AIDS In Prisons: Are We Doing the Right Thing?

I. INTRODUCTION

Acquired Immune Deficiency Syndrome,1 (AIDS)2 is a disease that destroys the victim's immune system, leaving the body open to various diseases.3 “AIDS is characterized by an extreme weakening of the immune system which leaves the body vulnerable to debilitating attacks of a host of opportunistic infections and diseases.”4 This disease has caused a panic across the country,5 as people fear contraction of the

1. “Acquired Immune Deficiency Syndrome . . . is an infectious, incurable disease that seriously impairs the body's ability to fight other diseases, and leads ultimately to death.” Parmet, AIDS and Quarantine: The Revival of an Archaic Doctrine, 14 Hofstra L. Rev. 53, 53 (1985) [hereinafter cited as AIDS and Quarantine]. It is a “reliably diagnosed disease that is at least moderately indicative of an underlying cellular immunodeficiency, or any other cause of reduced resistance reported to be associated with that disease.” LaRocca v. Dalsheim, 120 Misc.2d 697, 700, 467 N.Y.S.2d 302, 305 (1983) (citing Centers for Disease Control, MMWR, Vol. 32, No. 24, June 24, 1983).

“AIDS is a serious communicable disease that undermines the human body's ability to combat infections.” Hammett, AIDS in Prisons and Jails: Issues and Options, Nat'l Inst. of Just. Res. in Brief 2 (February 1986) [hereinafter cited as AIDS in Prisons]. “[T]he cellular immunodeficiency referred to is a condition in which the body's immune system is compromised, impairing its ability to resist infections which, in the normal system, would be easily defeated.” LaRocca, 120 Misc.2d at 700, 467 N.Y.S.2d at 305 (citing Masur, An Outbreak of Community - Acquired Pneumocystis Carinii Pneumonia - Initial Manifestation of Cellular Immune Dysfunction, New Eng. J. of Med. Vol. 305, No. 24, December 10, 1981, p. 1431). “As a result of this dysfunction, the body becomes a defenseless host to an array of opportunistic infections or rare concern disorders . . . .” LaRocca, 120 Misc.2d at 700, 467 N.Y.S.2d at 305 (citing Acquired Immunodeficiency Syndrome Cause(s) Still Elusive, J.A.M.A., Vol. 248, No. 12, September 24, 1982, p. 1423). In other words, “Acquired Immune Deficiency Syndrome is a virus that destroys the body's ability to fend off disease.” Gratteau, AIDS Fear Flourishes in Prisons, Chicago Tribune, December 2, 1985, at 2, sec. 2, col. 6.

2. “‘AIDS' is the abbreviation for acquired immune deficiency syndrome.” Sicklick and Rubinstein, A Medical Review of AIDS, 14 Hofstra L. Rev. 5 n.1 (1985). Throughout this Note, “AIDS” will be used as it is the more commonly known term utilized for the disease.


4. Id.

5. AIDS and Quarantine, supra note 1, at 53. “An epidemic of fear has accompanied the spread of the disease [AIDS] and with it, public attention has turned to quarantine, one of the oldest tools of public health.” Id. “The 13,000 cases of AIDS that have been reported since 1979 represent only about one-quarter of last year's traffic deaths, but the
virus. The disease primarily affects homosexuals, bisexuals and intravenous drug users.\(^7\)

In prisons, the AIDS fright runs rampant\(^6\) as the prisoners fear prison rape\(^9\) and realize the dangers of common drug use.\(^10\) This fear extends to the administration and the guards\(^11\) at the correctional facilities, who fear that they may contract the disease. These groups then create policies which segregate and isolate the AIDS victims from the rest of the prison population.\(^12\) Although segregation has become the common practice, some states have chosen not to follow it.\(^13\) These ripples of fear from the disease have already spread far beyond the homosexual men who are its most frequent victims . . . . Few scenarios are as alarming, though, as an AIDS epidemic in one of the two major institutions where large numbers of young men live together in isolation: the military and prisons.” Adler, _Trying to Lock Out AIDS_, NEWSWEEK, September 16, 1985, at 65. “Near panic and a lack of knowledgeable leadership characterize the situation in prisons across the country, where the problem of inmates with AIDS is growing rapidly.” Jones, _In Prison With AIDS_, THE GUARDIAN, December 4, 1985, at 1, col. 1. See also infra note 9 and accompanying text.

6. Note, _The Constitutional Rights of AIDS Carriers_, 99 HARV. L. REV. 1274, 1275 (1986) [hereinafter referred to as _The Constitutional Rights_]. “In the United States, AIDS primarily affects urban residents in two population groups: seventy-three percent of AIDS patients are gay or bisexual men and seventeen percent are heterosexual intravenous drug users. The virus that causes AIDS destroys the body’s ability to fight disease. The virus is difficult to contract—sexual and bloodstream-to-bloodstream contact with a carrier are the only proven methods of transmission—but those who do develop AIDS seem to have no chance of recovery.” Id. See also infra notes 10-11.

7. Id. “[T]he main avenue AIDS travels into the heterosexual community is through infected addicts.” _AIDS: At the Dawn of Fear_, U.S. NEWS & WORLD REP., January 12, 1987, at 65 [hereinafter cited as _At the Dawn of Fear_].

8. See supra note 5 and accompanying text. “In Illinois and other state prison systems, ‘there is so much fear [about AIDS] that it is verging on hysteria . . . .’” Gratteau, supra note 1, at col. 6.


10. Id. at 1, cols. 2-3. “Intravenous drug users are one of the major risk groups for the disease and are also thought to be among the main carriers of AIDS to the heterosexual population.” Kantrowitz, _Kids and Contraceptives_, NEWSWEEK, February 16, 1987, at 58.


12. Balanced Response, _supra_ note 3, at 4. “Segregation of inmates with AIDS is the policy of 42% of the state and federal systems . . . . Only two states reported that they do not segregate any inmates because of AIDS or AIDS-related conditions.” Id.

AIDS IN PRISONS

states allow the inmate to carry on with his normal routine. Then, when the victim gets sick, he is placed in the prison hospital, or in quarantine, until the illness is overcome. The AIDS inmate is then returned to the general population. This policy of returning the inmate to the general population is implemented by only a minority of states due to the rampant fear of AIDS both in and out of prisons.

This Note examines the prison administration's policies of isolation and segregation and their justifications and makes a determination as to whether or not the policies of segregation and isolation violate any rights inmates may have. Specifically, due process and equal protection rights as articulated in the fourteenth amendment of the Constitution and the issue of cruel and unusual punishment as stated in the eighth amendment are addressed.

II. An Example

Harry Bromfield appears to be a typical prisoner. However, when we look closer it is obvious that he is not. Harry Bromfield has been diagnosed as having AIDS. While Harry was an inmate in a prison in the State of New York's Correctional System, he was diagnosed as being a carrier of the AIDS virus. The doctors' diagnosis concluded that Harry was a carrier before he came into the prison system.

After the diagnosis was complete, Harry was escorted from his housing unit with a plastic bag over his head and quarantined in the

14. Balanced Response, supra note 3, at 4 (the "normal routine" that is mentioned is leaving the prisoner in the general population and letting him carry on with the activities as do all of the other prisoners in the general population who do not have AIDS).
15. Id.
16. Id.
17. See supra notes 12-13 and accompanying text.
18. Harry Bromfield is a fictitious character. He is being used as an example of how an AIDS victim is treated in prison. In order to protect any victim from potential abuse, this character was chosen to develop a scenario and a character as opposed to using a "real" example.
19. A New York State Correctional Institution was chosen for this example because New York has a large number of AIDS victims in its prisons. In a recent survey conducted by the National Prison Project in 1985, New York reported 231 of the 420 AIDS victims that were reported. NPP Gathers the Facts, supra note 11, at 4. "The overwhelming majority of the 420 [AIDS] cases diagnosed to date (85%) have been found in the New York, New Jersey and Florida systems." Id. at 2.
20. See infra note 32 and accompanying text. See also supra note 1 and accompanying text.
22. This portion of the scenario is a description of what actually occurred in a prison
prison's solitary confinement quarters.\textsuperscript{23} The cell and conditions into which Harry was placed were far worse than his former living quarters.\textsuperscript{24} During his quarantine Harry was not allowed visitors or permitted to mingle with other inmates.\textsuperscript{25} Harry was rarely allowed to go outside onto the prison grounds for exercise, and could never go onto the grounds if other prisoners were there.\textsuperscript{26} Most of the time he was confined to his cell in complete solitude,\textsuperscript{27} he was not allowed to visit the law library, use the same bathroom as other prisoners or eat with others.\textsuperscript{28}

Harry was put on display like a freak in a side show and the corrections officers were paraded past his cell so they could see what a person with AIDS looked like.\textsuperscript{29}

Eventually Harry died from AIDS.\textsuperscript{30} The last years of his life were

\begin{enumerate}
\item[23.] See supra note 12 and accompanying text.
\item[24.] Jones, supra note 5, at 1 and 11. This is an example of conditions that prisoners have complained about throughout the prison system. It is not a condition complained about in any specific case, the author merely uses these examples to develop the scenario.
\item[25.] See supra notes 22 and 24. "[I]nmates with AIDS have been placed in isolation, often in cells designed for disciplinary purposes. Inmates have been denied access to physical and educational programs solely because they have AIDS." Jones, supra note 5, at 1, col. 3.
\item[26.] See supra notes 22 and 25.
\item[27.] See supra notes 12, 24 and 25. "[S]egregation of . . . inmates is common among state systems . . . . Certainly prison administrators would be justified in removing an individual who is being threatened from the general population. But selectively placing individuals on protective custody status is markedly different from a policy of wholesale segregation of all prisoners with AIDS-related conditions." Balanced Response, supra note 3, at 4.
\item[28.] See supra notes 12, 24 and 25.
\item[29.] See supra note 22.
\item[30.] Beley, Moving Target: Searching for a Vaccine and a Cure, Newsweek, November 24, 1986, at 36.
\end{enumerate}

By any standard, the progress against AIDS has been nothing short of phenomenal. In the five years since the disease was discovered, researchers have identified the virus that causes it, developed a test for identifying antibodies to it and found a drug that seems to control some symptoms. But finding a cure for those afflicted - let alone a vaccine to protect the rest of the population - is still years or decades away.

\textit{Id.}

Because no cure has been found for the victims, they eventually die. "Acquired Immune Deficiency Syndrome . . . is an infectious, incurable disease that seriously impairs the body's ability to fight other diseases, and leads ultimately to death." AIDS and Quarantine, supra note 1, at 53.
spent in solitary confinement much like the way the majority of inmates with AIDS in prisons across the United States are treated.\textsuperscript{31}

III. DESCRIPTION OF “AIDS INMATES”

The group of inmates that can claim a violation of rights includes both AIDS carriers\textsuperscript{32} (an inmate who is carrying the virus but is not infected with it) and inmates who have contracted AIDS.\textsuperscript{33} These claims of violations of rights arise due to the imposition of administrative segregation on inmates in both of these categories.\textsuperscript{34} In dealing with an AIDS contractor himself, contraction of the disease eventually is visible,\textsuperscript{35} thus allowing the prison administrators to know who to place into administrative segregation.

The group of inmates who are AIDS carriers are not recognizable,\textsuperscript{36} thus prison officials utilize investigative testing to determine whether a prisoner is a carrier of AIDS.\textsuperscript{37} Some states have mandatory testing when the prisoner enters the correctional facility to determine if the inmate is an AIDS carrier.\textsuperscript{38} Testing is not utilized in all states,\textsuperscript{39} thus the policy of segregation is underinclusive as not all AIDS victims are being segregated.\textsuperscript{40} In states that do not test the inmates the only segregation that occurs is that of the visible contractor.\textsuperscript{41}

These states do not “protect” the prison population because they

\begin{itemize}
\item \textsuperscript{31} See supra notes 22 and 25.
\item \textsuperscript{32} An AIDS carrier is one who merely carries the AIDS virus without having contracted the disease itself. This is most common during a victim’s incubation period when the disease’s symptoms have not developed. The Constitutional Rights, supra note 6, at 1275 n.9.
\item \textsuperscript{33} Contraction of AIDS refers to the period when the symptoms develop and the victim begins the process of dying. Id.
\item \textsuperscript{34} See supra note 12 and accompanying text.
\item \textsuperscript{35} See supra note 33 and accompanying text.
\item \textsuperscript{36} These victims are not recognizable as they are merely carrying the virus and not exhibiting symptoms of it. See supra note 32.
\item \textsuperscript{37} NPP Gathers the Facts, supra note 11, at 2. “Sixty percent (29) of the 48 states which responded to the survey indicated that they use the ELISA test [Enzyme Linked Immuno-sorvent Assay, a test which measures the presence of antibodies to the HTLV-III virus] in some fashion.” Id.
\item \textsuperscript{38} Id. “Only sixteen states reported the use of some form of intake screening specifically aimed at identifying persons at risk for AIDS or those with AIDS-associated symptoms.” Id.
\item \textsuperscript{39} Id.
\item \textsuperscript{40} See infra notes 146-57 and accompanying text.
\item \textsuperscript{41} If no testing occurs, the only way to know if an individual is a victim and is “due” to be segregated is to see the symptoms. Thus, this requires that a victim who has contracted the disease is segregated while carriers who do not show any symptoms are not segregated.
\end{itemize}
allow the carrier of AIDS to stay within the general population. This results in the possible passing on of AIDS as these carriers could be intravenous drug users or engage in sexual acts which could infect another prisoner.\footnote{42} Because the AIDS carrier is not recognizable as such, the other prisoners will not know of the danger.

Both AIDS carriers and contractors are segregated if the state has testing to determine who the AIDS carriers are.\footnote{43} If not, only AIDS contractors are segregated.\footnote{44}

IV. \textit{Cordero v. Coughlin}

A. History

\textit{Cordero v. Coughlin}\footnote{45} is the leading case regarding the area of segregation and isolation of AIDS victims within the prison system.\footnote{46} The Southern District Court of New York was asked to consider a policy of segregation and isolation and determine if such policy violated a prisoner’s rights.\footnote{47} The plaintiffs in this case were inmates in various New York prisons who suffered from AIDS.\footnote{48} They alleged that segregation and isolation of an inmate from the general population and the lack of social, recreational and rehabilitative opportunities that resulted, violated their first, eighth and fourteenth amendment rights. \footnote{49} The \textit{Cordero} court held that no eighth amendment cruel and unusual punishment violations existed.\footnote{50} The court further stated that “[p]laintiffs here have alleged no facts which would entitle them to relief under the eighth amendment.”\footnote{51} The \textit{Cordero} court ultimately held that “AIDS victims are not a ‘suspect class’ and therefore . . . the Equal Protection Clause is not violated.”\footnote{52} It also held that, because there is no

\footnote{42} Any recognized victim who remains in the system is considered dangerous by the institution, yet the prison officials allow carriers to remain in the system without knowing that they have the disease or could pass it on.
\footnote{43} See \textit{supra} notes 35-40 and accompanying text.
\footnote{44} \textit{Id}.
\footnote{45} Cordero v. Coughlin, 607 F. Supp. 9 (D.C.N.Y. 1984) (in this decision the court held that no rights violations existed under the first, eighth or fourteenth amendments due to the policies of isolation and segregation in the prisons).
\footnote{46} \textit{Id}. at 9. Actually, to the best of this author’s knowledge, this is the only case that has been reported to date on AIDS victims in prisons claiming rights violations in the prison system.
\footnote{47} \textit{Id}.
\footnote{48} \textit{Id}. at 9-10.
\footnote{49} \textit{Id}. at 10.
\footnote{50} \textit{Id}. at 9.
\footnote{51} \textit{Id}. at 11.
\footnote{52} \textit{Id}. at 10.
requirement of a hearing before segregation under New York law,\(^\text{53}\) "[a] decision such as is involved here is clearly one of discretion, and as a matter of law plaintiffs' due process rights have not been violated."\(^\text{54}\) In rejecting all of the plaintiffs' claims, the court granted defendant prison official's motion to dismiss for failure to state a claim upon which relief could be granted.\(^\text{55}\)

B. Policy and Justifications

In reaching its decision the district court used the rationale\(^\text{66}\) of: fear from and for the AIDS victim,\(^\text{57}\) ignorance and mystification of the disease itself,\(^\text{58}\) care for the victim,\(^\text{59}\) and the fact that inmates have limited rights.\(^\text{60}\) These are the same justifications used by prison administrators to justify their policies of segregation and isolation.\(^\text{61}\) First, the

\(^{53}\) Id. Some states have policies of hearings before any type of confinement occurs. Hewitt v. Helms, 459 U.S. 460, 476 (1981). New York does not have such a policy. Cordero, 607 F. Supp. at 10. The Supreme Court has held that prisoners have to be given notice of what they are being confined for, as well as a hearing before confinement can occur. Hewitt, 459 U.S. at 476. If such a hearing is not given, it is a violation of the due process clause of the fourteenth amendment. Id.

\(^{54}\) Cordero, 607 F. Supp. at 10.

\(^{55}\) Id.

\(^{56}\) Id. The court in Cordero based their decision on policies put forth by the prison officials. Id. These objectives are the same policies put forth by other prison administrators who also want to justify segregation. See supra notes 5, 8 and accompanying text. These objectives were "to protect both the AIDS victims and other prisoners from the tensions and harm that could result from the fears of other inmates." Cordero, 607 F. Supp. at 10.

\(^{57}\) See supra notes 5, 8 and accompanying text.

\(^{58}\) Cordero, 607 F. Supp. at 10.

\(^{59}\) Id.

\(^{60}\) Hewitt, 459 U.S. at 467.

[\text{P}rison officials have broad administrative and discretionary authority over the institutions they manage and that lawfully incarcerated persons retain only a narrow range of protected liberty interests \ldots \ldots \text{[W]e have recognized that broad discretionary authority is necessary because the administration of a prison is 'at best an extraordinarily difficult undertaking' \ldots and have concluded that 'to hold that any substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts.' Id. The Court goes on to state that "[I]lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." Id.}

\(^{61}\) See supra note 56 and accompanying text. "[T]he state sets forth its objective: to protect both the AIDS victims and other prisoners from the tensions and harm that could result from the fears of other inmates." Cordero, 607 F. Supp. at 10.
officials and the Cordero court claimed that the fear of AIDS justifies the segregation and isolation. This fear, along with the other justifications, led the Cordero court to hold that isolation and segregation were correct under the circumstances. The court specifically stated that its objective was "to protect both the AIDS victims and other prisoners from the tensions and harm that could result from the fears of other inmates." The second justification utilized by the prison administration and the Cordero court is that there is not enough known about AIDS for the prisoners or prison officials to feel safe about it. The prison guards have also concurred and argued that they do not want to deal with inmates with AIDS until more is known about the disease. A third defense used to allow segregation is the claim that segregation is what is best for the victim. This argument extends to the physical as well as the psychological well-being of the victim. The prison officials maintain that if the victim is left in the general population, he could contract diseases which would ultimately lead to his death. The fourth and final rationale that the prison administrators and the Cordero court utilized is that inmates have limited rights and the prison administrators feel that they can deal with the inmates however they choose. If the conditions of incarceration are not hazardous and generally do not offend human dignity, then administrators can segregate the prisoners from the rest of the general population as long as there is some legitimate justification. These policies are implemented by placing prisoners in solitary confinement, excluding a group or a single inmate with AIDS in the prison hospital or confining the inmate in his cell.

62. Id. "They [AIDS victims] are . . . greatly feared by fellow inmates and, apparently ostracized." Id.
63. Id.
64. Id.
65. Id. "They [AIDS victims] suffer from an incurable, fatal disease both the genesis and transmission of which is poorly understood." Id.
66. Gratteau, supra note 1, at col. 6. See also Ward, Delaware Adopts Inmate Segregation, PHILADELPHIA GAY NEWS, November 1-7, 1985, at 26, col. 3.
68. Id. See also Nordheimer, supra note 13, at col. 2.
69. See supra text accompanying note 44.
70. State v. Muessig, 198 N.J. Super. 197, 486 A.2d 924, 925 (1985). The court must "inquire whether the nature of the punishment is grossly disproportionate to the offense and goes beyond any legitimate penal goal so as to shock the general conscience and violate principles of fundamental fairness." Id. "Conditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment." Rhodes v. Chapman, 452 U.S. 337, 347 (1981).
71. See supra notes 12, 25 and accompanying text.
C. Justifications Outdated

The major flaws in the rationale used by the prison officials and the court in *Cordero v. Coughlin* are that they are outdated and inapplicable due to medical advancements. The knowledge about AIDS today is vastly different from what it was in 1984, at the time of the *Cordero* decision. More has been learned about the disease. Important educational programs have been developed in general as well as in the prison system. These educational programs attempt to teach the prisoners and the administrators: that the disease cannot be contracted from casual contact; what can lead to contraction of the disease; and what to do if the disease is contracted. Scientists are discovering medicines which “control some of the symptoms” of the disease. The public and prisoners have learned that AIDS cannot be spread through casual contact. Education has become important to the general population and extremely important in the prison system.

72. See *supra* note 30 and accompanying text. The policy justifications used at the height of the AIDS scare are unfounded today in light of the advances which have been made. *Id.* Although a cure has not been found for the disease, progress has been made which includes educating people about the disease, getting people to use care and prevention, and the development of a drug that helps control the virus. *Id.* These advances make such policy justifications outdated as the circumstances surrounding the disease have totally changed.

73. See *supra* notes 30, 72 and accompanying text.

74. *Id.*

75. *Id.* “Lacking medical breakthroughs anytime soon, education will be the most powerful defense against AIDS for at least several years.” *At the Dawn of Fear, supra* note 7, at 65.

76. *NPP Gathers the Facts, supra* note 11, at 5.

The majority of corrections departments have developed training seminars for medical and security staff, and have distributed educational materials to inmates. The process of education is perhaps the key ingredient to the corrections community’s response to the AIDS crisis. Prison systems concerned with needle-use as well as consensual and non-consensual sexual activity inside prisons must continue to develop and improve educational materials which specifically and vividly impress upon both inmates and staff the risks associated with certain behaviors.

*Id.*

77. *Id.*

78. Beyley, *supra* note 30, at 36. “By any standard, the progress against AIDS has been nothing short of phenomenal. In the five years since the disease was discovered, researchers have identified the virus that causes it, developed a test for identifying antibodies to it and found a drug that seems to control some symptoms.” *Id.*


80. See *supra* note 75 and accompanying text.

81. See *supra* note 76 and accompanying text.
Additionally, the realization that prisoners do have limited rights negates the Cordero court’s justification for segregation. Some constitutional protections are offered to prisoners, although they do not have the broad constitutional rights that the general population is guaranteed. The courts have acknowledged that prisoners have the right to adequate facilities, adequate medical care, adequate programs and nutrition. Overall, the attitude towards AIDS has become more tolerant as people are educated and realize that they can protect themselves from the disease. This change in attitude as well as the scientific developments make the court’s justifications in Cordero flawed and no longer applicable.

V. STATE ACTION

In order to claim a rights violation, it must be shown that the state or federal government is acting in a way that infringes upon the rights of an individual or group. If infringement of rights occurs due to a private source, no constitutional protection is given.

When an inmate is segregated because he has AIDS, it is the state that acts and causes the alleged rights violations. Prison administrators are representatives of the state that they are in and they are accountable to the people of the state. These administrators spend state funds and are controlled by the state governments. State action is present and thus constitutional protections are warranted.

82. See supra note 60 and accompanying text.
83. Id.
85. See supra notes 75-76 and accompanying text.
   It is clear, as it always has been since the Civil Rights Cases, that individual invasion of individual rights is not the subject-matter of the amendment, and that private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it. Id. at 722.
   The Civil Rights Cases, 109 U.S. 3 (1883), embedded in our constitutional law the principle that the action inhibited by the first section [Equal Protection Clause] of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

87. Id. A private party or group, for the purposes of this Note, is defined as any non-governmental group or party.
VI. EQUAL PROTECTION

A. Overview

In Cordero v. Coughlin the court held that:

Because AIDS victims are not similarly situated to other prisoners the Equal Protection Clause simply does not apply here. Even assuming that the Equal Protection Clause does apply, AIDS victims are not a ‘suspect class’ and therefore as long as there is a legitimate government end and the means used are rationally related to that end, the Equal Protection Clause is not violated.88

In so holding, the court erred in its choice of what test89 to apply to the alleged rights violations. If AIDS victims are a suspect class90 a heightened scrutiny of the violations should have been applied. “Equal protection decisions . . . established that laws infringing fundamental rights would be held to the more demanding standard of review — ‘strict scrutiny’91 — once reserved for classifications based on race, national origin, and alienage.”92

“The Court also introduced a middle tier to equal protection analysis — ‘intermediate scrutiny’93 — which requires that legislation burdening certain ‘quasi-suspect’94 classes or impairing important, but not

89. Refers to the three levels of scrutiny discussed in this Note; strict scrutiny, intermediate scrutiny and rational relationship.
90. A “suspect class” is a class of people that fulfills the requirements of (1) having an immutable characteristic; (2) having a history of invidious discrimination; and (3) having the chance of tyranny of the majority. United States v. Carolene Products Co., 304 U.S. 144, 153 (1938).
91. “Strict scrutiny” is the highest level of three scrutinies that the courts have developed to analyze a governmental policy. This level of scrutiny requires a compelling state interest and means that are strictly tailored toward that end. It also requires that no less restrictive alternatives exist. This level requires an accurate and precise analysis of the policy and a precise fit with the means. If this does not exist, the policy fails. Note, The Supreme Court, 1984 Term, 99 Harv. L. Rev. 120, 161-62 (1985) [hereinafter cited as The Supreme Court, 1984 Term].
92. See The Constitutional Rights, supra note 6, at 1278.
93. “Intermediate scrutiny” is the middle and newest level of scrutiny developed by the courts. It requires an important governmental interest with a substantially related means that has no less restrictive alternatives. This level of scrutiny was developed because of the court’s recognition that there were groups that needed some protection but did not qualify for strict scrutiny protections. The Supreme Court, 1984 Term, supra note 119, at 161-62.
94. A “quasi-suspect class” is a class that may not fulfill all of the requirements of a true suspect class. They are close to or in relation to a suspect class, but they generally do not fulfill the requirement of having an immutable characteristic, i.e. one that can’t be changed. See, e.g., Craig v. Boren, 429 U.S. 190, 197 (1976) (treating gender classifica-
fundamental, rights be substantially related to an important state interest." The Cordero court bypassed both heightened scrutinies and based their decision on a "rational relationship" test that allows government regulations to withstand scrutiny easily. The court should have examined all of the tests and made a determination as to which to use instead of making a haphazard determination to further their analysis.

B. AIDS Victims as a Suspect Class

In order for a group claiming a rights violation to be examined under the three tests discussed above, it must first be categorized as a suspect class or a quasi-suspect class. Categorization must occur for AIDS victims in prison, as a group, claiming rights violations. This group

95. See The Constitutional Rights, supra note 6, at 1278.

96. A "rational relationship" test requires a legitimate governmental interest and means that are rationally related to that end. McDonald v. Board of Elections, 394 U.S. 802, 809 (1969). This level of scrutiny basically gives a free reign to the government to institute virtually any restrictions that it chooses. Note, An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality, 57 S. CAL. L. REV. 797, 808 (1984) [hereinafter cited as An Argument For Heightened Scrutiny]. "[R]ationality review, as currently used, is merely a rubber-stamp review." Id. at 808 (citing United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 178 (1980)). This is the test that the Cordero court used. Cordero, 607 F. Supp. at 10.

97. Referring to all of the levels of scrutinies discussed in this Note; strict scrutiny, intermediate scrutiny and rational relationship.

98. The court in Cordero gave no analysis as to why it chose to base its decision on a rational relationship test. The court delivered their opinion without analysis as to why or how it came to those decisions. Cordero, 607 F. Supp. at 9.

99. See supra note 90 and accompanying text. If the class does not meet the characteristic qualifications found in Carolene Products, it is not considered a "suspect class." Carolene Products, 304 U.S. at 153-54.

100. See supra note 94 and accompanying text.

101. The AIDS victim classification would be utilized to deal specifically with the group that is being segregated. The test to meet the qualifications of a suspect class would have to be specifically based on this group.

102. There are two other groups which could also claim rights violations under the three pronged test from Carolene Products. The first group is that of homosexuals. The second group would be that of intravenous drug users. Because these two groups combine to constitute the majority of AIDS victims, see supra note 6 and accompanying text, any rights violations may be deemed to be aimed at one or both of these populations, as well as the AIDS victims group itself.

When examining homosexuals (one who "exhibits sexual desire towards a member of one's own sex," WEBSTER'S NEW COLLEGIATE DICTIONARY 544 (1980)) as a group under the first prong of the Carolene Products test it is widely accepted that homosexuals have a characteristic which cannot be changed. Granted, there is a large debate raging pres-
includes both carriers and contractors.

tently as to how homosexuality develops in a person. Blake, Neurohormones and Sexual Preference, Psychology Today, January 1985, at 12. Different groups claim that it is developed either through the environment, through choice, or through heredity. "[T]here may be physiological development components in the sexual orientation of some homosexual men." Id. "[A]n intermediate level of responsiveness to estrogen could possibly be seen as a biological marker of sexual orientation in these men." Id. The author of this Note agrees with this theory and thus argues that homosexuality is something that an individual is born with yet concedes that "it may be developed through choice." An Argument For Heightened Scrutiny, supra note 96, at 817 (emphasis added). "Research indicates that neither individuals nor their parents can control whether the person turns out to be gay, bisexual, or heterosexual. Individuals do not choose their sexual orientation." Id. at 818. See also R. Kronemeyer, Overcoming Homosexuality 195 (1980) (homosexuality is not a "choice"). Homosexuality is not a disease or an abnormality that is acquired throughout a lifetime. Homosexuals are born with it and their upbringing nurtures the trait in the person just as a heterosexual's upbringing is a factor in their heterosexuality. "Sexual orientation is generally impervious to change. [E]ach person's erotic preference . . . has rather fixed boundaries and, once established, is remarkably stable throughout life." Id. at 819-20 (citing J. Money & A. Ekhhardt, Man and Woman, Boy and Girl 188 (1972)).

"In addition, '[h]omosexuality is just as deeply ingrained in a person as is heterosexuality.' Nothing exists to indicate that homosexuality is susceptible to change: the researchers who have claimed 'successful' conversions have yielded no more than limited and problematic behavioral changes which other researchers and commentators have severely criticized." Id. at 820. The trait of homosexuality can not be changed. It can be hidden or ignored, but it does not go away. Id.

The second prong of the test dealing with invidious discrimination extends to homosexuals. Homosexuals have been subjected to arbitrary firing from their jobs, as well as persecution from their peers because of their sexual preference. An Argument For Heightened Scrutiny, supra note 96, at 799-800. "Despite recent changes in some areas of the law, gays are still the victims of official discrimination. Some state and federal courts, for example, have acknowledged that gays need special judicial protection because of the official unwarranted discrimination they face." Id. Many laws that seem to be non-discriminatory in nature are applied in a discriminatory manner against homosexuals. Sodomy laws are a prime example of this type of discrimination. Id. at 800.

"Twenty-three states and the District of Columbia have sodomy statutes that deny homosexuals the right to have sexual relations. Generally, sodomy statutes do not distinguish between homosexuals and heterosexuals, although the statutes in six states bar only homosexual acts of sodomy." Id. at 802-03. See also Bowers v. Hardwick, 106 S. Ct. 2841 (1986) (although in Hardwick the Supreme Court never really dealt with the status as it is directly applied here).
The criteria that has been accepted by the courts as the legitimate determination of a suspect class is found in *United States v. Carolene Products Co.*. In this case the Supreme Court established a three-pronged analysis to determine if a group claiming rights violations is indeed a suspect class. First, the class must be grouped by an immutable characteristic. An immutable characteristic is a characteristic that cannot be changed. The second prong of the *Carolene Products* test also applies to intravenous drug users. The majority of the population persecutes homosexuals because of their sexual preference. Id. at 799-800. This tyranny extends to the work place, where homosexuals have been fired because they are gay. Id. This persecution extends to the prisons where homosexuals are categorized and abused. See *supra* notes 22-31 and accompanying text. Because homosexuals have the characteristics of political powerlessness and stigmatization, they should be protected by strict scrutiny. *An Argument For Heightened Scrutiny*, supra note 96, at 797-98. “[C]ourts should apply equal protection heightened scrutiny to classifications based on homosexuality on the premise that it is wrong for government to discriminate against gays solely because they are gay.” Id.

When examining intravenous drug users under the three pronged test outlined in *Carolene Products*, it is evident that they too would require a heightened scrutiny. The first prong of the test, dealing with immutable characteristics, is where this group would fail the test, if at all.

Drug users, for the most part, are not born with an addiction. It is a characteristic that they develop throughout their lifetime. It could be considered that an addiction is something that never goes away or changes, even if the addict stops using drugs.

Generally, intravenous drug users would be considered a “quasi-suspect class” at best, as they are not born with their addiction. Whether or not intravenous drug users would be considered to have an immutable characteristic is something that would be left to the discretion and determination of the judge. Intravenous drug users could possibly be classified as a “suspect class,” but *at the very least*, they could be considered a “quasi-suspect class” if they do not meet the immutable characteristic standard.

The second prong of the test, dealing with invidious discrimination, extends to intravenous drug users as a class as well. Drug users have been fired from their jobs, as well as having been persecuted by their peers. Morikawa, Hurtjen, Connor, & Costello, *Implementation of Drug and Alcohol Testing in the Unionized Workplace*, 11 NOVA L. REV. 654 (1987). Recently, there has been a push in the public and private sector to eliminate all drug users from the work force. Id.

This push has caused many people to downgrade all drug users and has promoted an overall feeling that drug users are a deplorable part of society. This feeling extends into the prison system as well, when prisoners learn the dangers, such as AIDS, that can result from drug use. See *supra* note 6 and accompanying text.

The third prong of the *Carolene Products* test also applies to intravenous drug users. The tyranny of the majority is again evident because of the firings and the persecution. Intravenous drug users, as a group, have the characteristics of discrimination (applied against them), political powerlessness and stigmatization. Therefore, this group should also be offered the protections of examination by a heightened scrutiny. *An Argument For Heightened Scrutiny*, supra note 96, at 797-98 (analogizing to homosexuals).
that cannot be changed. Generally, having AIDS is a characteristic that cannot be changed. Once a person becomes a carrier, he is a carrier for life. Being a carrier is not something that a victim is born with in all cases, but it is a defining characteristic.

The second prong of the analysis is an examination as to whether the group claiming violations has a history of invidious discrimination. When applying this prong of the analysis to AIDS victims, a pattern of discrimination may be seen. People with AIDS have had to deal with the large amounts of fear and ignorance of the disease. AIDS victims have been fired, barred from public schools and subjected to possible quarantines. In the prison system, the inmate with AIDS has a definite possibility of being segregated and isolated. These restrictions are aimed at the victims because of their general characteristic of contracting or carrying AIDS.

The third and final prong of the analysis is an examination of the likelihood of tyranny of the majority. If the action being taken by the majority of the population is a form of harassment and discrimination upon the minority group (that is claiming the rights violations) then it is invalid. This can occur through discriminatory application of a non-discriminatory law as well as through the application of a discriminatory law. Tyranny can also be achieved by failing to give the individual's control." An Argument For Heightened Scrutiny, supra note 96, at 798.

106. Id.
107. See The Constitutional Rights, supra note 6, at 1275.
108. Id. Once a person has contracted AIDS, the virus stays in the system. It is not a virus that a victim recovers from. Id.
109. Morganthau, Future Shock, NEWSWEEK, November 24, 1986, at 31. Some children are born with AIDS if one of the parents is an AIDS virus carrier, but generally the disease is contracted later in life. Id.
111. See supra notes 5, 8 and accompanying text.
112. See Morganthau, supra note 109, at 32.
114. See The Constitutional Rights, supra note 6, at 1281-82. "More than one in four Americans favors putting people with AIDS 'into quarantine in special places to keep them away from the general public' . . . . [A]t least one state, Virginia, has planned a quarantine program to isolate AIDS patients who continue to have sexual relations." Id.
115. See supra notes 24, 25 and accompanying text.
116. See The Constitutional Rights, supra note 6, at 1281-82.
118. Id. "The Court looks to whether the class has faced a 'history of purposeful unequal treatment.'" An Argument For Heightened Scrutiny, supra note 96, at 814.
119. An Argument For Heightened Scrutiny, supra note 96, at 800. See Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985); see also supra note 102.
rights and freedom that a group deserves. When applying this criteria to prisoners with AIDS, a definite history of tyranny is evident. Within the prison system, this tyranny is already in place. The majority group, the administration, places the minority group, the AIDS victims, into isolation with limited, if any, privileges. Other prisoners persecute the inmates with AIDS because of the disease. Overall, a court may consider the way the class is treated by others, the relationship of class members to one another, and the relevance of the class's defining characteristics to class members' abilities to participate in society. Although no one characteristic is determinative, political powerlessness, stigmatization, a history of unequal treatment, and the inability of individuals to control their membership in the class may identify the class as a "discrete and insular minority" deserving of special treatment. Gays, intravenous drug users, and AIDS carriers — all likely victims of irrational discrimination — arguably share many of these characteristics.

"Any AIDS-control regulation that restricts the movement and personal contacts of individuals impinges on fundamental rights and should be evaluated under strict scrutiny."

C. Analysis of Levels of Scrutiny

1. Strict Scrutiny

The highest test to apply to a claim of rights infringement is that of strict scrutiny. This test is applied if the group claiming rights violations is found to be a suspect class. The elements of this test are: determining first if there is a compelling state interest, and second whether the means (policies which the state utilizes) are strictly tailored towards that end. The compelling interest that the state claims

120. An Argument For Heightened Scrutiny, supra note 96, at 800.
121. Cordero v. Coughlin, 607 F. Supp. 9 (D.C. N.Y. 1984). The prison administration is able to place the AIDS victim into segregation. This is an indication of tyranny of the majority.
122. Id.
123. Nordheimer, supra note 13, at col. 1.
125. Id.
126. See The Constitutional Rights, supra note 6, at 1278.
127. Id. at 1282.
128. See supra note 91 and accompanying text.
129. See supra note 90 and accompanying text.
AIDS IN PRISONS

in segregating AIDS victims is health and safety.\textsuperscript{131} Prison administrators fear the spread of AIDS within the prison system.\textsuperscript{132} Generally, health and safety factors are legitimate and compelling.\textsuperscript{133} The question turns on whether the means of segregation and isolation are strictly tailored enough to the end of prevention of AIDS to warrant violations of the inmates' rights.

It seems evident that isolation is not strictly tailored to the health and safety issue involved. There is no guarantee that isolation and segregation of AIDS victims will prevent the fear and spread of the disease that the policy is intended to stop.\textsuperscript{134} The incubation period of the AIDS virus is lengthy\textsuperscript{135} and the victim could pass the disease along to someone else before he even knew that he had contracted the disease.\textsuperscript{136} The symptoms of AIDS are not readily self-evident.\textsuperscript{137} The majority of AIDS cases in prison arise because of intravenous drug use,\textsuperscript{138} however the prison administrators are directing their programs and fears towards the homosexual acts that often occur in prisons. Thus, the administrators' fears are aimed in the wrong direction.\textsuperscript{139} They are not fearing, or even facing, the harm that results due to intravenous drug use.\textsuperscript{140}

If protection of the victim is a government interest,\textsuperscript{141} then the system again fails.\textsuperscript{142} Placing an AIDS inmate into a potentially inferior

\begin{footnotes}
\footnotetext[131]{Cordero, 607 F. Supp. at 10.}
\footnotetext[132]{See supra notes 8, 11 and accompanying text.}
\footnotetext[133]{Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429, 443 (1978).}
\footnotetext[134]{Cordero, 607 F. Supp. at 10.}
\footnotetext[135]{Nordheimer, supra note 13, at col. 2. "While health officials are not certain of the length of the virus's incubation period, they believe it to be three to five years." Id.}
\footnotetext[136]{Id. "Because AIDS has a long and indeterminate incubation period, you and your partner can carry it and spread it around with perfect innocence, perhaps for more than 10 years." At the Dawn of Fear, supra note 7, at 61.}
\footnotetext[137]{Nordheimer, supra note 13, at col. 2.}
\footnotetext[138]{Id. at col. 1. "[I]ntravenous drug users represent a majority of prisoners who have AIDS." Id. "I don't think our major problem is with prisoners engaging in homosexual activity either before incarceration or while in prison . . . [T]he issue is what do you do with the i.v. drug users. They are the ones who are getting the disease." Id. (quoting Alan Koonsfigest, Health Service Coordinator for New Jersey's Department of Corrections).}
\footnotetext[139]{Id. Because the prison administrations are directing their actions towards the homosexual activity, they are not going after the main source of the disease within the prison system. Id.}
\footnotetext[140]{Id.}
\footnotetext[141]{Cordero, 607 F. Supp. at 10.}
\footnotetext[142]{See supra notes 138-40 and accompanying text. The system is aiming its interests at homosexuality when that is not the cause of the disease in prisons. "Despite the incidence of homosexual activity in prisons . . . inmates generally do not have frequent sexual contact with a wide number of partners, a factor in the spread of AIDS among pro-}
\end{footnotes}
solitary confinement cell would place the AIDS inmate into a situation where diseases may be contracted more easily than in the general population. The AIDS inmates are placed into isolation cells that are not fit for a person in good health much less for someone who can contract deadly diseases easily.

One significant aspect involved in this analysis is that the policy of segregation is underinclusive. Segregation does not occur for all AIDS contractors and carriers. Some states test for the AIDS virus when the inmate is placed into the prison. Other states do not test at all. In those states that do test, the AIDS carriers are also placed into segregation if they are discovered. In most states there is no AIDS testing; only the AIDS victims who are visibly ill are segregated. Thus, AIDS carriers are not discovered or segregated. In these states the policy of segregation is extremely underinclusive. A potentially dangerous sector of the group that the policy of segregation is intended to cover is left unaffected by the policy. This raises this policy to be more of an intrusion and rights violation. Generally,
segregation fails as a means towards the government’s health and safety end.\textsuperscript{157}

2. Intermediate Scrutiny

The second level of scrutiny to be applied to the groups claiming rights violations is intermediate scrutiny.\textsuperscript{158} This test involves a quasi-suspect class that may be subject to discrimination but does not have an immutable characteristic.\textsuperscript{159} In this level of scrutiny the ends (government interest) must be important and the means must be substantially related to that end.\textsuperscript{160} This level of scrutiny indicates an important end: health and safety.\textsuperscript{161}

The problem that the prison officials have with this level of scrutiny occurs when an examination of the means is done. Again, the means fail because they are not substantially related to health and safety.\textsuperscript{162} Although the administration feels a relationship exists (between the segregation and the governmental interest),\textsuperscript{163} it is evident that it does not, as the policy of segregation does not prevent the spread of AIDS at all.\textsuperscript{164} The government is aiming its efforts in the wrong direction.\textsuperscript{165} Because segregation is extremely underinclusive it does little to further the prevention of AIDS within the prison systems.\textsuperscript{166} Because of this, the policy of isolation and segregation of AIDS inmates fails the intermediate level of scrutiny as well.

3. Less Restrictive Alternatives

In both of the above levels of scrutiny, the end must be strictly related or substantially related (depending on which level of scrutiny is being applied), with no less restrictive alternatives available.\textsuperscript{167} If any less restrictive alternatives are available, then the government regulation must fail even if the end itself passes the test.\textsuperscript{168}

\textsuperscript{157} Id.
\textsuperscript{158} See supra note 93 and accompanying text.
\textsuperscript{159} See supra note 105 and accompanying text.
\textsuperscript{160} Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977).
\textsuperscript{161} See supra note 133 and accompanying text.
\textsuperscript{162} See supra notes 134-40 and accompanying text.
\textsuperscript{163} Cordero, 607 F. Supp. at 10.
\textsuperscript{164} See supra notes 134-40 and accompanying text.
\textsuperscript{165} See supra note 139 and accompanying text.
\textsuperscript{166} Id.
\textsuperscript{167} A less restrictive alternative is an alternative to the governmental action in question that is not as restrictive as the action in question. Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951).
\textsuperscript{168} Id.
Several less restrictive alternatives are available to the highly restrictive policy of segregation. First, education could be increased further to teach the prison population about how AIDS is contracted, what AIDS is and how to prevent contraction of the disease.\textsuperscript{169} If prisoners are continuously informed about AIDS, they will realize that they must become aware of this disease.\textsuperscript{170} Currently, some prison systems are utilizing educational programs for the prisoners,\textsuperscript{171} as well as for the guards and administrators.\textsuperscript{172} These education programs have been beneficial, but they can and should be increased to become more effective.\textsuperscript{173}

A second less restrictive alternative could be the use of preventative measures.\textsuperscript{174} A program could be formulated to distribute condoms to the prisoners, along with the education on how and why to use them.\textsuperscript{175} This type of program has been implemented in correctional facilities in Canada and Vermont.\textsuperscript{176} Currently, many communities are starting condom distribution campaigns\textsuperscript{177} in order to teach protection and prevention.\textsuperscript{178} These communities fear the spread of AIDS\textsuperscript{179} as well as

\begin{itemize}
\item \textsuperscript{169} See supra notes 75, 76 and accompanying text. These programs have already been put into effect. The prison system needs to increase these programs so that their effectiveness, established with their present level of use, can be spread throughout the system. This education covers a variety of issues on the AIDS topic. What AIDS is, how it can be contracted and cured and what prevention is best, are just a few of the issues that present education encompasses. "Education has been a dazzling success with homosexuals. After an all-out educational campaign in San Francisco orchestrated by gay activist groups, gays increased their use of condoms, cut down on casual pickups and practiced less physically damaging sex." At the Dawn of Fear, supra note 7, at 65-68.
\item \textsuperscript{170} At the Dawn of Fear, supra note 7, at 65-68.
\item \textsuperscript{171} See supra note 76 and accompanying text.
\item \textsuperscript{172} Id.
\item \textsuperscript{173} See supra note 169 and accompanying text.
\item \textsuperscript{174} For a description of the effectiveness of education programs, see id. One of the results of the education programs was effective prevention. At the Dawn of Fear, supra note 7, at 65-68.
\item \textsuperscript{175} Condoms are used by homosexuals as a method of protection so that semen or the AIDS virus is not passed into the bloodstream during sex. Barol, Koop and Bennett Agree to Disagree, NEWSWEEK, February 16, 1987, at 64.
\item \textsuperscript{176} Witcher, Vermont Prisons Dispensing Condoms, BOSTON GLOBE, March 4, 1987, at 1, col. 1. "Vermont prison officials have begun giving condoms to inmates who ask for them in a first-of-its-kind approach to preventing the spread of AIDS." Id.
\item \textsuperscript{177} Kantrowitz, Kids and Contraceptives, NEWSWEEK, February 16, 1987, at 55. "It is now much more acceptable to talk publicly about contraception. In the last few weeks, condom ads have begun appearing on some television stations and in major newspapers and magazines, including Newsweek." Id.
\item \textsuperscript{178} Id. "In October Surgeon General C. Everett Koop — known for his conservative views on abortion and birth control — came out in favor of early and explicit sex education in schools; he also advocated the use of condoms as protection against AIDS." Id.
\item \textsuperscript{179} Id. "A potentially more serious threat — AIDS — has forged unlikely alliances in
teen pregnancy. Some of the general public is against this type of program but the distribution continues in full force. If the prisoners are truly frightened of AIDS (as the prison officials claim), then they will want to protect themselves.

A third, less restrictive, alternative is a drug rehabilitation program. Because AIDS in prisons is spread more through drug use than homosexual acts, it seems evident that a decrease in drug use would decrease the spread of AIDS. This program would include education and a substance abuse program. This policy only requires initiative by the prison officials to help the prison reform. This program could even go so far as to distribute clean needles so that the virus is not passed in this way. This is a program which New York City now has outside of prison. Less restrictive alternatives are available, thus the government regulations would fail under strict scrutiny, as well as intermediate scrutiny.

---

the battle over teenage sex. Public-health experts worry openly that sexually active teenagers will be the next AIDS 'high risk' group." Id.

180. Id. at 54. "Each year for the past decade, more than a million teenage girls have become pregnant. Even though the teenage-pregnancy rate has remained fairly steady for the last few years, it is still very high — indeed, it is the highest in the western world. The number of illegitimate births has soared." Id.

181. Id. at 58.

Sometimes the opposition [to sex education and clinics in public schools] spreads beyond the schools themselves. In Boston a task force convened last fall by school Superintendent Laval Wilson recommended that clinics be established in two middle schools and two high schools. A powerful lobby lined up against the clinics. Included were Mayor Ray Flynn, members of the school board, local conservatives, prominent black leaders and religious leaders. The Roman Catholic Church set up its own task force and compiled a thorough report arguing that clinics are not only morally wrong but ultimately ineffective. In a letter he sent last fall to Wilson, Cardinal Bernard Law, archbishop of Boston, argued that the clinics would 'place the Boston public schools in the position of implicitly condoning or encouraging sexual activity among students.'

Id.

182. See supra note 177 and accompanying text.

183. This type of program would help the drug users stop using drugs so that the number of drug users who become AIDS victims would decrease.

184. See supra notes 6, 138 and accompanying text. In the prison system, the majority of the AIDS victims acquire the disease from intravenous drug use rather than homosexual activity. Id.

185. See supra note 183 and accompanying text. This program could be stereotypical of current drug rehabilitation programs that are present in society now.

186. Lyons, Rise in Needle-linked AIDS Predicted, THE BOSTON GLOBE, December 12, 1986, at 10, col. 2. "One proposal, under review in New York State, would provide a limited number of addicts with sterile syringes, possibly allowing drug users to exchange dirty needles for clean ones." Id.
4. Rational Relationship

The third level of scrutiny, the level used in *Cordero v. Coughlin*, is a rational relationship test. This level of scrutiny requires a legitimate governmental interest, with the means rationally related towards that end. The *Cordero* court held that this test was met. The court stated that "the separation of these inmates [the AIDS victims] . . . bears a rational relation to this objective [of health and safety] . . ." The court's analysis in *Cordero* is flawed because it used the wrong level of scrutiny. An examination of the group claiming rights' violations indicates that they are a suspect class, or, at the very least, a quasi-suspect class. This policy of segregating AIDS inmates is evidence that discrimination and tyranny are present.

An examination of the rational relationship test indicates that the court erred in its determination that the test was met. Although the first criterion, dealing with a legitimate governmental interest, is met because health and safety justifications are legitimate, the second criterion, that the means be rationally related to the end, fails. The segregation does not prevent the spread of AIDS in the prison system. The policy of segregation has no effect on the prevention of the

188. See supra note 96 and accompanying text.
190. *Cordero*, 607 F. Supp. at 10. The court stated that "AIDS victims are not a 'suspect class' and therefore as long as there is a legitimate government end and the means used are rationally related to that end, the Equal Protection Clause is not violated." *Id.*
191. *Id.*
192. See The Constitutional Rights, supra note 6, at 1278. AIDS victims, as a class, are either suspect or quasi-suspect. Because of this the court should have used either strict scrutiny or intermediate scrutiny, not the rational relationship test. *Id.*
193. *Id.* Because AIDS victims have an immutable characteristic, have a history of invidious discrimination and a possibility of tyranny of the majority, they fall into this category of suspect classification.
194. *Id.* If it is not accepted that AIDS victims have an immutable characteristic, they would at least become a quasi-suspect class and receive intermediate scrutiny instead of rational relationship scrutiny.
196. See supra note 192 and accompanying text. Because a policy of segregation has not been proven to be effective by the prison administrations, there can not be a determination that the means were rationally related to the health and safety justification. In order to be rationally related the prison officials have to at least show some effectiveness of their means.
199. See supra notes 134-40 and accompanying text.
AIDS epidemic. In states that do not segregate AIDS inmates, there have not been any increases in the reports of AIDS spreading throughout the prisons. Prison officials cannot substantiate that segregation has the effect of reducing the risk of AIDS. This leads to the failure of the segregation policy under even the rational relationship test, as segregation has no relation to any interest the state may have.

5. Comparison To Similarly Situated Prisoners

Because there have been few cases on the issue of segregation of AIDS inmates, an analysis of similarly situated prisoners is warranted. In analyzing mentally handicapped prisoners, it can be seen that treatment is similar. In Negron v. Ward the prisoners were confined separately for psychiatric observation. During this incarceration the prisoners were “isolated from important and normal institutional associations and activities . . . .” For a period of several months they were prevented from associating with any inmates in the general population and prohibited from moving anywhere within the institution. This segregation and resulting loss of activities is similar to what AIDS victims endure although not as severe. In Negron the court held that this policy of isolation violated the prisoner’s rights. If that is true, then it follows that the more extreme segregation procedure utilized for AIDS victims would be held to violate the victim’s rights as well.

VII. Due Process

A. Segregation of AIDS Victims

In Cordero v. Coughlin the court held that: “[U]nder applicable New York law, there is no requirement of a hearing before prison officials

200. Id.
201. See supra notes 13-16 and accompanying text.
203. Id.
206. Id.
207. Id.
208. Compare the circumstances of the handicapped prisoners to the circumstances of Harry Bromfield in the introduction to the Article. Further comparison can be found with the situations that physically handicapped prisoners are placed into. Physically handicapped prisoners are secluded like the mentally handicapped prisoners in Negron.
may act . . . [A] decision such as is involved here is clearly one of discretion, and as a matter of law plaintiff's due process rights have not been violated.\textsuperscript{210} This holding itself is contrary to federal case law.\textsuperscript{211} The Supreme Court, as well as many lower courts, has repeatedly held that prisoners are entitled to a hearing before any lengthy segregation can occur.\textsuperscript{212} A violation of the prisoners' due process rights also occurs where the government's segregation is arbitrary.\textsuperscript{213} Prison officials must review the segregation periodically to insure that the prisoner is not indefinitely confined.\textsuperscript{214} If the courts find that the prisoner's due process rights have been violated, the government's restriction can and will be struck down regardless of their justifications.\textsuperscript{215}

Administrative segregation\textsuperscript{216} of AIDS inmates also constitutes a violation of their due process rights.\textsuperscript{217} AIDS victims are not given preliminary hearings before their isolation begins.\textsuperscript{218} They are placed into confinement without periodic reviews of their situation.\textsuperscript{219} This segregation occurs because of their status as an AIDS inmate and not for violation of any prison policy.\textsuperscript{220} If this type of action were taken against a normal\textsuperscript{221} inmate, the courts would not hesitate to strike down that prisoner's confinement as unconstitutional.\textsuperscript{222} The same standards should be applied with AIDS patients.\textsuperscript{223}

211. Most states require that a hearing be given to the prisoner before confinement can begin so that the prisoner's due process rights are not violated. Hewitt v. Helms, 459 U.S. 460 (1981).
212. Id.
216. Administrative segregation is segregation based on the prison official's desire to control the prisoner for reasons of institutional order or security.
218. Generally the prisoners are placed into segregation once it is discovered that they have contracted AIDS. No hearing is given. The victim is administratively segregated. See supra notes 22, 23 and accompanying text.
219. See supra note 22 and accompanying text. AIDS victims are not given periodic reviews of their segregation. They are placed into seclusion and left there.
221. A normal prisoner is a non-victim who stays in the general population and carries on the routine of all the prisoners in the general population.
223. See supra text accompanying note 127.
B. Similarly Situated Prisoners

An examination of case law relating to mentally handicapped prisoners indicates that their due process rights are protected by the courts.224 These mentally handicapped prisoners are similarly situated to the AIDS victim in that they are also placed into administrative segregation because of physical, not disciplinary, problems. Their privileges are limited and they have limited activities available.225 Confinement of mentally handicapped prisoners without a hearing constitutes a due process violation.226 Generally, the courts have held that "due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence."227 This same heightened scrutiny should be applied to AIDS victims who are segregated and isolated.

VIII. CRUEL AND UNUSUAL PUNISHMENT

The court in Cordero v. Coughlin simply stated that "the prisoners have alleged no facts which would entitle them to a finding of cruel and unusual punishment."228 As Justice Rehnquist has stated: "I know nothing in the eighth amendment which requires that [inmates] be housed in a manner most pleasing to them or considered even by most knowledgeable penal authorities to be likely to avoid psychological confrontations, psychological depression, and the like."229 The court refused to analyze the conditions the AIDS inmates were placed into and make a determination as to whether those conditions constituted cruel and unusual punishment.230

Generally, the courts look to the totality of the conditions to determine if cruel and unusual punishment exists.231 These conditions may be looked at separately also,232 as a combination of one or more may constitute cruel and unusual punishment as defined in the eighth

225. Id. at 749.
226. Id.
227. Id. at 753.
229. Id.
232. Id. In Cordero the court did not examine the conditions of the prisoners' confinement. They merely held that plaintiffs did not allege any condition which entitled relief. Cordero, 607 F. Supp. at 11.
amendment of the Constitution. In this "overall conditions" analysis, the courts examine all of the conditions present in total and make a determination as to whether cruel and unusual punishment exists.

In cases of administrative segregation, the courts have held that "punishment for no offense is disproportionate and cruel and unusual." This is the case of the AIDS inmates. They are placed into segregation and isolation without hearings as to why they are being isolated, without having committed an offense and without proper justification. The AIDS inmates are also placed into confinement under circumstances that would lead to continuous isolation or future isolation.

Many courts have held that "[n]ot only is it cruel and unusual punishment to confine a person in an institution under circumstances which increase the likelihood of future confinement, but these same conditions defeat the goal of rehabilitation which prison officials have set for their institution." The Eighth Amendment is not limited to tempering only the infliction of cruel and unusual punishment on the physical body; its protections extend to the whole person as a human being.

The court must consider all aspects of the segregation not just what may be physical.

Generally, the conditions that AIDS patients are placed into would seem to constitute cruel and unusual punishment. The isolation of the prisoner with "no time out of the cell," the humiliation of being on exhibit, the confinement in conditions not justifiable as punishment, and the prisoner's lack of access to facilities such as the law library, are conditions that "so violate human dignity" that they constitute
cruel and unusual punishment.246 The AIDS inmates are placed into these conditions not because of an offense that they have committed, but because of their classification.247

Some states have tried to justify the AIDS inmates' placement into these facilities by a lack of funds given to them to run their correctional facilities.248 Overall, this justification has been struck down by the courts which have held that a "shortage of funds is not a justification for continuing to deny citizens their constitutional rights."249 Generally, "that it might be inconvenient or more expensive for [the] state to run its prison in a constitutional fashion was neither a defense to [the inmate's] action for relief from unconstitutional conditions and practices,250 nor a grant for modification of judgment requiring prison reform."251 If the constitutional violations exist, the state is responsible for correcting them.252

IX. Conclusion

The court in Cordero v. Coughlin made several rash holdings which were unsubstantiated. When analyzing the prison system's policy of segregation and isolation of AIDS victims, the court held that no constitutional violations existed. All evidence and analysis would seem to lead in the opposite direction. Segregation of AIDS victims as a class is a clear violation of the equal protection clause. AIDS inmates are a suspect class, or a quasi-suspect class which justifies heightened scrutiny, which the Cordero court refused to recognize. This policy of segregation cannot be justified by any relationship to the goal of health and safety, as isolation and segregation do not further that end. The policy of segregation and isolation of the AIDS inmates does not prevent the spread of AIDS at all. In the states that do not segregate the inmates there has not been a reported increase of the disease. This policy of segregation violates the prisoners' due process rights as well. Confinement without an offense or confinement without action and a hearing is a clear violation of the Constitution's protections. Finally,

247. See supra notes 218-19 and accompanying text.
248. Gates v. Collier, 501 F.2d 1241 (5th Cir. 1974). Some states claim that one of the main reasons that there are poor conditions in the prisons is because the state does not have enough money to keep the prisons adequate for use. Id.
250. The practices dealt with in this discussion are the practices of isolation and segregation as well as the conditions in question.
251. Gates, 501 F.2d at 1321.
252. Id.
the policy of segregation in and of itself constitutes cruel and unusual punishment, as this policy so offends human dignity that it is completely intrusive. Because the policy justifications of fear and ignorance are no longer present, the courts should re-examine the issue of segregation and put that policy to rest.

ROBERT E. BENSON*

*I dedicate this Note to my parents, Frank and Carol Benson. Without their guidance, loving, caring and understanding, I would not have reached out for my dream to become a part of the legal profession or succeeded in achieving it.