WHY (AND HOW) THE CONSTITUTION SHOULD PROTECT PRISONERS FROM GRATUITOUS DISCLOSURE OF THEIR HIV/AIDS STATUS

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INTRODUCTION

A prison guard jokingly reveals that an inmate is HIV positive to several other inmates. They all laugh. Later, one of the inmates who heard the disclosure attacks the individual with HIV out of an unfounded fear that he may have spread the disease.[1] The victim of the attack will likely live in fear for at least as long as he remains at the same facility, and even then, he will have to live with the anxiety of knowing that a prison official could easily paint a target on his back by disclosing his medical condition.[2]

Of course, one hope for incarcerated people living with HIV/AIDS is Fourteenth Amendment privacy protection. Unfortunately, the most recent federal appellate court to weigh in on this issue, the Fourth Circuit, held that incarcerated people lack a "reasonable expectation of privacy in [their] HIV[/AIDS] diagnosis" and, therefore, lack any constitutional protection from disclosure.[3] Even in situations like the hypothetical above, where the disclosure serves no purpose other than to demean an inmate, it seems the Fourth Circuit has ruled out any potential for constitutional liability.[4] This Note is concerned with such instances of gratuitous disclosure, where prison officials disclose an inmate's diagnosis for humor, gossip, or some other illegitimate purpose.[5]

This Note is not the first to advocate for prisoners' constitutional privacy rights concerning their HIV/AIDS status, but it is the first to focus on isolated incidents of disclosure rather than general policies that tend to lead to disclosure like mandatory testing or

1. HIV (human immunodeficiency virus) attacks the body's immune system and can lead to AIDS (acquired immunodeficiency syndrome) if left untreated. *About HIV*, CDC (June 30, 2022), https://www.cdc.gov/hiv/basics/whatishiv.html [https://perma.cc/U3Z4-TLVR].

2. *See HIV Stigma and Discrimination*, CDC (June 1, 2021), https://www.cdc.gov/hiv/basics/hiv-stigma/index.html [https://perma.cc/V3EC-E4V5].

3. Payne v. Taslimi, 998 F.3d 648, 659-60 (4th Cir. 2021).

4. *See* Whittaker v. O'Sullivan, No. 3:21cv474, 2022 WL 3215007, at *12 (E.D. Va. Aug. 9, 2022) (citing *Payne*, 998 F.3d at 658-59) (explaining that the Fourth Circuit's ruling in *Payne* seems to exclude the possibility of liability even in cases of gratuitous disclosure).

5. This Note uses the term "gratuitous disclosure" as used by the Second Circuit in *Powell v. Schriver*, 175 F.3d 107, 112 (2d Cir. 1999).

segregation based on HIV/AIDS status.[6] This Note argues that the Fourteenth Amendment's Due Process Clause should protect prisoners from isolated disclosures, meaning prisoners should have a § 1983 cause of action against guards or other prison officials who disclose their HIV/AIDS status in a gratuitous manner.[7] Although this Note is concerned with the Fourth Circuit in particular, the arguments this Note presents are relevant among the several circuits—as privacy rights under the Fourteenth Amendment are far from settled.[8] The Fourth Circuit's language in *Payne v. Taslimi* seems to disavow any constitutional privacy rights for inmates with respect to their HIV/AIDS status.[9] Thus, this Note critiques the Fourth Circuit's analysis in *Payne* so that other circuits that reach the same issue can avoid the needless erosion of constitutional rights of incarcerated people.

The proceeding section of this Note, Part I, details the existing legal framework for constitutional privacy rights, from the seminal case *Whalen v. Roe* to the current circuit split.[10] Part II explores the *Payne* decision in depth to explain why other circuits should not follow the Fourth Circuit's holding concerning the privacy rights of incarcerated people. Part III explains why the Fourteenth Amendment is the proper source of privacy protection compared to the Eighth Amendment and state law remedies. Finally, Part IV addresses important questions pertaining to § 1983 litigation for gratuitous disclosure.

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6. *See generally, e.g.*, Hannah R. Fishman, Comment, *HIV Confidentiality and Stigma: A Way Forward*, 16 U. PA. J. CONST. L. 199 (2013); Karen E. Zuck, Comment, *HIV and Medical Privacy: Government Infringement on Prisoners' Constitutional Rights*, 9 U. PA. J. CONST. L. 1277 (2007); Gary H. Loeb, *Protecting the Right to Informational Privacy for HIV-Positive Prisoners*, 27 COLUM. J.L. & SOC. PROBS. 269 (1994).

7. 42 U.S.C. § 1983 (creating a statutory cause of action for violation of constitutional and federal rights).

8. *See In re* U.S. Off. of Pers. Mgmt. Data Sec. Breach Litig., 928 F.3d 42, 72-73 (D.C. Cir. 2019) (casting doubt on other circuits' decisions that have held the Constitution protects individuals from disclosure of personal matters).

9. *See* 998 F.3d 648, 659 (4th Cir. 2021) ("Information about an inmate's HIV diagnosis and medication is unlike the expectations of privacy that we have found protected in prison.... Payne has a reduced expectation of privacy in prison and, as we conclude here, no reasonable expectation of privacy in his HIV diagnosis and treatment.").

10. 429 U.S. 589 (1977).

I. CONSTITUTIONAL FOUNDATION TO PRISONERS' PRIVACY RIGHTS

An analysis of an inmate's privacy rights must begin with a broader examination of constitutional doctrine surrounding privacy in general. Although the Supreme Court was initially divided over the source of constitutional privacy rights,[11] courts today understand those rights to fall within the Fourteenth Amendment's protection of substantive due process.[12] The Supreme Court has interpreted the Fourteenth Amendment's protection of "liberty" to prohibit government interference in several areas involving important personal decisions.[13] These areas include intimate partner association,[14] child-rearing,[15] education,[16] contraception,[17] and, until recently, abortion.[18]

Constitutional privacy rights are not, however, limited to freedoms concerning important personal decisions. In its 1977 decision, *Whalen v. Roe*, the Supreme Court acknowledged a second type of privacy interest in "avoiding disclosure of personal matters."[19] In that case, the Court considered a New York statute that required the recording of the names and addresses of people who acquired certain drugs under a doctor's prescription.[20] Ultimately, the Court held that the statute did not invade privacy interests because the risk of improper disclosure of health information was low and the disclosure of such information to proper personnel was an "essential part of modern medical practice."[21] Recognizing the limited scope of the Court's inquiry, Justice William Brennan authored a concurring

11. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (rooting privacy rights in the "penumbras" of the First, Third, Fourth, Fifth, and Ninth Amendments); *id.* at 499 (Goldberg, J., concurring) (rooting privacy rights in the Ninth Amendment); *id.* at 500 (Harlan, J., concurring) (rooting privacy rights in the Fourteenth Amendment); *id.* at 502 (White, J., concurring) (rooting privacy rights in the "liberty" protected by the Fourteenth Amendment).

12. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003).

13. *Whalen*, 429 U.S. at 599.

14. *Lawrence*, 539 U.S. at 562; Loving v. Virginia, 388 U.S. 1, 12 (1967).

15. Troxel v. Granville, 530 U.S. 57, 65 (2000).

16. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

17. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

18. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2235 (2022).

19. 429 U.S. 589, 599 (1977).

20. *Id.* at 591.

21. *Id.* at 600-03.

opinion and reasoned that if a state statute were to invade an individual's privacy rights, the Court ought to weigh that invasion against any compelling state interest in disclosure.[22]

The *Whalen* decision is vital to any discussion of privacy rights related to HIV/AIDS status because the Supreme Court has offered little guidance with respect to informational privacy rights since that case.[23] The Court has apparently left this area of constitutional doctrine for the circuits to determine. The circuits have responded to *Whalen* in two general ways. First, several circuits recognize informational privacy rights and implement a balancing approach like the one contemplated by Justice Brennan.[24] In 1980, the Third Circuit adopted perhaps the most robust of these approaches in *United States v. Westinghouse Electric Corporation*, which lays out a seven-factor balancing test.[25] The factors are:

> [T]he type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.[26]

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22. *Id.* at 606-07 (Brennan, J., concurring).

23. Often cited alongside *Whalen* is *Nixon v. Administrator of General Services*. 433 U.S. 425 (1977). *Nixon* concerned President Richard Nixon's privacy interest in archival material related to his presidency and appears to reaffirm the existence of Fourteenth Amendment informational privacy rights. *See id.* at 457. Though, perhaps, reliance on *Nixon* for that proposition is dubious, as one author has pointed out the Court may have "confuse[d] [F]ourth and [F]ourteenth [A]mendment privacy protection." Bruce E. Falby, Comment, *A Constitutional Right to Avoid Disclosure of Personal Matter: Perfecting Privacy Analysis in* J.P. v. DeSanti, 71 GEO. L.J. 219, 234 (1982) (pointing out that the *Nixon* Court cites the *Whalen* Court's language on privacy but applies a Fourth Amendment balancing test).

24. *See, e.g.*, Taylor v. Best, 746 F.2d 220, 225 (4th Cir. 1984); Barry v. City of New York, 712 F.2d 1554, 1558-59 (2d Cir. 1983); U.S. v. Westinghouse Elec. Corp., 638 F.2d 570, 576-79 (3d Cir. 1980).

25. 638 F.2d at 578.

26. *Id.*

Conversely, other circuits cast serious doubt on the existence of constitutional informational privacy rights.[27] The two circuits that have not recognized the right—the Sixth and D.C. Circuits—discard the informational privacy language in *Whalen* as dicta.[28] Those courts fear that "virtually every governmental action" would implicate a general privacy right in personal information.[29]

Among the circuits that recognize informational privacy rights, several have explicitly held that an individual's HIV/AIDS status falls within the Fourteenth Amendment's protected zone of privacy.[30] These courts understand an individual's HIV/AIDS status to be protected as medical information, and they also note the serious implications that accompany unwanted disclosure of an HIV/AIDS diagnosis in particular.[31] Of course, in these cases the courts still applied a balancing test, sometimes finding that a compelling state interest in disclosure outweighed the individual's privacy interest.[32]

To further complicate matters, the circuits that recognize constitutional privacy protections for HIV/AIDS status differ in the extent to which they recognize incarcerated people enjoy those protections. The Second Circuit sits at one end of this spectrum, having held that a prison official violated an inmate's constitutional privacy rights in a case of gratuitous disclosure.[33] There, a corrections officer

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27. *See, e.g.*, J.P. v. DeSanti, 653 F.2d 1080, 1088-89 (6th Cir. 1981); Am. Fed'n Gov't Emps. v. Dep't of Hous. & Urb. Dev., 118 F.3d 786, 791 (D.C. Cir. 1997).

28. *DeSanti*, 653 F.2d at 1089-90; *Am. Fed'n of Gov't Emps.*, 118 F.3d at 792-93.

29. *DeSanti*, 653 F.2d at 1090.

30. *See, e.g.*, Herring v. Keenan, 218 F.3d 1171, 1175 (10th Cir. 2000); Doe v. SEPTA, 72 F.3d 1133, 1140 (3d Cir. 1995); Doe v. City of New York, 15 F.3d 264, 267 (2d Cir. 1994).

31. *See, e.g.*, Doe v. City of New York, 15 F.3d at 267 ("[A]n individual's choice to inform others that she has contracted what is at this point invariably and sadly a fatal, incurable disease is one that she should normally be allowed to make for herself. This would be true for any serious medical condition, but is especially true with regard to those infected with HIV or living with AIDS, considering the unfortunately unfeeling attitude among many in this society toward those coping with the disease.").

32. *See, e.g.*, Doe v. SEPTA, 72 F.3d at 1140 ("There is a strong public interest of the Transportation Authority ... in containing its costs and expenses by permitting this sort of research by authorized personnel. This interest outweighs the minimal intrusion, particularly given the lack of any economic loss, discrimination, or harassment actually suffered by plaintiff.").

33. Powell v. Schriver, 175 F.3d 107, 112 (2d Cir. 1999) ("[T]he gratuitous disclosure of an inmate's confidential medical information as humor or gossip ... is *not* reasonably related to a legitimate penological interest, and it therefore violates the inmate's constitutional right to privacy."). Ultimately, the defendant in *Powell* prevailed under qualified immunity. *Id.* at 114.

disclosed to another officer that the plaintiff was HIV-positive within earshot of other inmates for no other reason than to spread a bit of gossip.[34] This led the plaintiff to suffer harassment from other inmates and officers,[35] much like the scenario described in the Introduction of this Note.[36] In 2001, the Third Circuit also recognized prisoners' privacy rights in their HIV/AIDS status because those rights "[are] not fundamentally inconsistent with incarceration."[37]

In contrast, the Seventh Circuit held in *Anderson v. Romero* that prisoners do not possess any constitutional right to confidentiality in their HIV/AIDS status.[38] The *Anderson* court explained that confidentiality of medical information is incompatible with incarceration because the state has a compelling interest in using an individual's information to prevent the spread of a communicable disease.[39] And, as explained earlier,[40] the Fourth Circuit, in *Payne v. Taslimi*, joined the Seventh Circuit in its understanding of the issue.[41] The *Payne* court's wholesale elimination of prisoners' privacy interest in their HIV/AIDS status, as Part II demonstrates, contravenes established Fourth Circuit precedent and ignores the instructions of the Supreme Court.

II. A CRITICAL LOOK AT *PAYNE V. TASLIMI*

In *Payne v. Taslimi*, a doctor inadvertently disclosed a prisoner's HIV/AIDS status to other inmates in the prison medical center.[42] The court relied on a balancing test from an earlier Fourth Circuit

34. *Id.* at 109.

35. *Id.*

36. *See supra* Introduction.

37. Doe v. Delie, 257 F.3d 309, 317 (3d Cir. 2001). The *Delie* court did, however, acknowledge that the scope of a prisoner's privacy rights may be subject to certain limitations to "achieve legitimate correctional goals and maintain institutional security." *Id.*

38. 72 F.3d 518, 524 (7th Cir. 1995) ("[E]ven if a right of prisoners to the confidentiality of their medical records in general had been clearly established ... it would not follow that a prisoner had a right to conceal his HIV status."). The Eighth Circuit reached the same conclusion a year later. Tokar v. Armontrout, 97 F.3d 1078, 1084 (8th Cir. 1996) (expressing agreement with the reasoning and holding in *Anderson*).

39. 72 F.3d at 524.

40. *See supra* Introduction.

41. *See* 998 F.3d 648, 659 (4th Cir. 2021).

42. *Id.* at 652-53.

decision but never actually reached the balancing inquiry because the court found there to be no privacy interest at issue.[43] Although the court framed its decision as bound by prior Supreme Court and Fourth Circuit precedent, the court could have easily decided the case on narrower grounds so as not to preclude constitutional challenges in gratuitous disclosure cases.[44] In fact, an examination of the cases on which the *Payne* court relied reveals that the court was incorrect in its interpretation of binding and persuasive authority.[45] This Part proceeds with a closer look at the *Payne* decision and what the Fourth Circuit got wrong.

A. Privacy in Prison

In holding that incarcerated people do not have a constitutional right to privacy concerning their HIV/AIDS status, the Fourth Circuit relied on its earlier holding in *Walls v. City of Petersburg*.[46] *Walls* laid out a two-part test in which courts must decide whether there was a reasonable expectation of confidentiality and, if so, whether the government had a compelling interest in disclosure that outweighed the privacy interest.[47] The *Payne* court applied the first part of the test and found that the plaintiff did not have a reasonable expectation of confidentiality concerning his HIV/AIDS status.[48] To reach that decision, the court relied on *Hudson v. Palmer*, a Supreme Court case concerning the applicability of Fourth Amendment protections from unlawful searches and seizures in the confines of prison.[49] Reliance on *Hudson*, however, was inappropriate.

In *Hudson*, prison officials performed a "shakedown" in search of contraband in Russell Palmer's cell.[50] The search revealed a torn pillowcase in a trash can for which the prison officials punished

43. *Id.* at 660.
44. *See id.* at 659-60.
45. *See supra* Part II.
46. *Payne*, 998 F.3d at 659-60 (citing Walls v. City of Petersburg, 895 F.2d 188, 192 (4th Cir. 1990)).
47. 895 F.2d at 192.
48. *Payne*, 998 F.3d at 660.
49. *Id.* at 658-60 (citing Hudson v. Palmer, 468 U.S. 517 (1984)).
50. 468 U.S. at 519.

Palmer, alleging destruction of state property.[51] Palmer sued one of the prison officials, Ted Hudson, for a violation of his Fourth Amendment protection from unreasonable searches.[52] Although the court explicitly acknowledged that no "iron curtain" separates prisons from constitutional protections, prisoners will only "be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration."[53] To determine if privacy rights under the Fourth Amendment were compatible with imprisonment, the Court relied on *Katz v. United States*.[54] Under the *Katz* standard, protection from unreasonable searches only applies when a legitimate expectation of privacy exists.[55] The *Hudson* Court explained that this requires the plaintiff to show that his privacy interest was one "society is prepared to recognize as 'reasonable.'"[56] Thus, the Court held that Palmer lacked a justifiable expectation of privacy because "society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell."[57]

Payne was incorrect to rely on *Hudson* because *Hudson* is limited to Fourth Amendment privacy rights, which are distinct from the substantive guarantees of the Fourteenth Amendment.[58] As the Seventh Circuit explained, the holding in *Hudson* "was with reference to the Fourth Amendment and it would be premature to assume that the Court meant to extinguish claims of privacy of an entirely different kind."[59] Thus, *Hudson* bears little on claims concerning informational privacy rights, and the *Payne* court should not have relied on the sweeping language in *Hudson* to decide whether the plaintiff had a reasonable expectation of confidentiality.[60]

The *Payne* court acknowledged that:

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51. *Id.* at 519-20.

52. *Id.* at 522.

53. *Id.* at 523.

54. *Id.* at 525 (citing Katz v. United States, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring)).

55. 389 U.S. at 360-61 (Harlan, J., concurring).

56. *Hudson*, 468 U.S. at 525 (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

57. *Id.* at 526.

58. *See* Anderson v. Romero, 72 F.3d 518, 522 (7th Cir. 1995) (citing *Hudson*, 468 U.S. at 526).

59. *Id.*

60. *See* Payne v. Taslimi, 998 F.3d 648, 659-60 (4th Cir. 2021).

> The circuits that have found a right to privacy [for inmates with HIV/AIDS] have done so by finding that privacy right to be "completely different" than the rights "extinguished" by *Hudson*'s reasonable-expectation-of-privacy test. Whatever the merits of that position, we are constrained to apply our holding in *Walls* to the contrary.[61]

Yet, nothing from the *Walls* opinion suggests that *Hudson* is controlling in a Fourteenth Amendment case.[62] The *Walls* court cites neither *Hudson* nor *Katz* in explaining how courts should examine Fourteenth Amendment privacy cases—in fact, citations to *Hudson* or *Katz* appear nowhere in the *Walls* opinion.[63] Rather, the *Walls* court instructs trial courts to look to the information in question to determine whether an expectation of privacy exists: "The more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny."[64]

The *Payne* court further attempted to justify its reliance on Fourth Amendment precedent by pointing out that both the Supreme Court in *Nixon v. Administrator of General Services* and the Fourth Circuit in *Walls* relied on Fourth Amendment precedent in assessing Fourteenth Amendment privacy claims.[65] But a close examination of those two cases reveals that they in no way contradict the idea that the Fourth and Fourteenth Amendments require separate inquiries. Although the *Nixon* Court does cite *Katz*, the Fourth Amendment inquiry there was justified by the fact that President Nixon raised his Fourth Amendment rights in alleging that the law in question was "tantamount to a general warrant authorizing search and seizure of all of his Presidential 'papers and effects.'"[66] It is also entirely possible that the Supreme Court was simply incorrect in relying on Fourth Amendment precedent. As another author has pointed out, the Court seemed to have confused the two constitutional inquiries because the Amendments are

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61. *Id.* at 660 n.10 (citations omitted).
62. *See* Walls v. City of Petersburg, 895 F.2d 188 (4th Cir. 1990).
63. *See id.*
64. *Id.* at 192.
65. *Payne*, 998 F.3d at 656 n.7 (citing Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 458-63 (1977); *Walls*, 895 F.2d at 192).
66. *Nixon*, 433 U.S. at 460.

distinct in their applicability.[67] Although both inquiries concern legitimate expectations of privacy, the Fourth Amendment concerns government access to information, whereas the Fourteenth Amendment concerns government dissemination of information.[68]

The *Walls* court did cite a Fourth Amendment case, *Olmstead v. United States*, but only for the powerful language in Justice Louis Brandeis's dissent.[69] While the majority held the Fourth Amendment does not protect citizens from warrantless wiretapping, Brandeis admonished his colleagues for not respecting "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[70] It is this exact quote that the *Walls* court used—hardly an acknowledgement that courts in the Fourth Circuit are free to muddle two distinct constitutional inquiries.[71] Moreover, the use of that quote in a Fourteenth Amendment case is justified because Brandeis himself was likely writing about a concept of privacy broader in scope than the Fourth Amendment. In an 1890 article for the *Harvard Law Review*, Brandeis and his coauthor wrote:

> Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone." Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops."[72]

This suggests that Brandeis's quote concerning "the right to be let alone" in *Olmstead* pertained to his normative philosophical understanding of privacy beyond just the prohibitions of the Fourth

67. Falby, *supra* note 23, at 234; *see also id.* at 240-41 n.185.

68. *Id.* at 240-41 n.185.

69. *See Walls*, 895 F.2d at 192 (citing Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

70. *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

71. *See Walls*, 895 F.2d at 192.

72. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (footnote omitted).

Amendment.[73] Thus, the *Walls* court likely used the Brandeis quote to convey a similar message and not to suggest that Fourth and Fourteenth Amendment inquiries are one and the same.[74]

A Fourth Circuit case decided in the same year as *Payne* further suggests that Fourth and Fourteenth Amendment privacy inquiries are distinct. In *Prynne v. Settle*, the court had to determine whether the Virginia Sex Offender and Crime Against Minors Registry (VSOR) violated the plaintiff's privacy rights under substantive due process.[75] In laying out the applicable rule, the court explained that "[t]he more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny."[76] The court held that because the VSOR largely republishes information already available in public records, it does not violate Fourteenth Amendment privacy rights.[77] In its explanation of privacy interests in a footnote, the court stated that "[the cases upon which the plaintiff relies] address the right to be free from unreasonable searches under the Fourth Amendment and do not address the right to privacy embodied in the Due Process Clause."[78] Thus, the court acknowledged that Fourth Amendment precedent is not directly applicable to Fourteenth Amendment cases.

In light of the distinction between Fourth and Fourteenth Amendment inquiries, the *Payne* court should have looked to Fourteenth Amendment authority on privacy of medical information. Seeing as there is an apparent lack of on point authority within the Fourth Circuit with respect to HIV/AIDS status, it would have been advisable to look to authority from other circuits—like the Third Circuit's *Doe v. Delie*, in which the court held that inmates have a constitutional privacy interest in their medical information including HIV/AIDS status.[79] The question of whether that right exists within prison is best left for the second prong of the *Walls* test: the balancing portion.

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73. *See* 277 U.S. at 478.
74. *See Walls*, 895 F.2d at 192.
75. 848 F. App'x 93, 96-97 (4th Cir. 2021).
76. *Id.* at 105 (quoting *Walls*, 895 F.2d at 192).
77. *Id.*
78. *Id.* at 105 n.10.
79. *See* 257 F.3d 309, 317 (3d Cir. 2001).

B. Constitutional Balancing

An examination of the Fourth Circuit's reasoning in *Payne* reveals the circular nature of the court's logic. The court explained that the plaintiff had no privacy interest in his HIV/AIDS status because he "was in prison, a place where individuals have a curtailed expectation of privacy."[80] Thus, the court elected not to reach the balancing test.[81] But by considering the environment in which the disclosure occurred—that is to say, a prison medical unit—the court necessarily considered the costs associated with government liability for accidental disclosure.[82] These costs would consist of any precautions necessary to maintain the same strict confidentiality rules that exist outside of prison. At some level, such measures would hinder efficiency in the administration of prison medical care. Thus, buried within the court's holding is an implicit balancing inquiry between the plaintiff's privacy interest and the government's interest in efficiency.[83] The government's interest won out.[84]

Under the proper application of the *Walls* test, the court would have recognized the plaintiff's privacy interest and then explicitly weighed that against the government's interest in providing medical care within prisons free of confidentiality rules.[85] This would have left the privacy interests of incarcerated people living with HIV/AIDS protected in cases where the government clearly lacks a compelling interest—like in cases of gratuitous disclosure.[86] In other words, assessing the existence of constitutional privacy rights in the context of prison should be left for the balancing portion of the applicable test to prevent the needless whittling of constitutional rights for incarcerated people. Instead, the *Payne* court ruled for an indiscriminate elimination of a constitutional right for inmates in the Fourth Circuit, no matter the circumstances of the disclosure.[87]

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80. Payne v. Taslimi, 998 F.3d 648, 660 (4th Cir. 2021).
81. *Id.*
82. *See id.* at 658-60.
83. *See id.*
84. *See id.*
85. *See* Walls v. City of Petersburg, 895 F.2d 188, 192 (4th Cir. 1990).
86. *See* Powell v. Schriver, 175 F.3d 107, 112 (2d Cir. 1999).
87. *See Payne*, 998 F.3d at 660.

Taylor v. Best provides a more appropriate application of a balancing test within the context of prisons.[88] There, the plaintiff, Clarence Taylor, brought a § 1983 action against the prison psychologist, E. Parry Best, after Best disciplined Taylor for refusing to answer questions concerning his family background.[89] The Fourth Circuit held that the government's compelling interests "in assuring the security of prisons and in effective rehabilitation clearly outweigh[ed] Taylor's interest in maintaining the confidentiality of his family background."[90] From this, it is apparent that the prison context is but one factor that leans in favor of the government's interest rather than some dispositive trigger that eliminates the balancing test altogether.

Interestingly, the *Payne* court did not cite *Taylor*, which is curious considering that both cases deal with the same general question of privacy rights in prison.[91] Granted, *Walls* does offer a more robust test for Fourteenth Amendment privacy violations.[92] Still, *Taylor* is helpful, if not on point, authority.[93] The *Taylor* court established the balancing inquiry as that between the inmate's privacy interest and the public's interest in rehabilitation and security of prisons.[94] Had the *Payne* court applied that balancing test, it would have had to either hold in favor of Payne's interest or navigate the awkward position of explaining how a prison doctor's freedom from confidentiality rules is in the public's interest.[95] A cynic might argue that the *Payne* court held that there was no privacy interest to avoid having to take that awkward position while still reaching the same outcome: reducing the constitutional rights of incarcerated people.

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88. *See* 746 F.2d 220, 225 (4th Cir. 1984).

89. *Id.* at 221.

90. *Id.* at 225.

91. *Compare Payne*, 998 F.3d at 659-60 (addressing whether inmates have a constitutional privacy right to their HIV/AIDS status), *with Taylor*, 746 F.2d at 225 (addressing whether inmates have a constitutional privacy right to their family background).

92. *Compare* Walls v. City of Petersburg, 895 F.2d 188, 192 (4th Cir. 1990) (using case law from several courts to explain how courts must determine whether a privacy interest outweighs any public interest in disclosure), *with Taylor*, 746 F.2d at 225 (explaining merely that courts must balance the stated privacy interest with the public interest of assuring security and effective rehabilitation in prison).

93. *See Taylor*, 746 F.2d at 225.

94. *Id.*

95. *See* 998 F.3d at 660.

The type of balancing test that *Whalen* implies—and *Walls* and *Taylor* explicitly adopt—is further indicative of the *Payne* court's improper balancing inquiry. Throughout the twentieth century, "balancing" between competing interests became a standard mechanism for resolving questions of constitutional law.[96] Constitutional balancing may be divided into two varieties: definitional balancing and ad hoc balancing.[97] Definitional balancing "establishes a substantive constitutional principle of general application."[98] In other words, courts engage in definitional balancing when they decide that one particular interest will prevail against another particular interest in all cases.[99] Alternatively, ad hoc balancing is the sort of inquiry that courts engage in when applying a test for deciding between competing interests in a particular case.[100] Just because the court rules in favor of one interest in one case does not mean it will rule in favor of that same interest in a subsequent case.[101]

The *Whalen* and *Nixon* decisions invite lower courts to engage in ad hoc balancing to resolve questions of informational privacy rights under the Fourteenth Amendment. As Justice Brennan explained in his *Whalen* concurrence, "[b]road dissemination by state officials of [medical] information ... would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests."[102] The *Nixon* court lays out a similar rule in stating that "any intrusion [of President Nixon's privacy] must be weighed against the public interest in subjecting the Presidential materials ... to archival screening."[103] Professor Norman Vieira, writing on HIV/AIDS privacy rights, argues that although the *Whalen* and *Nixon* Courts offered little guidance to lower courts, they clearly advocated for an ad hoc balancing inquiry to address Fourteenth Amendment privacy disputes.[104]

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96. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 945, 952 (1987).

97. *Id.* at 948.

98. *Id.*

99. *See id.*

100. *See id.*

101. *See id.*

102. Whalen v. Roe, 429 U.S. 589, 606 (1977) (Brennan, J., concurring).

103. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 458 (1977).

104. Norman Vieira, *Unwarranted Government Disclosures: Reflections on Privacy Rights, HIV and Ad Hoc Balancing*, 47 WAYNE L. REV. 173, 178-80 (2001).

The ad hoc balancing inquiry suggested in *Whalen* and *Nixon* is precisely the sort of test that several circuits have created, and the *Walls* court is no exception.[105] The *Payne* court, however, engaged in definitional balancing by holding that an inmate's privacy interest in their HIV/AIDS status never outweighs the government's interest in efficient operation of a prison.[106] The application of the wrong test is contrary to both circuit and Supreme Court precedents, which clearly envision a flexible test that will produce different outcomes based on the circumstances of a particular case.[107] The first part of the *Walls* test instructs nothing more than to look at the nature of the information itself to determine whether there exists a reasonable expectation of confidentiality.[108] Instead, the *Payne* court reached beyond its proper discretion by holding that a certain type of information is not protected merely because of the location in which it was disclosed.[109] This unnecessarily strips constitutional protection from future plaintiffs who find themselves victims of gratuitous disclosure at the hands of prison officials. What makes this all the more appalling is that such plaintiffs would likely prevail under the proper ad hoc balancing inquiry because gratuitous disclosure serves no penological purpose.[110]

It is clear that medical confidentiality will remain a serious concern for the safety of incarcerated people living with HIV/AIDS. In fact, a report from the Bureau of Justice Statistics revealed that HIV was three times more prevalent among incarcerated people than the general U.S. population.[111] Given the potential scope of this

105. *Compare, e.g.*, U.S. v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3d Cir. 1980) ("In the cases in which a court has allowed some intrusion into the zone of privacy surrounding medical records, it has usually done so only after finding that the societal interest in disclosure outweighs the privacy interest on the specific facts of the case."), *and* Barry v. City of New York, 712 F.2d 1554, 1558-59 (2d Cir. 1983) ("[S]ome form of intermediate scrutiny or balancing approach is appropriate as a standard of review."), *with* Walls v. City of Petersburg, 895 F.2d 188, 192 (4th Cir. 1990) ("[T]he defendant has the burden to prove that a compelling governmental interest in disclosure outweighs the individual's privacy interest.").

106. *See* Payne v. Taslimi, 998 F.3d 648, 660 (4th Cir. 2021).

107. *See supra* notes 102-04 and accompanying text.

108. *Walls*, 895 F.2d at 192.

109. *See Payne*, 998 F.3d at 660.

110. *See* Powell v. Schriver, 175 F.3d 107, 112 (2d Cir. 1999).

111. Jehan Z. Budak & Lara B. Strick, *HIV and Corrections, Overview of United States Correctional System*, NAT'L HIV CURRICULUM (Aug. 26, 2020), https://www.hiv.uw.edu/go/key-populations/hiv-corrections/core-concept/all [https://perma.cc/9UHX-DJDS] (citing Laura M.

issue, any future courts that weigh in must reject the approach taken by the *Payne* court. Courts should recognize that Fourteenth Amendment privacy rights continue to exist in prison,[112] and in instances of gratuitous disclosure, courts should balance privacy interests against any public interest. Seeing as gratuitous disclosure serves no penological interest,[113] courts should hold that gratuitous disclosure of an inmate's HIV/AIDS status is a per se violation of the Fourteenth Amendment, actionable under § 1983.

III. WHY SUBSTANTIVE DUE PROCESS?

Part II of this Note relies on an important assumption: Fourteenth Amendment substantive due process is the optimal legal vehicle to support the privacy rights of incarcerated people living with HIV/AIDS. This Part's analysis of potential alternatives will reveal that substantive due process is in fact superior. The first of these alternatives—one proffered by the Seventh Circuit—is the Eighth Amendment's prohibition of cruel and unusual punishment.[114] The second alternative is reliance on state law remedies, whether judge-made or statutory.

A. Disclosure as Cruel and Unusual Punishment

Writing for the Seventh Circuit in *Anderson v. Romero*, Judge Richard Posner opined that "[i]f prison officials disseminated humiliating but penologically irrelevant details of a prisoner's medical history, their action might conceivably constitute the infliction of cruel and unusual punishment" under the Eighth Amendment.[115]

Although a remedy under the Eighth Amendment should certainly be available in cases of gratuitous disclosure, it is not an adequate substitute for due process protection under the Fourteenth Amendment. The discrepancy boils down to how plaintiffs must

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MARUSCHAL & JENNIFER BRONSON, HIV IN PRISONS, 2015—STATISTICAL TABLES 4 (2017)).

112. *See supra* notes 33-37 and accompanying text.

113. *Powell*, 175 F.3d at 112.

114. *See* Anderson v. Romero, 72 F.3d 518, 523 (7th Cir. 1995).

115. *Id.*

demonstrate infliction of cruel and unusual punishment. Because the ultimate risk of disclosure is violence from other inmates, courts would apply the deliberate indifference standard.[116] Under this test, courts ask whether prison officials were deliberately indifferent to a serious harm or risk of harm to the inmate.[117] This creates two hurdles for plaintiffs. First, they must prove the requisite mental state of deliberate indifference.[118] This is a high bar to meet, as it is comparable to criminal recklessness and requires actual knowledge of the danger the inmate faces.[119] No matter how severe the danger, if corrections officers can show that they were not subjectively aware of the danger, then they will escape liability.[120] Perhaps with an effective lawyer, plaintiffs might gather enough evidence to prove such a state of mind. Unfortunately, this is not likely to happen: in 2021, plaintiffs in 91.4 percent of prisoner civil rights cases proceeded without a lawyer.[121]

The second hurdle plaintiffs face is demonstrating serious harm or risk of harm as a result of the prison officials' deliberate indifference.[122] It is easy to imagine a case where harm to the plaintiff is obvious, like the hypothetical scenario described in *Anderson* in which an inmate is attacked by other inmates for his HIV/AIDS status.[123] But imagine, for instance, if a corrections officer revealed an inmate's HIV diagnosis, and it was only months later that another inmate heard of this through gossip and then decided to attack the individual with HIV. With an attack so remote in time from the disclosure, the plaintiff would struggle to prove that the harm they suffered arose from the corrections officer's conduct. The prison official could cast serious doubt on the plaintiff's chain of causation by pointing to any of the several other motivations for violence in prison.

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116. *See* Farmer v. Brennan, 511 U.S. 825, 833-34 (1994).

117. *Id.* at 828.

118. *Id.* at 839-43.

119. *See id.*

120. *See, e.g.*, Moss v. Harwood, 19 F.4th 614, 625 (4th Cir. 2021) (holding that prison officials were not deliberately indifferent because they did not appreciate the severity of the inmate's health condition).

121. *Data Update*, INCARCERATION AND THE LAW (Apr. 2022), https://incarcerationlaw.com/resources/data-update/#TableB [https://perma.cc/HF2W-VJUB].

122. *Farmer*, 511 U.S. at 842-43.

123. *See* Anderson v. Romero, 72 F.3d 518, 523 (7th Cir. 1995).

Plaintiffs in this situation might argue that the disclosure violated the Eighth Amendment because it created a risk of violence from other inmates. Although risk of harm is sufficient to establish an Eighth Amendment violation,[124] plaintiffs would still struggle to prove such a risk existed. For instance, in *Doe v. Magnusson*, an inmate sued two corrections officers for gratuitously disclosing his HIV/AIDS status, alleging violations of both the Fourteenth and Eighth Amendments.[125] The corrections officers had intentionally spilled the plaintiff's box of medication in plain view of his cellmate.[126] The revelation of the plaintiff's medications made his HIV diagnosis known to other inmates, which led to verbal harassment from other inmates.[127] The plaintiff also cited physical violence in his complaint, but could not point to a specific incident stemming from the disclosure of his diagnosis, speaking to the difficulty of establishing causation.[128]

The *Magnusson* court held that although the plaintiff's Fourteenth Amendment privacy rights were violated,[129] he failed to state a claim for violation of his Eighth Amendment rights.[130] The harassment and general risk of violence were inadequate to establish a sufficiently serious risk of harm.[131] The court even suggested that the corrections officers would have had to disclose the plaintiff's HIV diagnosis with the explicit purpose of inciting violence for the plaintiff to state a claim based on risk of harm.[132] The court's holding demonstrates the impracticality of alleging cruel and unusual punishment in the absence of an explicit threat from another inmate. Given that impracticality, substantive due process protection is the preferable remedy as the plaintiff's primary hurdle

124. *Farmer*, 511 U.S. at 842-43.

125. No. CIV.04-130-B-W, 2005 WL 758454, at *1 (D. Me. Mar. 21, 2005), *report and recommendation adopted*, No. CIV.04-130-B-W, 2005 WL 859272 (D. Me. Apr. 14, 2005).

126. *Id.*

127. *Id.* at *14.

128. *Id.*

129. *Id.* at *11 (the court dismissed the claim nonetheless on qualified immunity grounds).

130. *Id.* at *17

131. *Id.* at *17.

132. *Id.* at *16.

would be to prove the disclosure itself rather than a high mental state or existence of serious harm.[133]

B. State Law Remedies for Improper Disclosure

Another alternative remedy for improper disclosure might be available through state law, whether a common law or statutory cause of action. Upon closer examination, however, it becomes apparent that state law alternatives do not provide a viable path for protecting the privacy of incarcerated people living with HIV/AIDS. Although the supreme courts of most states have recognized a common law cause of action for improper disclosure of medical information,[134] the tort arises from the fiduciary duty that exists between doctors and their patients.[135] The fiduciary duty exists to encourage honest and open communication from patients to their doctors.[136] Seeing as the underlying policy reason for the cause of action is unique to health care providers, it is hard to imagine a court extending the cause of action to include corrections officers.

State statutory causes of action are also an inadequate remedy for protecting prisoners' privacy. Even though there are some state supreme courts that have interpreted state privacy statutes to create a cause of action for improper disclosure,[137] it is far from clear that such remedies are available to prisoners. For instance, New York has a statute that prohibits the disclosure of HIV related information,[138] and a New York court has held this statute to create a private cause of action after an analysis of legislative history.[139] A

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133. There will be several other hurdles throughout litigation, namely qualified immunity. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815-19 (1982). Qualified immunity, however, would pose a risk in any civil rights action regardless of the underlying right the plaintiff asserts. *See* Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 124 (2009).

134. *See, e.g.*, Lawson v. Halpern-Reiss, 212 A.3d 1213, 1219 (Vt. 2019) ("[W]e join the consensus of jurisdictions recognizing a common-law private right of action for damages arising from a medical provider's unauthorized disclosure of information obtained during treatment.").

135. *Id.* at 1218.

136. *Id.* at 1218-19.

137. *See, e.g.*, *In re* V. v. State, 566 N.Y.S.2d 987, 989 (Ct. Cl. 1991).

138. N.Y. PUB. HEALTH LAW § 2782(1) (McKinney 2020) (the statute includes several exceptions).

139. *In re V.*, 566 N.Y.S.2d at 989.

recent case, however, demonstrates just how unlikely prisoners are to prevail under such statutes.

In *Anthony YY. v. State*, an inmate sued prison nursing staff after they turned over his medical history to the state Office of the Attorney General.[140] Because his medical history included HIV-related information, he sued under the New York statute mentioned above.[141] The court ultimately ruled against the plaintiff because New York law permitted disclosure to agents of the state's Department of Corrections and Community Supervision "in accordance with rules and regulations promulgated by the Commissioner of Corrections and Community Supervision."[142] One such rule allowed for disclosure of HIV-related information to the Office of the Attorney General "when access is reasonably necessary in the course of providing legal services and when reasonably necessary for supervision, monitoring, administration or provision of services."[143] Courts in New York may understand this statute to eliminate a prisoner's expectation of privacy in their HIV/AIDS status.

The example above shows how easily incarcerated people's statutory privacy rights can give way to government interests. This leaves one alternative: a statute that explicitly creates a cause of action for incarcerated people whose medical information is disclosed by prison officials. The chances of a state legislature enacting such a law for the benefit of inmates, who cannot vote in forty-eight out of fifty states,[144] are dubious.

One final reason to prefer a constitutional remedy to a state law remedy is the difference between common law sovereign immunity and Eleventh Amendment immunity. Common law sovereign immunity is a doctrine that bars lawsuits against a sovereign authority in its own courts without the sovereign's consent.[145] The sovereign immunity of the state may be extended to state officials, such as

140. 56 N.Y.S.3d 593, 594 (N.Y. App. Div. 2017).

141. *Id.*

142. *Id.* at 595.

143. *Id.* (quoting N.Y. COMP. CODES R. & REGS. tit. 7, § 7.5).

144. Only Maine, Vermont, and the District of Columbia allow inmates to vote. *Voting Rights for People with a Felony Conviction*, NONPROFITVOTE (Aug. 2021), https://www.nonprofitvote.org/voting-in-your-state/voting-as-an-ex-offender/ [https://perma.cc/3A3K-D6U4].

145. Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 773 (2008).

sheriffs.[146] Eleventh Amendment immunity serves a similar purpose by prohibiting certain lawsuits against states in federal court.[147] Eleventh Amendment immunity, however, does not extend to municipalities.[148] Thus, plaintiffs may sue municipal officials for monetary damages in federal court for violation of their federal rights. How a state creates its sheriffs' offices—or whichever body is responsible for prisons—could determine whether Eleventh Amendment immunity protects the sheriffs.

In *Abusaid v. Hillsborough County Board of County Commissioners*, the Eleventh Circuit considered whether Florida sheriffs acted as "arms of the state" to determine whether they benefited from Eleventh Amendment immunity.[149] The court ruled that the sheriff in that case was not acting as an arm of the state because the state constitution referred to sheriffs as county officials.[150] The court also based its decision on the fact that the county exercised relatively greater control over the sheriff's office compared to the state,[151] county taxes funded the sheriff's office,[152] and the state treasury would not have to pay out an adverse judgment for the sheriff.[153] In contrast, a Florida state appellate court ruled in *Gualtieri v. Pownall* that a sheriff was protected by the common law doctrine of sovereign immunity.[154] The comparison between *Abusaid* and *Gualtieri*—both Florida cases—demonstrates the difference between the two types of immunity.[155] Eleventh Amendment immunity is not quite as broad as sovereign immunity, which means that incarcerated people who sue sheriffs or similar officials for disclosure of their HIV/AIDS status would have a greater chance of reaching the merits of their case if they were able bring a constitutional claim in federal court.

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146. *See, e.g.*, Gualtieri v. Pownall, 346 So. 3d 84, 89 (Fla. Dist. Ct. App. 2022).

147. *See* Florey, *supra* note 145, at 774.

148. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977).

149. 405 F.3d 1298, 1304 (11th Cir. 2005).

150. *Id.* at 1304-05.

151. *Id.* at 1306-10.

152. *Id.* at 1310-12.

153. *Id.* at 1312-13.

154. 346 So. 3d 84, 89 (Fla. Dist. Ct. App. 2022). The underlying controversy in *Gualtieri* was the sheriff's decision to remove seatbelts in a prisoner transport van, which resulted in injury to the plaintiff. *Id.* at 86.

155. *Compare Abusaid*, 405 F.3d at 1304, *with Gualtieri*, 346 So. 3d at 89.

IV. WHAT WOULD PROTECTION FROM GRATUITOUS DISCLOSURE LOOK LIKE?

One final question remains: what would be the implications on constitutional litigation if courts were to reject the *Payne* court's decision (along with its faulty reasoning) and properly consider the privacy interests of incarcerated people living with HIV/AIDS in cases of gratuitous disclosure? Precedent from two district court decisions helps to answer that question.

A. "Under Color of" State Law Requirement

Section 1983 creates a cause of action for violation of one's constitutional rights at the hands of a state official.[156] Section 1983 requires, however, that the defendant was acting "under color of" state law when the alleged violation occurred.[157] This complicates cases involving gratuitous disclosure because those sorts of disclosures are by nature *not* pursuant to any state law or prison policy.[158] *Doe v. Borough of Barrington*, a 1990 case from the District of New Jersey, illustrates how state officials who disclose a person's HIV/AIDS status in the course of their work are in fact acting under color of state law because disclosure amounts to an abuse of power.[159]

In *Borough of Barrington*, Jane Doe's husband—who died prior to the lawsuit—revealed to officers during a traffic stop that he had AIDS.[160] One of the officers conveyed this information to the defendant police officers as they responded to an unrelated incident involving Jane Doe.[161] The defendant officers then revealed Jane Doe's husband's AIDS diagnosis to Jane Doe's neighbor as they responded to the unrelated incident.[162] The neighbor subsequently shared this

156. 42 U.S.C. § 1983.
157. *Id.*
158. *See* Loeb, *supra* note 6, at 279-81.
159. *See* 729 F. Supp. 376, 385 (D.N.J. 1990).
160. *Id.* at 378.
161. *Id.*
162. *Id.*

information with several other people out of an ill-informed concern that Jane Doe's children were a danger to the local school.[163]

In deciding whether the defendants had violated Doe's constitutional privacy rights, the court held first that "[t]he sensitive nature of medical information about AIDS makes a compelling argument for keeping this information confidential."[164] This is analogous to the first part of the *Walls* test in the Fourth Circuit—the court was establishing that Jane Doe's husband's HIV/AIDS status was indeed subject to constitutional protection.[165] In applying the balancing portion of the test, the court found that the government lacked a compelling interest in disclosure because the disclosure "could not prevent the transmission of AIDS because there was no threat of transmission present."[166] Thus, the court granted Doe's motion for summary judgement on her Fourteenth Amendment privacy claim.[167] Although *Borough of Barrington* did not involve an incarcerated plaintiff, it is still relevant to this Note because it established that when an official reveals someone's HIV/AIDS without any legitimate purpose while working for the state, they are in fact operating under color of state law through an abuse of power theory.[168]

B. Gratuitous Disclosure Serves No Penological Purpose

Wood v. White, a 1988 case from the Western District of Wisconsin, offers more particular guidance for addressing gratuitous disclosure in prison.[169] In this case, prison medical personnel revealed to non-medical personnel and other inmates that the plaintiff suffered from AIDS—apparently for no purpose other than to spread a bit of gossip.[170] The court explained that "it is not necessary to balance plaintiff's right to nondisclosure of his medical records

163. *Id.* at 379.
164. *Id.* at 384.
165. *See* Walls v. City of Petersburg, 895 F.2d 188, 192 (4th Cir. 1990).
166. *Borough of Barrington*, 729 F. Supp. at 385 (explaining that even though "prevention of this deadly disease is clearly an appropriate state objective, this objective was not served by Smith's statement that [Doe's neighbor] should wash with disinfectant").
167. *Id.* at 391.
168. *Id.* at 385.
169. *See* 689 F. Supp. 874 (W.D. Wis. 1988).
170. *Id.* at 874-75.

against a countervailing governmental interest. Defendants make no claim that any important public interest was served in their discussion of plaintiff's positive test for the AIDS virus."[171] The implication here is monumental: gratuitous disclosure of an incarcerated person's HIV/AIDS status serves no government interest as a matter of law.[172] This suggests that gratuitous disclosure of an inmate's HIV/AIDS status is a per se violation of the Fourteenth Amendment.[173]

With the *Woods* holding in mind, it is apparent why the *Payne* court's decision is so problematic: it precludes lower courts from reaching a decision like that in *Woods* by preventing them from reaching the balancing analysis.[174] This is exceedingly frustrating in light of the fact that gratuitous disclosures serve no penological interest and plaintiffs would surely prevail on the balancing inquiry.[175] The Fourth Circuit should reexamine its holding in *Payne* at the first chance it gets—perhaps using a case of gratuitous disclosure to carve out an exception to its sweeping prior decision. Other circuits that have yet to reach the question of gratuitous disclosure should avoid the same pitfalls as the *Payne* court because the stigma surrounding HIV/AIDS persists, especially in prisons. Constitutional protection might go a long way in protecting those living with HIV/AIDS and discourage improper disclosure by those individuals society trusts to operate penal institutions.

CONCLUSION

Courts play an important role in shaping prison conditions because it is federal judges who decide which constitutional rights are compatible with incarceration.[176] In *Payne*, the Fourth Circuit reached a decision bound to affect hundreds of incarcerated people living with HIV/AIDS by ruling that they do not have a constitutional privacy interest in their HIV/AIDS status.[177] Thus, a group

171. *Id.* at 876.
172. *See id.*
173. *See id.*
174. *See supra* note 171 and accompanying text.
175. *See supra* notes 106-08 and accompanying text.
176. Turner v. Safley, 482 U.S. 78, 84 (1987).
177. Payne v. Taslimi, 998 F.3d 648, 659-60 (4th Cir. 2021).

has been stripped of its constitutional rights by an institution that many believe exists to protect those rights.[178] This is an especially concerning development for victims of gratuitous disclosure at the hands of prison officials.

Moving forward, other circuits that reach this issue might look at the *Payne* decision through a critical lens. Those courts will see that the Fourth Circuit improperly relied on Fourth Amendment precedent to preclude the possibility of informational privacy rights within prison.[179] They will see that the Fourth Circuit did not apply the sort of balancing test envisioned in *Whalen v. Roe* and expanded upon by several circuit decisions.[180] Hopefully, courts that weigh in on the issue of gratuitous disclosure will reject the Fourth Circuit's reasoning and view gratuitous disclosure as nothing less than a per se violation of the privacy guarantees of the Fourteenth Amendment. If something as reprehensible as jokingly disclosing an inmate's HIV/AIDS status does not violate the liberty guaranteed by our Constitution, what does?

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178. *See id.*

179. *See supra* Part II.A.

180. *See supra* Part II.B.

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