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Conjugal Visitation Rights and the Appropriate Standard of Judicial Review for Prison Regulations

Conjugal visitation rights allow prison inmates and spouses to visit privately and have sexual relations. A number of countries, particularly in Latin America, permit conjugal visits. Although in the United States only Mississippi and California currently permit conjugal visitation, the experience of these two states shows that such programs are workable. Conjugal visitation has met with varied reaction in the literature, but persuasive arguments have been made that it would offer potential psychological benefits to the prisoner, reduce prison homosexuality, and allow the inmate to preserve his or her marital ties. Nevertheless, the reaction of penal administrators in this country to conjugal visitation has been largely negative.

Recently an increasing number of prison inmates have brought suit challenging the power of states to deny them conjugal visitation rights. The argument most frequently advanced is that the denial of...
such rights constitutes cruel and unusual punishment, prohibited by the eighth amendment. This note discusses the less commonly made argument that the denial of conjugal visitation is an impermissible intrusion upon the rights of privacy of the married couple involved.\(^6\) The discussion will review the development of the right of conjugal privacy for nonprisoners and then focus on the applicability of the right to married pretrial detainees and convicted prisoners. Of particular concern will be the appropriate standard of judicial review in the prison context. After considering various approaches currently employed by the courts, this note will propose a refinement of one suggested standard and use it to assess the constitutionality of denying conjugal visiting rights.

Several Supreme Court decisions have firmly established, at least for nonprisoners, that the right of marital privacy is fundamental. *Skinner v. Oklahoma*,\(^{10}\) in which the Court invalidated a state law permitting sterilization of persons three-times convicted of certain felonies, marked a major step in the development of the right. The Court based its holding on the fact that “[w]e are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.”\(^{11}\) In *Griswold v. Connecticut*,\(^ {12}\) the Court showed the same great deference to the rights of marriage and procreation,\(^ {13}\) striking down a Connecticut statute prohibiting the use of contraceptives in so far as the statute applied to married couples. The law


\(^{10}\) 316 U.S. 535 (1942).

\(^{11}\) 316 U.S. at 541. See also *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

\(^{12}\) 381 U.S. 479 (1965).

\(^{13}\) 381 U.S. at 486-495.
had a maximum destructive impact upon the privacy of the marital relationship because it regulated the use of contraceptives, rather than their manufacture or sale.\textsuperscript{14} The Court found the idea of allowing police to search marital beds for evidence of the use of contraceptives “repulsive to the notions of privacy surrounding the marriage relationship.”\textsuperscript{15}

A narrow reading of \textit{Griswold} would limit marital privacy to a restraint on governmental enforcement methods that intrude upon the marriage bed.\textsuperscript{16} This reading views the right exclusively as an aspect of the fourth amendment’s prohibition on unreasonable searches and seizures. However, language in the \textit{Griswold} opinion indicates that the right of privacy can also be found in the penumbras of the first, third, fifth, and ninth amendments.\textsuperscript{17} Furthermore, in a later Supreme Court decision concerning a woman’s right to obtain a nontherapeutic abortion, the majority held the right of privacy to be “founded in the Fourteenth Amendment’s concept of personal liberty and restrictions on state action.”\textsuperscript{18} Although multiple constitutional bases do not necessarily imply a broad scope for the privacy right, the fact that the fourth amendment has not been viewed as its sole source suggests a broader scope than the narrow reading of \textit{Griswold} would allow.

Subsequent cases have expanded the \textit{Griswold} holding so that the right of privacy now extends beyond a restriction on state law enforcement methods.\textsuperscript{19} In \textit{Eisenstadt v. Baird}\textsuperscript{20} the Supreme Court invalidated on equal protection grounds a Massachusetts statute prohibiting the distribution of contraceptives to unmarried persons. The Court stated in dictum:

\begin{quote}
It is true that in \textit{Griswold} the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals. . . . If the right of privacy means anything, it is the right of the \textit{individual}, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.\textsuperscript{21}
\end{quote}

The Court here did not focus on the problems that may arise in enforcing the statute; rather, it objected to the statutory purpose of

\begin{itemize}
  \item 14. 381 U.S. at 485.
  \item 15. 381 U.S. at 486.
  \item 17. 381 U.S. at 484.
  \item 20. 405 U.S. 438 (1972).
  \item 21. 405 U.S. at 453 (emphasis original).
\end{itemize}
restricting individual choice with regard to childbearing. Similarly, in *Roe v. Wade* the Court held that the right of privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." The Court found a Texas law making abortion a crime except when necessary to save the life of the mother an impermissible infringement on the right of privacy. While it might be argued that privacy protects only the rights to use contraceptives and to abort a fetus under certain conditions, the central holding of these cases seems to be that married couples have a fundamental right to be free of governmental intrusion into their decision to have sexual relations. Thus, Justice Goldberg's concurring opinion in *Griswold* noted that "it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations." Moreover, the right to use contraceptives or to abort a fetus would be of little consequence if the state could regulate marital relations.

In extending the fundamental right of conjugal privacy to prisoners and pretrial detainees, three preliminary objections must be met. Although it is now well established that "a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime," until recently judicial review of inmate petitions challenging conditions of confinement were routinely dismissed under the "hands-off" doctrine: "Courts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations." The courts recently have been more receptive to

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23. 410 U.S. at 153.
27. Even an individual's fundamental rights are not absolute. A state can override a fundamental right if it shows a compelling state interest that is furthered by the state infringement and that cannot be furthered by less drastic state regulation. See text at notes 39-42 infra.
the constitutional claims of inmates. For instance, in Cruz v. Beto a prisoner alleged that as a Buddhist he was denied a reasonable opportunity to pursue his faith comparable to that offered other inmates adhering to more "conventional" religious beliefs. The complaint was dismissed by the district court as within an area more properly left "to the sound discretion of prison administrators." The Supreme Court vacated the judgment and remanded the case for a hearing on the allegations of the complaint. The Court summarized the duty of the federal courts in suits brought by inmates:


30. The Supreme Court's per curiam reversal in Cooper v. Pate, 378 U.S. 546 (1964), seemingly marked the beginning of increased judicial review of prisoners' constitutional claims, although a few lower courts had already begun to hear prisoner complaints. See, e.g., Pierce v. La Vallee, 293 F.2d 283 (2d Cir. 1961); Swell v. Pegelow, 291 F.2d 196 (4th Cir. 1961). Inmates generally bring suits under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970). Civil rights actions filed by state prisoners increased from 218 to 2915 between 1966 and 1971. See Weinstein, Administrative Reform and the Courts, in PRISONERS' RIGHTS SOURCEBOOK, supra note 3, at 501; Note, Prisoners' Rights Under Section 1983, 57 GEO. L.J. 1270 (1969). The Supreme Court has been careful to protect prisoners' access to the courts under this statute. See Wilwording v. Swenson, 404 U.S. 249 (1971) (state prisoners are not held to a stricter standard of exhaustion of remedies than other civil rights plaintiffs); Houghton v. Scafer, 392 U.S. 639 (1968) (state prisoners are not required to exhaust administrative remedies before bringing a suit under section 1983). However, in Preiser v. Rodriguez, 411 U.S. 475 (1973), in which the plaintiffs challenged the duration or fact of confinement rather than the conditions thereof, the habeas corpus exhaustion rule was found to be applicable. One district court has read Preiser to require an exhaustion of remedies under a newly devised state grievance procedure before a prisoner will be allowed to bring suit under section 1983. McCray v. Burrell, 367 F. Supp. 1191 (D. Md. 1973), appeal docketed, No. 74-1042 (4th Cir. Jan. 9, 1974).

The judiciary now recognizes an affirmative duty to intervene to ensure that the prisoner receives no punishment beyond what is imposed by his sentence. One court stated: "The courts which have been responsible for placing men behind bars under our system of criminal justice cannot evade their continuing responsibility to protect their basic rights after conviction, any more than the Constitution permits them to do before conviction." In re Lamb, 34 Ohio App. 2d 85, 89-90, 239 N.E.2d 280, 285 (1975) (emphasis original). See Spaeth, The Court's Responsibility for Prison Reform, 16 VILL. L. REV. 1031 (1971). The federal courts have the responsibility under section 1983 to protect the constitutional rights of inmates. Since it is settled that exhaustion of state remedies is not required in such an action, Wilwording v. Swenson, 404 U.S. 249 (1971), notions of comity and federalism should not impede federal judicial review of state correctional officials' actions. Millemmann, Protected Inmate Liberties: A Case for Judicial Responsibility, 55 OREG. L. REV. 29, 41-42 (1976).

33. 405 U.S. at 322. The Court stated that "'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" 405 U.S. at 322, quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957).
Federal courts sit not to supervise prisons but to enforce the constitutional rights of all "persons," including prisoners. We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations. But persons in prison, like other individuals, have the right to petition the Government for redress of grievances which, of course, includes "access of prisoners to the courts for the purpose of presenting their complaints." 34

A second objection to the extension of the right of privacy to prisoners is that prisons are not private places but public institutions, and that by committing a crime that justifies incarceration the inmate has waived his right to marital privacy. 35 Prison commentator Richard Singer has noted that "the concepts of privacy and prison are antithetical beyond comprehension: the prison is, almost by definition, a place where the resident has lost his privacy . . . ," 36 and the Supreme Court has stated in dictum that "a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room." 37 This argument, of course, is not applicable to pretrial detainees, whose guilt has not yet been adjudicated; moreover, it begs the question. Prisons can be freely fashioned to conform with constitutional requirements. A priori notions about the nature of prisons are thus inappropriate in deciding whether incarceration may constitutionally include deprivation of conjugal privacy.

Finally there is the objection that a citizen's right to be free of governmental intrusion into his marriage does not require the state to create special places or programs in prisons for the private conduct of marital relations. 38 In other words, a restraint on state interference with an individual's activities does not imply an affirmative duty to


The appropriate degree of judicial intervention into the internal administration of prisons was declared by the Court of Appeals for the Third Circuit to involve a three-step determination: "(1) [w]hether the inmate is entitled under the federal Constitution to the particular right claimed . . . , (2) if so, whether such right has been infringed in the case before [the court], and (3) if a constitutional right has been infringed, what remedy is appropriate." Gray v. Creamer, 465 F.2d 179, 184 (1972). This three-step determination has been employed in the conjugal visitation context. See United States ex rel. Choice v. Johnson, Civil No. 72-2060 (E.D. Pa. Nov. 28, 1972) (excerpted in 12 CRIM. L. REP. 2298).


36. Singer, supra note 9, at 669. See also E. Goffman, Asylums 14-35 (1961).


promote those activities. This argument also misstates the issue. The fact that the introduction of conjugal visitation programs would require states to alter the status quo in most prisons does not change the fundamental question: Is the right to marital privacy among those rights that the states may constitutionally withdraw from a person when he is incarcerated?

The principal problem in answering this question is to determine the standard of judicial review that should be applied to prison regulations. In the nonprison context the state must carry a heavy burden if it is to encroach on the right of privacy or on any other fundamental right. The Supreme Court stated in Roe v. Wade that, "[w]here certain 'fundamental rights' are involved, . . . regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and . . . legislative enactments must be narrowly drawn to express only the legitimate state interest at stake." The Court has also required the states to use the least restrictive means of achieving their goals where fundamental rights are involved: A "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." In Wade, for example, the state's interest in the mother's health was not found sufficiently compelling to justify regulation of the abortion procedure during the first trimester of pregnancy. Even after the point at which that state interest becomes compelling, the statute prohibiting abortions except where necessary to save the life of the mother was found to be an unjustifiably broad incursion on the mother's right of privacy. Only after the point at which a fetus becomes viable was the state interest in preserving potential human life sufficiently compelling to justify the prohibition.

Courts have recently employed the same close scrutiny in reviewing the conditions of confinement of pretrial detainees as when reviewing constitutional deprivations in the nonprison context. As one court notes, "where incarceration is imposed prior to conviction, deterrence, punishment, and retribution are not legitimate functions of the incarcerating officials. Their role is but a temporary holding operation, and their necessary freedom of action is concomitantly diminished . . . . Punitive measures in such a context are out of harmony with the presumption of innocence." In keeping with the limited function of detention, courts have not accepted punitive justi-

41. 410 U.S. at 164.
42. 410 U.S. at 164-65.
fications for infringement of detainees' constitutional rights; they have held that deprivations are permissible only if necessary to assure the presence of the detainee at trial. Thus, only the state's interest in security, discipline, or the maintenance of orderly institutional administration can justify the curtailment of detainees' rights.\textsuperscript{44} Even with regard to these interests courts have steadfastly demanded that the state show a substantial threat before infringing on constitutional rights.\textsuperscript{45} Detainees may suffer only those constitutional deprivations that are "absolutely requisite,"\textsuperscript{46} "absolutely necessary,"\textsuperscript{47} "justified by a compelling necessity,"\textsuperscript{48} or "inherent in . . . confinement itself."\textsuperscript{49} Moreover, courts have generally required that states pursue the least restrictive means of accomplishing their interests.\textsuperscript{50}

Under this strict standard of judicial review pretrial detainees have a strong argument that the state must grant them conjugal visiting rights. The state's strongest justifications for denying the rights are the security and disciplinary risks of importation of weapons or narcotics and the circulation of escape plans.\textsuperscript{51} However, as existing


Some courts have reached identical conclusions under an equal protection analysis that views detainees as a subgroup of the class of people who have been arrested and are awaiting trial; the other subgroup in the class includes people who are out on bail (bailees). Detainees are treated differently from bailees because it is thought necessary to confine the former in order to ensure their appearance at trial. Hence, as expressed by one district court, "[e]xcept for the right to come and go as he pleases, a pre-trial detainee retains all of the rights of a bailee, and his rights may not be ignored because it is expedient or economical to do so. Any restrictions and deprivations of those rights, beyond those which inhere in the confinement itself, must be justified by a compelling necessity . . . arising from the dearth of alternatives . . . ." Brenneman v. Madigan, 343 F. Supp. 128, 138 (N.D. Cal. 1972) (citations omitted). See also Hamilton v. Love, 328 F. Supp. 1182, 1192 (E.D. Ark. 1971). This analysis appears to have been first suggested in cases involving lineups. See Butler v. Crumlish, 229 F. Supp. 560 (E.D. Pa.), permanent injunction denied on other grounds, 237 F. Supp. 58 (1964). The application to cases challenging the conditions of confinement of pretrial detainees was suggested in Note, Constitutional Limitations on the Conditions of Pretrial Detention, 79 Yale L.J. 941 (1970).

programs have shown, reasonable search procedures can generally provide as effective a means of maintaining security as a complete prohibition of conjugal visitation. Nor does it appear that the administrative burden of instituting a conjugal visitation program is prohibitive. In any case, the courts are not inclined to defer automatically to justifications based on administrative expediency, security, or discipline. In *Brenneman v. Madigan*, for instance, the court found no adequate justification for limitations on detainees' correspondence, recreational activities, and visiting privileges. "The justification of administrative ease was rejected as "unpersuasive," and the court cautioned that it would not "confer carte blanche . . . to justify every restriction and deprivation by invoking the rubric of 'security' or 'discipline.' " Finally, the courts have been loath to accept limitations on state economic resources as a justification for depriving detainees of their rights. One court bluntly stated that "[i]nadequate resources can never be an adequate justification for the state's depriving any person of his constitutional rights." Although a court cannot require the people to appropriate funds for jail improvements or for a new facility, it can order officials to shift resources to the jails. At least one court has noted that it could order the release of the detainees: "[I]f the state cannot obtain the

52. The administration of conjugal visitation programs for detainees will be very similar to that of programs for prisoners; in many instances detainees and prisoners are placed in the same facilities. Flynn, *Jails and Criminal Justice*, in *PRISONERS IN AMERICA* 49, 56 (L. Ohlin ed. 1975). Many of the concerns and problems of the state will thus be the same. For a description of conjugal visitation programs in Mississippi and California, see notes 152, 154 and text at notes 150-56 infra. For discussion of possible limitations on feasibility of conjugal visitation programs depending on the length of time the individual is incarcerated or the type of facility where the individual is being held, see note 67 and text at notes 153-55 infra.

53. See *Rhem v. Malcolm*, 371 F. Supp. 594, 625-26, modified, 377 F. Supp. 995 (S.D.N.Y. 1974); notes 152, 154 and text at notes 150-56 infra. In the case of a notoriously desperate pretrial detainee, complete prohibition may be justified by the danger that the detainee will use the visiting spouse as a hostage in order to escape.

54. Prison administrators operating the conjugal visitation programs in Mississippi and California have indicated that they have not experienced any serious administrative problems. See C. HOPPER, supra note 1, at 96-97; Wilson, supra note 6, at 262; text at note 158 infra.


56. 345 F. Supp. at 140-42.

57. 345 F. Supp. at 139.


resources to detain persons awaiting trial in accordance with minimum constitutional standards, then the state simply will not be permitted to detain such persons." 62 Another court has forbidden the housing of detainees in a particular jail, although the prohibition was not to take effect until three years after the date of decision. 63 Several courts have specifically ordered the construction of new visitation facilities for nonconjugal visitation, as well as the institution of relaxed visiting procedures. 64 One district court has in fact ordered that conjugal visiting rights be granted to detainees who had been held in maximum security for nine months. 65 Although the court did not clearly articulate the grounds for its decision, it appeared to regard conjugal rights as fundamental. 66 However, it observed that it might reach a different result in cases involving "the normal short pre-trial detention period." 67

The strict standard of judicial scrutiny may not be appropriate when the rights of convicted persons are at stake. 68 The purpose of incarceration is of course inconsistent with the notion of prisons as free societies. Those in control of a prison must have authority and discretion to abridge some prisoner rights in order to maintain security and order. As one district court has stated, "[t]he number of state interests which may justify narrowly-tailored encroachments upon protected freedoms is greater in a prison setting than in almost

66. The court noted that judicial intervention on behalf of detainees is justified only if a "constitutional deprivation" is found. 3 PRISON L. REP. at 20. The issue therefore was: "What rights amount to constitutional dimensions? ... I would ... say that certain activities would be amenities or privileges to some, but rights to others depending upon their different lifestyles. But there are nonetheless certain basic conditions and activities which I believe do approach constitutional dimensions to all ... ." 3 PRISON L. REP. at 20. The court concluded that conjugal rights are "basic" and that the defendants, who had been detained in maximum security for nine months, could not be further deprived, although "conjugal rights shall be subject to reasonable restrictions and regulations ... ." 3 PRISON L. REP. at 20.
67. 3 PRISON L. REP. at 20. There should be a distinction between cases involving long and short detention. During a short period of detention a detainee's privacy right is not substantially infringed by a denial of conjugal visitation. Yet it is difficult to determine how long a detainee can be held before his marital privacy is substantially infringed. Even if a "normal" pretrial detention period can in fact be established, it should perhaps not be accorded much weight because it is indicative less of the degree of infringement of the detainee's right than of the degree to which the court's docket is clogged.
68. For a detailed elucidation of the argument for strict scrutiny, see Millemann, supra note 30.
any other area of state regulation. The true constitutional balance leaves the state free to deal effectively with any contingency.\textsuperscript{60} The Supreme Court has employed strict scrutiny almost exclusively to invalidate legislation when fundamental interests or the rights of suspect classes have been infringed.\textsuperscript{70} Applied to prisoner's rights a strict standard of review might result in the invalidation of many necessary prison restraints.\textsuperscript{71} The prison context thus seems to require a standard of review less rigorous than strict scrutiny.

The fact that prisons must exert considerable control over inmates' lives,\textsuperscript{72} however, suggests several reasons why courts should apply a standard of review more protective of prisoners' rights than minimal scrutiny, which requires merely a rational relationship between a legitimate state purpose and the legislative means chosen.\textsuperscript{73} First, prison inmates are a discrete and insular minority, and lack the political power to effectuate legislative reform of the conditions of their confinement. Although strict scrutiny has generally been applied to protect groups whose defining characteristics are immutable,\textsuperscript{74}

\textsuperscript{60} Rinehart v. Brewer, 360 F. Supp. 105, 111 (S.D. Iowa 1973), affd., 491 F.2d 705 (8th Cir. 1974).


\textsuperscript{71} See text at note 91 infra.

\textsuperscript{72} "Prisoners more than any others are subjected to state control. State officials govern inmates' lives by a series of decisions on an hourly, indeed continual, basis." Landman v. Royster, 333 F. Supp. 621, 644 (E.D. Va. 1971). On the general characteristics of total institutions, see E. GoFFMAN, supra note 36, at 3-124 (1968).

\textsuperscript{73} See Flemming v. Nester, 363 U.S. 603 (1960), for the application of the minimal scrutiny test in a case concerning an amendment to the Social Security Act that provided for the termination of benefits to aliens deported on certain grounds. The Court held that the amendment did not violate the due process clause: "Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as this, we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." 363 U.S. at 611.


\textsuperscript{74} E.g., Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (sex) (plurality opinion).
the Supreme Court has long recognized that political impotence is an important factor calling for heightened judicial scrutiny of legislation or regulations directed at minorities. As one federal court of appeals noted: "Most decisionmaking of correctional personnel is less visible to the public than is the decisionmaking of other public officials, and therefore less likely to benefit from the inherent constraints of public discussion and scrutiny. . . . [T]here exist awesome possibilities for misuse of discretion to the extent that decisions which affect prisoners in important ways be made arbitrarily or based upon mistakes of fact." Because of their lack of political influence with the executive and legislative branches of government, prisoners must depend on the courts to vindicate their rights. Second, many institutional restrictions result from administrative judgments made without the aid of legislative guidelines. Courts have traditionally shown less deference to such judgments. Furthermore, courts often defer to administrative judgments because of the administrators' expertise in the subject of the dispute. Prison commentator Michael Millemann has pointed out, however, that the crucial day-to-day decisions in prisons are made by undertrained, lower-echelon officials; moreover, decisions that are in fact made by skilled, higher-level officials are often unduly colored by their perception of budgetary limitations. Finally, a minimal scrutiny standard that always results in upholding prison regulations is inappropriate for the reasons advanced earlier to justify judicial review of prisoner complaints.

*Morales v. Schmidt* illustrates the attempt by the federal courts to define the appropriate level of judicial scrutiny of prisoner chal-

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77. See, e.g., Morales v. Schmidt, 489 F.2d 1335, 1348 (7th Cir. 1973) (Stevens, J., dissenting), remanded on rehearing en banc, 494 F.2d 85 (7th Cir. 1974). When first amendment values are at stake, the Supreme Court has demanded specific legislative guidelines before it will sustain the application of statutes prohibiting expression in public places. Compare Cox v. Louisiana [No. 24], 379 U.S. 536 (1965), with Cox v. Louisiana [No. 49], 379 U.S. 559 (1965).

78. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 30.09, at 240-46 (1958).

79. Millemann, supra note 30, at 40.

80. See note 30 and text at notes 30-34 supra.

In that case a prisoner sought to resume correspondence with a sister-in-law whose name had been stricken from his approved correspondence list because of the previous illicit sexual relationship between them. The district court found nothing in the Constitution or decisions of the Supreme Court justifying the application of different standards for constitutional challenges brought by prisoners and nonprisoners.\footnote{340 F. Supp. at 550.} Regarding freedom to use the mails as a fundamental first amendment right, the court adopted an equal protection analysis\footnote{Under an equal protection analysis it could be argued that denial of conjugal privacy of prisoners deprives them and their spouses of equal protection, because married nonprisoners are not similarly restricted in the exercise of that right. Such an argument is identical to the argument that the prohibition of conjugal visiting deprives the married couple of their right to privacy. In both cases the ultimate question to be decided by the court is whether prisons may constitutionally prohibit sexual relations between husband and wife. Where fundamental rights are infringed, reviewing courts under current equal protection analysis require the state to show that the deprivation is necessary to further a compelling state interest. See, e.g., \textit{Shapiro v. Thompson}, 394 U.S. 618 (1969). Since the right to marital privacy is fundamental, the issue of the appropriate standard of judicial review also arises when the prisoner's claim is couched in terms of equal protection. Thus, this note will not address the issue of the constitutionality of the denial of conjugal visitation under the equal protection clause. See also \textit{Polakoff v. Henderson}, 370 F. Supp. 650 (N.D. Ga. 1973), affd., 488 F.2d 977 (5th Cir. 1974) (equal protection claims for conjugal visits by prisoner and his wife rejected by the district court for lack of evidence that the wife had been discriminated against, since many prisoners' wives are not permitted conjugal visits and nothing requires uniform policies throughout the federal prison system).} and imposed on the state the burden of showing a compelling interest in placing greater restrictions on prisoners' freedom of correspondence than on the freedom of nonprisoners. The state's interest in security and rehabilitation were judged insufficient under that test, and the court granted the plaintiff's motion for a temporary injunction.

The Court of Appeals for the Seventh Circuit reversed,\footnote{489 F.2d 1335 (1973), remanded on rehearing en banc, 494 F.2d 85 (1974).} finding a suggestion in the thirteenth amendment\footnote{"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII.} that involuntary servitude may be imposed upon one convicted of a crime.\footnote{Cf. \textit{Ruffin v. Commonwealth}, 62 Va. (21 Gratt.) 790 (1871). "He [the convicted person] has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State." 62 Va. (21 Gratt.) at 796.} Although the incorporation of most of the Bill of Rights, including the eighth amendment, into the due process clause of the fourteenth amend-
ment had "moderated the harsh implications of the Thirteenth Amendment," the court recognized that "tension remains between the view that a prisoner enjoys many constitutional rights, which rights can be limited only to the extent necessary for the maintenance of a person's status as a prisoner (or parolee), and the view that a prisoner has only a few rudimentary rights and must accept whatever regulations and restrictions prison administrators and State law deem essential to a correctional system." The court also relied on Supreme Court dicta stating that the "[r]evocation [of parole] deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions," and that "[t]he State has found the parolee guilty of a crime against the people. That finding justifies imposing extensive restrictions on the individual's liberty." The appeals court found that this language applied equally to prisoners and therefore authorized substantially greater restrictions on prisoners than on nonprisoners. In addition, the court shared the defendants' concern that with the adoption of the compelling state interest standard "few prison regulations will be able to withstand constitutional attack. Prisoners . . . will contest every disciplinary measure, and prison administrators will be unable to command the adherence to rules which allows the correctional system to function smoothly."

The appellate court in *Morales* determined that the appropriate standard for judicial review was whether the regulation bore a rational relationship to a legitimate state purpose. However, it carefully eschewed reliance upon the "hands-off" doctrine, stating that "to allow prison administrators to determine the constitutional rights of a convicted person would be to abdicate our responsibilities." Furthermore, the standard was not merely an "'obeisance to a warden's asserted expertise'"; thus the district court was urged to examine closely the proffered state justifications on remand.

*Morales* was reheard by the appellate court en banc. The en banc

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87. 489 F.2d at 1338.
90. 489 F.2d at 1342.
91. 489 F.2d at 1341.
92. 489 F.2d at 1342.
93. 489 F.2d at 1343, quoting Spaeth, *supra* note 30, at 1037.
94. The court of appeals panel remanded to the district court for a decision in light of the new standard. 489 F.2d at 1343-44. Judge Stevens filed a dissenting opinion. Although he too disagreed with the district judge's analysis, he believed that the lower court was correct in granting the injunction. In his view the state's prohibition of the plaintiff's correspondence was a "prior restraint" on the plaintiff's speech and invalid under a contemporaneous Wisconsin decision requiring the action to be supported by a reasonable regulation furthering a legitimate state purpose. 489 F.2d at 1346-47.
95. 494 F.2d 85 (7th Cir. 1974).
court held to its previous disposition, but Judge Pell's opinion acknowledged that "difficulty [had] been experienced in articulating a disposition . . . in a manner satisfactory to a majority of the active judges of this court." The court reaffirmed its holding that the proper standard for review was whether the "restriction is related both reasonably and necessarily to the advancement of a justifiable purpose of imprisonment," but emphasized its view that the same result might ultimately be reached as under the district court's standard. Judge Stevens filed a concurring opinion in which he reasserted his view that the result reached by the district court was correct, although he too disagreed with the compelling state interest standard applied by the lower court. Chief Judge Swygert also concurred, noting that he would require "the State to assume a heavy burden of justification" by demonstrating that "the restriction is not only reasonable but that there is a substantial necessity for it. This more forceful standard would be less than a compelling State interest but clearly more than a rational relationship between the restriction and prison discipline and rehabilitation."  

The *Morales* district court was faced with the task of interpreting the court of appeals decisions in the subsequent case of *Mabra v. Schmidt*. In *Mabra* the plaintiff claimed that his confinement in a prison's segregation building deprived him of the right to visit with his infant children. The district judge first restated his *Morales* view that where a prison regulation deprives a prisoner of a fundamental right, equal protection requires that the discrimination vis-à-vis nonprisoners be justified by a compelling state interest. Nevertheless, the court recognized that it was bound by the appellate court decision in *Morales*. However, it interpreted that decision as retaining the familiar two-tier equal protection analysis but dividing the category of fundamental interests into two subcategories. The state would be required to show a compelling interest in order to justify the deprivation of a fundamental right falling into one subcategory, but deprivations of fundamental rights in the second subcategory—like the right involved in *Morales*—would require only a rational basis.

On the merits of the *Mabra* case, the court determined that the freedom to associate with one's children was a fundamental aspect of privacy under *Roe v. Wade*. It decided that this right fell within the

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96. 494 F.2d at 86.
97. 494 F.2d at 87.
98. 494 F.2d at 87.
99. 494 F.2d at 88.
102. The appellate court opinions in *Morales* do not explicitly support this interpretation.
Morales subcategory,^{103} and thus assigned the state the burden of showing that the segregation restriction was rationally related to the advancement of a legitimate purpose. The court held that the state failed to carry that burden and denied the defendant's motion to dismiss.

The differences described above illustrate the difficulty of deciding upon an appropriate standard of review of prison regulations. However, the different standards enunciated by the district and appellate courts in Morales and Mabra seem to be moving toward a common position. The minimal scrutiny advocated by the appellate court is not meant to imply complete judicial abdication, and at least Chief Judge Swygert would require a standard higher than minimal scrutiny. In Mabra, the district court envisioned applying the compelling state interest test with enough flexibility to ensure the unfettered evolution of correctional practices and constitutional doctrine, emphasizing "that the adjudicative processes, techniques, and approaches should be administered evenhandedly by the courts, not that the results should be uniform."^{104} Correctional officials could take comfort in its prediction that rational relationships, reasonable necessities, and compelling state interests would probably be frequently discovered by courts, and its comment that "[h]istorically, the courts have surely been disposed to preserve the correctional system."^{105} Nevertheless, the more restrictive language of the district court's modification of the strict standard would probably result in invalidating more prison regulations than would the modification of minimal scrutiny advocated by the appellate court.

It is submitted that none of the standards of review enunciated in Morales and Mabra adequately take into account the competing interests of the prisoner and the state. Nor are the factors that a court should weigh in striking an accommodation between the competing interests explicitly identified. For example, the Morales appellate court's rational relationship standard requires close examination of state justifications for the abridgement of a prisoner's fundamental rights, without indicating how that examination should differ from traditional minimal scrutiny or how a court can tell when an asserted state interest is legitimate. The failure of these standards to provide proper guidance will create substantial uncertainty in future cases, which in turn may "unnecessarily . . . perpetuate the involvement of the federal courts in affairs of prison administration."^{106} an involve-

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103. But cf. McGregor v. Schmidt, 358 F. Supp. 1131 (W.D. Wis. 1973) (restriction imposed on parolee that he remain within the state infringed his fundamental right of interstate travel and had to be justified by a compelling state interest).
104. 356 F. Supp. at 630.
105. 356 F. Supp. at 630.
ment especially unfortunate where state prisons are concerned. Furthermore, the lack of guidance permits a judge's unarticulated and possibly subjective values to control the outcome of a case.

A balancing test may provide a more suitable method of achieving the middle ground of judicial review sought by the courts in Morales. The Eighth Circuit has in fact accepted a balancing test, holding that "when the claim is that a prison regulation infringes upon a constitutional right, 'a court must balance the asserted need for the regulation in furthering prison security or orderly administration against the claimed constitutional right and the degree to which it has been impaired.' " The Supreme Court also adopted the balancing approach in Pell v. Procunier. In that case inmates challenged under the first and fourteenth amendments a California prison regulation prohibiting press interviews with specific inmates. Assuming without deciding that first amendment rights were at stake, the Court characterized Pell as a case "where 'we [are] called upon to balance First Amendment rights against [legitimate] governmental . . . interests.' "

An important factor in the balancing process was the Court's recognition that the prisoner's right to communicate by mail or through visits provided alternative means of communication with the outside world. Moreover, permitting the press interviews would have created security and administrative problems. The combination of these factors led the Court to hold the regulation valid.

Such a balancing technique is not necessarily inconsistent with the established constitutional doctrine that deprivations of fundamental rights must be justified by compelling state interests. The state, through criminal convictions comporting with due process of law, has presumably shown compelling reasons for incarcerating prisoners. The state thus has already shown a compelling interest in depriving convicted persons of those rights that are inconsistent with incarceration. The sole issue presented when a prisoner challenges a particular deprivation, therefore, is whether the exercise of the right is inconsistent with incarceration. In Pell the Supreme Court seemed to base its use of balancing with regard to first amendment rights on a similar analysis, stating:

[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus, challenges to prison restrictions that are asserted to inhibit First Amendment

interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law.\textsuperscript{111}

The Court apparently viewed balancing as the appropriate means of reconciling the asserted first amendment rights with the legitimate policies and goals of the correctional system. Balancing seems equally appropriate where other fundamental interests are at stake.\textsuperscript{112}

The utility of the \textit{Pell} balancing test, however, requires a fuller enumeration of the many state interests in incarceration. Four goals of imprisonment are generally recognized: retribution, deterrence, rehabilitation, and confinement of the prisoner for the protection of society.\textsuperscript{113} Other state interests relate primarily to the practical problems associated with running a prison, especially the maintenance of security and order. Administrative convenience may also be entitled to some weight, although budgetary limitations must be discounted.\textsuperscript{114} A court will have to inquire whether the challenged regulation actually furthers these interests, and less weight should be assigned to regulatory purposes that the state could achieve by alternatives less destructive of constitutional rights.\textsuperscript{115} Courts must recognize the need of prison administrators for some degree of discretion in dealing with day-to-day problems,\textsuperscript{116} and when the administrators' professional expertise plays a role in the exercise of their discretion, their judgment should be entitled to special weight.\textsuperscript{117}

\begin{itemize}
\item \textsuperscript{111} 417 U.S. at 822.
\item \textsuperscript{112} However, the balancing test is inappropriate where nonfundamental rights are at stake. Balancing is designed to resolve the conflict between the nature of the prison as an institution and the strict scrutiny test generally applied in cases involving fundamental rights. Since this conflict does not exist when a fundamental right is not at stake, the balancing test is inapplicable.
\item \textsuperscript{113} Cressy, \textit{Adult Felons in Prison}, in \textit{Prisoners in America}, supra note 52, at 117, 125-26.
\item \textsuperscript{114} See text at note 59 supra.
\item \textsuperscript{115} This notion is similar to the doctrine of the "least restrictive alternative." "When the government has 'reasonable and adequate alternatives available' to a given end, it must choose the measure which least interferes with individual liberties." Palmigiano v. Baxter, 487 F.2d 1280, 1288 (1st Cir. 1973), vacated, 42 U.S.L.W. 3710 (U.S. July 8, 1974), \textit{modified on remand,} 16 CAM. L. REV. 2295 (1st Cir. Dec. 20, 1974), \textit{quoting} Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951). See also Chambers, \textit{Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives,} 70 Mich. L. Rev. 1107, 1145-51 (1972); Wormuth & Mirkin, \textit{The Doctrine of the Reasonable Alternative,} 9 Utah L. Rev. 254 passim (1964).
\item \textsuperscript{116} For example, an administrator should have discretionary authority to order a prison lockup when warranted by emergency circumstances. See Biagiarello v. Sielaff, 483 F.2d 508 (3d Cir. 1973); Hoitt v. Vitek, 395 F. Supp. 1238 (D.N.H. 1975), \textit{afld.}, 495 F.2d 596 (1st Cir. 1974).
\item \textsuperscript{117} For example, balancing the rehabilitative effect of personal contact during ordinary visitation against the inherent security risks is peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should
\end{itemize}
On the other side of the balance, the court must consider the nature of the right infringed and the degree of the infringement. While all fundamental rights are entitled to a great deal of weight, in the prison context some fundamental rights are more important than others. For example, the Supreme Court has held that "[t]he constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights." Therefore, the Court has consistently invalidated undue restrictions imposed upon the right of access to the courts. A court should ascribe greater weight to that right than to the right to travel, which is clearly inconsistent with the requirements of incarceration. Similarly, the greater the infringement of the fundamental right, the greater weight the court should give the prisoner's claim. If the infringement is minor, or if the prisoner has legitimate alternative means of exercising his rights, his claim should be assigned less weight. Illustratively, in Johnson v. Avery the Supreme Court held a Tennessee regulation prohibiting the activities of a jailhouse lawyer to be an impermissible intrusion upon the prisoner's right to apply to a federal court for a writ of habeas corpus. While holding that prison "writ-writing" could not be prohibited in the absence of alternative means of legal assistance, the Court noted that reasonable time and place limitations were legitimate.

By enumerating the interests that are to be considered on behalf of the state and the prisoner, the proposed balancing test will give more guidance to courts than do the standards proposed in Morales or Pell. Balancing always presents the possibility that the outcome of a case will depend upon a court's subjective evaluation of the interests involved, but this danger may be limited somewhat by requiring judges to consider only certain interests and to make their value judgments explicit. Nevertheless, it must be admitted that balancing will do nothing to reduce the federal-state clash produced when federal courts intervene in the administration of state prisons. Still,

ordinary defer to their expert judgment in such matters. Courts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties. But when the issue involves a regulation limiting one of several means of communication by an inmate, the institutional objectives furthered by that regulation and the measure of judicial deference owed to corrections officials in their attempt to serve those interests are relevant in gauging the validity of the regulation.


120. 393 U.S. 483 (1969).
121. 393 U.S. at 490.
balancing provides a more sensible and just reconciliation of state and individual interests than either strict or minimal scrutiny.

Applying the proposed standard of judicial review to conjugal visiting rights, the issue is whether a program for securing to the prisoner the meaningful exercise of the fundamental right of marital privacy is on balance inconsistent with state interests in incarceration.

It can be argued that the exercise of this particular fundamental right is especially important because of the negative impact that the denial of conjugal visits has on the prisoner. One obvious effect is physiological frustration, which is apparently heightened by the inmate's accessibility to sex-oriented publications and programs and pornography. Furthermore, according to one writer, the sexual experience of inmates prior to imprisonment tends to be broader than that of nonprisoners: "The men who make up the bulk of the imprisoned populations tend to be drawn from deprived sections of the society . . . . As a consequence, the sexual experience of these men and the meaning that sex has for them differs in significant ways from other portions of the population that are less likely to be imprisoned." The psychological impact upon the inmate is even more profound. Virtually all contacts with the opposite sex are cut off. The denial of conjugal visiting rights deprives the inmate of an important source of emotional support. Perhaps the most significant psychological effect of the deprivation of heterosexual relations, however, is the impact upon the prisoner's self-image. The sexual frustration felt by a male inmate deprived of heterosexual relationships can cause him anxiety concerning his status as a male. Where the inmate's adjustment to the sexual deprivation of prison evokes latent homosexual tendencies and behavior the result is likely to be an acute psychological onslaught upon the inmate's "ego image." Even where homosexual tendencies do not develop into behavior, they will "arouse strong guilt feelings at either the conscious or unconscious level." Moreover, especially in the case of adolescent inmates, life-

125. C. HOPPER, supra note 1, at 147; H. KLARE, supra note 3, at 64-65.
126. G. SYKES, supra note 122, at 72.
127. Id. at 71. Because of the paucity of available information concerning women's prisons, this note focuses on the problems created within men's institutions. However, it is likely that substantially similar considerations obtain in women's prisons. See D. WARD & G. KASSEBAUM, WOMEN'S PRISONS (1965). For a constitutional critique of the separation of prisoners by sex, see Note, The Sexual Segregation of American Prisons, 82 YALE L.J. 1229 (1973).
time patterns of sexual behavior may be shaped by homosexual experiences in prisons. Finally, conflicts arising from homosexual relationships may lead to physical violence.

The fact that the prisoner's right of marital privacy is shared by a nonprisoner spouse provides another reason for according this right great weight. In *Procunier v. Martinez* the Supreme Court relied upon the nonprisoner rights infringed by censorship of prisoner mail to invalidate prison censorship regulations. Because nonprisoner rights were at stake, the Court employed a strict standard of review, holding that the prison officials' discretion to censor "statements that 'unduly complain' or 'magnify grievances,' expressions of 'inflammatory political, racial, or religious, or other views,' and matter deemed 'defamatory' or 'otherwise inappropriate'" was "far broader than any legitimate interest of penal administration."

The Court found it unnecessary to decide whether the first amendment rights of prisoners alone would invalidate the censorship.

Finally, the prisoner's right of marital privacy is entitled to great weight because the deprivation is total: Prisoners have no sexual privacy in their marital relations when conjugal visitation is prohibited. The situation is thus fundamentally different from that in *Pell*, where the Court relied upon the availability to inmates of alternative means of communication to uphold a prison regulation prohibiting press interviews. A prisoner's only alternative for achieving marital privacy is the home furlough, which is infrequently available.

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131. For example, it has been estimated that nearly every slightly built young prisoner will be sexually approached within minutes of admission. P. BUFFUM, supra note 3, at 18. The young inmate may be eager to cultivate a friendship with an obliging inmate in order to ease his anxieties. As he accepts friendly overtures, however, he becomes dependent upon his benefactor to the extent that when the desire to develop a homosexual relationship is revealed, the young inmate's indebtedness affords him no choices other than submitting or being beaten or killed. D. CLEMMER, supra note 123, at 263-74. See also id. at 270-71, quoting an anonymous ex-inmate: "Many a knife 'scrape' in prison can be laid at the door of some fair-haired lad. Usually the wielders of 'shivs' are fighting over an affair of amour, while not a few onlookers are hoping that both duelists send each other to the hospital so they can have a 'chance' at the lad. I have seen some serious knife-slashing—over what? Over the affections of some 'punk.' " Potential violence is but one example of the destructive influence of institutional homosexuality on the inmate. See P. BUFFUM, supra, at 14-15; J. FISHMAN, supra note 3, at 83-89; G. SYKES, supra note 122, at 83-89.


133. 416 U.S. at 413-14.

134. 416 U.S. at 415, quoting Director's Rules 1201, 1205, 2402(8).

135. 416 U.S. at 416. The Court, however, would have upheld prison mail censorship to the extent that it enabled prison officials to refuse to deliver escape plans or encoded messages. 416 U.S. at 413.

136. At the Parchman penitentiary in Mississippi, for example, which has a relatively liberal furlough program, only prisoners who have served at least three years
On the other side of the balance, the state can assert the basic goals of incarceration as justification for infringing on marital privacy. Retribution and deterrence are clearly served by a condition of imprisonment as unpleasant to the inmate as sexual deprivation. The protective function is also served, albeit only to the extent that denial of conjugal visitation facilitates the maintenance of prison security. As long as the prisoner remains under prison supervision society is protected from his unlawful activity. The goal of rehabilitating the prisoner, however, is frustrated. The deprivation of heterosexual conduct has been shown to have psychologically destructive effects on the inmate and his marriage. Conjugal visits would mitigate these negative effects and thereby facilitate rehabilitation.

The extent to which a positive effect on rehabilitation should be regarded as offsetting the state's interest in retribution and deterrence is unclear. The Supreme Court has not required the states to rank their interests in the goals of incarceration, although Justice Marshall has stated that the eighth amendment prohibits a state from making retribution the sole object of punishment. In dictum the Court has noted that retribution is no longer the dominant objective of imprisonment and that rehabilitation has become increasingly important. Nevertheless, two federal circuit courts have upheld the states' rights to pursue retributive goals. One federal district court even in Sweden, which also has a liberal furlough policy, leaves are granted only after a third of the prisoner's sentence has been completed, with a maximum frequency of one leave every three months. For a detailed account of the Pennsylvania home furlough program, see Comment, An Evaluation of the Home Furlough Program in Pennsylvania Correctional Institutions, at 7-8. For a detailed account of the Pennsylvania home furlough program, see Comment, An Evaluation of the Home Furlough Program in Pennsylvania Correctional Institutions, 47 Temp. L.Q. 288 (1974).


138. Security as a state interest is discussed in text at notes 146-56 infra.

139. See text at notes 122-31 supra.

140. For an intensive analysis of the impact of prison separation upon family relationships, see P. Morris, Prisoners and Their Families (1965).

One study of post-release failures concludes that "men whose first residence is with their wives have the fewest failures, and those living alone have the most." D. Glaser, The Effectiveness of a Prison and Parole System 249 (abridged ed. 1969).

The officials at the Correctional Institute at Tehachapi in California advanced as partial justification for their program of conjugal visiting that "[i]t is our contention that we do not protect society by contributing to the dissolution of the family unity . . . . A broken family in all probability becomes a permanent welfare case. Without his wife and children, the prison parolee starts his re-entry into the social experience with another great handicap—his failure as a husband and father." Wilson, supra note 6, at 262.


has refused to require a state to adopt rehabilitation as a goal,\textsuperscript{144} but another has required that rehabilitation prevail over other state goals when there is conflict among them.\textsuperscript{145} Even in the absence of a priority ranking, it is arguable that rehabilitation is entitled to substantial weight and that the inconsistency with rehabilitative goals should reduce the weight assigned to retribution and deterrence as justifications for denying conjugal visiting rights.

A denial of conjugal visitation also furthers the state interest in prison security. Private visiting may increase the risk of secret importation of drugs and weapons or the seizure of hostages, and may facilitate escape. Although the courts have steadfastly recognized the need to maintain security within the prison, they have also made it clear that an alleged interest in security will not justify every deprivation. In \textit{Johnson v. Avery},\textsuperscript{146} for example, prison authorities argued that prohibiting an inmate from acting as attorney for other inmates was "justified as a part of the State's disciplinary administration of the prisons."\textsuperscript{147} The Supreme Court admitted that "prison 'writ writers' . . . are sometimes a menace to prison discipline"\textsuperscript{148} but concluded that the state could not foreclose inmates from enlisting the legal assistance of other inmates without providing a reasonable alternative method of legal assistance. In \textit{Pell v. Procunier}, however, the Court relied in part upon security grounds to uphold the challenged regulation prohibiting press interviews. The Court stated that "[a]lthough they would not permit prison officials to prohibit all expression or communication by prison inmates, security considerations are sufficiently paramount in the administration of the prison to justify the imposition of some restrictions on the entry of outsiders into the prison for face-to-face contact with inmates."\textsuperscript{149}

The weight of the state's interest in maintaining prison security should be reduced by the presence of an effective alternative to the complete denial of conjugal visits—personal searches of the visiting spouses and of the inmates. In the Mississippi conjugal visitation program, for example, visiting spouses are searched,\textsuperscript{150} and the pro-


\textsuperscript{146} 393 U.S. 483 (1969).

\textsuperscript{147} 393 U.S. at 486.

\textsuperscript{148} 393 U.S. at 488.

\textsuperscript{149} 417 U.S. 817, 827 (1974).

\textsuperscript{150} C. HOPPER, supra note 1, at 49-50.
gram has apparently not led to additional security problems. It is important to note that the Mississippi penitentiary that has instituted conjugal visitation is a farm prison; prisoners are located in small, separate camps and are thus more easily controlled than in a prison with a concentrated inmate population. In California, however, "family visiting in which wives, parents, children and other family members of inmates are permitted two-day visits in the privacy of home-like apartments" has been initiated in all state correctional institutions, including Folsom Prison, California's maximum-security facility. Moreover, the California Department of Corrections "is attempting to increase its family visiting facilities, particularly within security sectors." While family visiting programs in this country are too new to dispel completely the fear of security and discipline

151. Id. at 89-98.
152. Id. at 75-79.
Mississippi operates its conjugal visitation program at the Parchman penitentiary, where the program has developed informally since 1918. Until 1963 there were no funds allocated for the construction of facilities. Id. at 82. Initially private visits occurred in the prisoner's quarters; later, inmates were allowed to construct more private "red houses." Id. at 53-55. Following an initial search of the visitor, id. at 49-50, and a showing of identification and verification of marriage to the prisoner visited, id. at 56, the inmate and his wife are relatively free to walk around the grounds and are unsupervised until the end of the visit. Id. at 55-57. The use of the "red house" is similarly unstructured, and the facilities are shared among the inmates in a cooperative fashion. Id. at 59-60. By informal agreement those inmates not participating stay away from the area in which the "red house" are located. Id. Visits are permitted on alternate Sundays. Id. at 49.

Every married male inmate at Parchman not in the maximum security unit is free to participate. There is no good behavior requirement, and a survey taken in 1968 revealed that almost sixty per cent of the married inmates participated. Id. at 61-62. Generally, those not participating had wives who lived too far away, had not been getting along well with their wives, or had simply chosen not to participate. Id. at 61. In a survey taken at Parchman, 90 per cent of the single prisoners questioned expressed no resentment toward the privilege afforded the married inmates, and few (less than 10 per cent) of the participating prisoners reported embarrassment or difficulties arising from the other inmates. Id. at 98-101.

154. California Department of Corrections, Status Report 17 (1974). The program was originally instituted at the Correctional Institute at Tehachapi, where it was formulated expressly to deal with the problem of the strain on the family unit caused by the long absence of the imprisoned parent. The Tehachapi program allows the inmate to stay for two days with his immediate family at special cottages on the prison grounds. The cottages provide a relaxed, family-like setting with adequate facilities, although the range of available activities is limited. Prison officials view the opportunity for husband and wife to engage in sexual relations, with the accompanying benefits of curtailing homosexuality among inmates and extra-marital activity by wives, as an incidental feature of the program. In addition to proving a legitimate family relationship with prospective visitors, a participating inmate must be within his minimum eligible parole date and have established at least a six-month good conduct record. The reaction of participating families and of state officials has been positive. Wilson, supra note 6, at 261-64.
155. California Department of Corrections, supra note 154, at 17.
problems, no evidence exists that such problems will in fact arise. The state should perhaps not be allowed to rely on this argument for infringing upon a fundamental right unless it proves a direct, factual connection between denying conjugal visitation and the maintenance of security. Complete denial of conjugal visits seems unsupportable, at least where minimum security or farm prisons are involved.

The implementation of a conjugal visitation program also involves some administrative burdens. For example, it will be necessary to determine the validity of alleged marriages, and conducting personal searches will require prison manpower. Implementation will also require the construction of new facilities or the conversion of existing buildings. Scheduling of visits will entail additional record-keeping. Administrative burdens should not be over-estimated, however. California has instituted a program that accommodates 6,000 family visits per year, yet "[n]o budget increases were involved. In some instances inmates constructed visiting facilities using salvaged lumber and materials."

Even if substantial administrative costs are entailed, the weight to which they should be entitled is not clear. In Wolff v. McDonnell the Supreme Court sanctioned a limited deprivation of due process rights in the name of convenience of prison administration. The Court held that the imposition of certain prison disciplinary sanctions must be preceded by minimal notions of procedural due process, including written notice, a written factfinding report, and an opportunity for the prisoner to call witnesses and to present documentary evidence in his defense. It rejected the state's argument that the less burdensome procedures it provided were sufficient, but also rejected the inmate's contention that he should be provided with counsel at the disciplinary hearings. The Court was especially concerned that providing counsel would unduly prolong the proceedings.

Wolff may be limited by the fact that it dealt with the requirements of procedural due process. The Court recognized that the procedures constitutionally required in a given situation depend upon the institutional setting. Thus, it is peculiarly appropriate to con-
sider administrative burdens in determining procedural due process requirements. On the other hand, conjugal visitation concerns the fundamental substantive right of marital privacy. It is less appropriate that institutional concerns should shape the content of this right. Moreover, it is well established that economic costs cannot justify the infringement of a fundamental right, and a conjugal visitation program would be burdensome, if at all, chiefly in terms of manpower and money. By contrast, the Court in Wolff found that the administrative burdens imposed by allowing inmates to be represented by counsel at disciplinary hearings would have changed the fundamental nature of the hearings and "reduce[d] their utility as a means to further correctional goals."

Although there are weighty interests on both sides of the issue, a strong argument can be made that a court must find that married prisoners and their spouses have a constitutional right to participate in a program of conjugal visitation. Whether the balance will be struck in the prisoner's favor will depend primarily on the relative importance of the conflicting purposes of imprisonment. If rehabilitation remains the favored goal, as it now seems to be, the benefits of conjugal visiting should tip the scales in the prisoner's favor. In any case, the implementation of a conjugal visitation program makes sense because the rehabilitative benefits of such a program can be gained at little expense to the goals of retribution and deterrence. Prisons will remain unpleasant places even if conjugal visiting is allowed several times a month. Imprisonment will confer no less of a social stigma because of the presence of such a program.

This note has considered only whether prisoners in general are entitled to any conjugal visitation. If the conclusion that prisoners are constitutionally entitled to that right is accepted, many administrative details must be resolved: How often must conjugal visitation be made available; in which types of prisons must conjugal visits be instituted; for what reasons, if any, may the right be withdrawn from an individual prisoner? Administrative discretion and expertise will be entitled to much weight in making these practical decisions. All the courts can do is ensure that the right is generally available and that substantial reasons justify cases of individual deprivation.


163. See text at note 59 supra.

164. 418 U.S. at 570.