risk of misidentifying the HIV status of prisoners is high, the countervailing strong governmental interest in ensuring the proper placement of prisoners either inside or outside an HIV unit, and the potentially high risk of unwarranted transfers of inmates to HIV units together suggest that before prisoners are segregated because they are supposedly HIV-positive, they are entitled to more in terms of predeprivation procedural due process than was the horsetrainer in *Barry v. Barchi*. What that "more" is may depend on the circumstances.

If insufficient steps are taken by the authorities to reduce the rate of errors made by laboratories conducting HIV-antibody tests on blood samples, prisoners would be entitled to a wide array of procedural safeguards before transfer to an HIV unit. The following procedural safe-

309. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

310. Barry v. Barchi, 443 U.S. 55, 64-65 (1979).

311. *Id.* at 65.

312. *See supra* notes 303-04 and accompanying text.

313. *Id.*

guards probably would satisfy the dictates of due process: (1) notice to the inmates of the test results and access to those results; (2) a hearing where the test results could be challenged before an independent decisionmaker, i.e., someone other than the person who conducted the initial tests; (3) additional tests performed by a different laboratory on a blood sample drawn from the inmate, and paid for by the government if the inmate is indigent; (4) the opportunity for the inmate to call witnesses and present documentary evidence unless "good cause" exists for not permitting the inmate to do so; (5) the opportunity to confront and cross-examine witnesses on issues such as the procedures followed when determining the inmate's HIV status unless "good cause" exists for not affording the inmate this opportunity; (6) assistance in challenging the validity of the reportedly positive HIV-antibody test results from someone who is "independent" and "qualified;" and (7) notification of the rights delineated above.[314]

On the other hand, if adequate measures were taken to reduce laboratory errors and if the population tested were at high risk for HIV, a person would be unlikely to be erroneously labelled HIV-positive. Consequently, other than the procedures designed to limit laboratory errors, little would be necessary in terms of predeprivation due process except, of course, that the prisoner be apprised of his or her test results and receive a copy of those results.

Despite the low risk of an unfounded transfer to an HIV unit, however, the prisoner, once transferred, would be entitled to a postdeprivation hearing held with reasonable promptness, for the purpose of ensuring that the prisoner was indeed seropositive. Even the horsetrainer in *Barry v. Barchi*, who suffered only a 15 day suspension of his license, was constitutionally entitled, according to the Supreme Court, to a postdeprivation hearing.[315] Certainly a prisoner transferred to an HIV unit who suffers the onus, opprobrium, and loss of privileges attending such a transfer would be entitled to the same procedural protection.

At the post-transfer hearing, the prisoner would be entitled to the array of safeguards delineated earlier: an independent decisionmaker; additional HIV-antibody tests, paid for by the government if the prisoner is indigent; the limited right to call witnesses, present documentary evidence, and confront and cross-examine witnesses; and assistance from someone who is "independent" and qualified to assist in challenging the

314. *Cf. supra* notes 261-62 and accompanying text (discussing procedural safeguards for prisoner subject to involuntary transfer to mental hospital).

315. 443 U.S. at 66.

initial test results.[316] Of particular importance is the latter procedural safeguard since the technical complexity of HIV-antibody testing would make it nearly impossible for prisoners to mount a successful challenge to the validity of certain test results.

The most difficult question regarding the procedural due process rights of prisoners transferred to HIV units concerns the procedural safeguards that must attend a prisoner's transfer when all adequate measures have been taken to reduce the error rate of laboratories but the population being tested is at low risk for HIV. As discussed earlier,[317] with such a low-risk population, the potential error rate is quite high; even with steps taken to reduce laboratory errors, up to five of every fifteen persons identified as HIV-positive may in fact be HIV-negative.[318] The question arises whether in this situation, a hearing must precede the prisoner's transfer to an HIV unit.

Prison officials would cite *Barry v. Barchi* in support of their contention that such a predeprivation hearing is unnecessary since the Supreme Court in that case held that a predeprivation hearing was not needed before a horsetrainer's license was suspended as long as there was probable cause to believe that a horse he had trained had been drugged and that he was responsible for the drugging.[319] The prison officials would point out that even with an error rate of about 33%, if a person tested positive for HIV antibodies, probable cause would exist to believe that the person was indeed infected with the AIDS virus. The officials would cite as their authority the determination by the Supreme Court that probable cause will exist as long as there is a "fair probability" or a "substantial chance" that the facts are as contemplated.[320]

The significance of the private interest at stake, however, distinguishes a prisoner's transfer to an HIV unit from the suspension of a horsetrainer's license. As *Vitek v. Jones* suggests,[321] this distinction, when coupled with the relatively high rate of error in the government's deprivatory actions, is enough to alter the balance towards a finding that a predeprivation hearing is constitutionally mandated. In *Vitek*, no doubt there was at least probable cause to believe that the inmate was mentally ill and in need of hospitalization outside the prison once a psychiatrist or psychologist had certified the existence of these facts. In addition, the transfer of mentally ill prisoners to mental hospitals for

316. *See supra* text accompanying note 314.
317. *See supra* note 287 and accompanying text.
318. *Id.*
319. Barry v. Barchi, 443 U.S. 55, 65 (1979).
320. Illinois v. Gates, 462 U.S. 213, 238, 244 n.13 (1983).
321. 445 U.S. 480 (1980).

needed mental health treatment furthers several important governmental interests: the meeting of the health care needs of the ill prisoners, the protection of other inmates who might be endangered if the mental illnesses of some prisoners were untreated, and the maintenance of institutional security. Nonetheless, the significance of the private interest affected by such an institutional transfer and the risk of error attending psychiatric diagnoses convinced the Court that the transfer must be preceded not only by a hearing, but by a hearing accompanied by an array of procedural safeguards.[322]

Similarly, it would seem, prisoners would be entitled to a predeprivation hearing before their transfer to an HIV unit when there is a risk that the transfer of up to one-third of the prisoners whose transfer is being contemplated is unwarranted. Before or at this hearing, the inmates would have the rights discussed earlier: to present evidence, confront and cross-examine witnesses, receive assistance, and have additional HIV antibody tests conducted.[323]

Conclusion

The inclination of many people confronted with the problem of AIDS is to banish persons known to be afflicted with the AIDS virus from their environs. Parents demand that HIV-positive students be removed from the schools, employers summarily fire employees known to be or suspected of being HIV-positive, and children infected with the virus, whose parents are unable to care for them, often languish in hospitals, unwanted by prospective adoptive or foster parents.

This seeming callousness is really the product of fear, fear that springs from ignorance about AIDS and the ways that HIV is transmitted. To the extent that the government capitulates to this fear and treats groups of seropositive persons, such as all seropositive inmates, as pariahs, it will encourage and perpetuate unfounded notions about the disease.

Ironically, a policy of segregating all inmates who test positive for HIV antibodies from the rest of the prison population may actually facilitate rather than curb the spread of HIV among prisoners. Prisoners who remain in the general prison population, left with the false impression that they are all HIV-free, may more readily engage in the types of activities through which the virus is spread.

322. *Id.* at 494-97.

323. *See supra* text accompanying note 316.

Should the government ignore these arguments against a segregation policy and persist in adopting such a policy, however, the constitutional ramifications of the policy would have to be considered. One question concerns the extent to which, if at all, prisoners must be afforded, under the Due Process Clause, the benefit of procedural safeguards designed to ensure that the prisoner transferred is indeed seropositive.

Before answering this question, one must inquire whether inmates transferred to an HIV unit are deprived of a liberty interest within the meaning of the Due Process Clause. Although a liberty interest may not normally, according to the Supreme Court,[324] be implicated by a prisoner's transfer to an administrative segregation unit, the transfer of a prisoner to an HIV unit is different from other generic forms of administrative segregation. The transferred prisoner will be substantially stigmatized by being labelled a carrier of the AIDS virus and most likely will suffer the loss of privileges normally attending administrative confinement for a much longer period of time than occurs when an inmate is subjected to other forms of administrative segregation. This loss of privileges, including curtailed work and educational opportunities, may in turn drastically impair the prisoner's chances of being released on parole. In short, as with the transfer of an inmate to a mental institution, the transfer of a prisoner to an HIV unit fundamentally alters the nature of the inmate's confinement, thereby implicating a constitutionally derived liberty interest.

A prisoner transferred to an HIV unit, in any event, may have been deprived of a liberty interest derived from state law. If transfer to an HIV unit were contingent, under the state's statutes or regulations, upon a finding of HIV-positivity, prisoners would have more than a "unilateral expectation" that they would not be transferred to an HIV unit unless they were seropositive;[325] they would have an " 'objective expectation, firmly fixed in state law and official Penal Complex practice' " that such a transfer would not occur unless this predicate condition were met.[326] According to the Supreme Court, this "objective expectation" would be enough to give rise to a liberty interest falling within the protection of the Due Process Clause.[327]

The next question is what "process" or procedural safeguards must be afforded a prisoner transferred to an HIV unit. While the Supreme

324. *See* Hewitt v. Helms, 459 U.S. 460, 468 (1983).

325. Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 7 (1979) (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

326. Vitek v. Jones, 445 U.S. 480, 489-90 (1980) (quoting Miller v. Vitek, 437 F.Supp. 569, 572-73 (D. Neb. 1977)).

327. *Id.*

Court has required that only minimal safeguards attend a prisoner's transfer to administrative segregation,[328] a transfer to an HIV unit is different, in terms of both the centrality of the private interest affected by the transfer and the risk that the transfer is unfounded. The due process balancing test therefore points towards affording greater procedural protection when prisoners are transferred to HIV units.

What that protection must actually entail will depend on the circumstances. If government officials have taken adequate measures to limit laboratory errors and if the prison population being tested is at high risk for HIV, a summary transfer to an HIV unit might be constitutional as long as two conditions have been met: first, an expert has reported that the inmate tested positive on two ELISA tests and a Western blot, and second, the inmate has been notified of and given a copy of the test results. Soon after the inmate's transfer to the HIV unit, however, a hearing would have to be held on the question of his or her HIV status. At this hearing, the inmate would have a number of rights, including the right to present the testimony of witnesses and documentary evidence absent good cause for not permitting the inmate to do so, the right to confront and cross-examine witnesses unless there was good cause for forbidding such confrontation and cross-examination, and the right to assistance in contesting the HIV results from someone who is "independent" and qualified to provide such assistance. In addition, the inmate would have the right to have additional tests performed on a newly drawn blood sample and to receive notice of all of the above rights.

On the other hand, if the government failed to guard adequately against laboratory errors, due process would require that the hearing, with its attendant procedural safeguards, precede the transfer to the HIV unit. In addition, if the government did all that could be done to reduce the rate of laboratory errors in interpreting HIV-antibody test results, the risk of being erroneously identified as HIV-positive would be quite high if the prevalence of the HIV in the population being tested was low. As discussed earlier, up to five of every fifteen persons might be misidentified as seropositive.[329] In this situation, it would seem, due process also would dictate a pretransfer hearing.

In the fight against AIDS, government officials can do more to combat the spread of HIV. The challenge for the government, however, is to resist harebrained ideas that have surface appeal but that will actually undermine the government's efforts to curtail the spread of the virus. Should government officials succumb to demands to segregate all HIV-

328. *Hewitt*, 459 U.S. at 476-77.

329. *See supra* note 287 and accompanying text.

positive prisoners in special units, however, and should this segregation policy otherwise comport with the Constitution, the government will still have to set up adequate procedures to ensure that inmates are not arbitrarily placed in an HIV unit. While meeting the challenge of doing more to fight AIDS, the government can do no less than the Constitution demands.