

## **ESSAY QUESTION NO. 4**

### **Answer this question in booklet No. 4**

Steve and Linda have been married for several years. Steve is presently incarcerated at a State of Alaska medium security prison. Steve was convicted of Assault in the Third Degree (a felony) for trying to strangle Linda. Steve's only prior convictions are of domestic violence against Linda.

While Steve has been in prison, Steve and Linda have become very religious. Based on their family pastor's religious teaching, they believe that they should pray together for as long as possible. Their new religious practices also require them to embrace while praying. Their prayers must last as long as one hour.

However, prison rules limit physical contact between inmates and visitors to a brief handshake or embrace. As a result, the prison has not allowed Steve and Linda to embrace throughout their prayers. The stated purpose for this rule is to limit the introduction of contraband into the prison.

1. Discuss what state and federal constitutional claims Steve may assert to challenge the prison rules.

## GRADER'S GUIDE

### \*\*\* QUESTION NO. 4 \*\*\*

#### **SUBJECT: CONSTITUTIONAL LAW**

#### I. Federal Free Exercise (40 points total )

##### A. General Federal Free Exercise (25 points)

The Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof...*" (Emphasis added). See Cantwell v. Connecticut 310 U.S. 296, 303 (1940). It should be noted that this is a Free Exercise question and thus the Lemon v. Kurtzman (403 U.S. 602 (1971)) test is not applicable because that test is only relevant to the Establishment Clause.

Instead the appropriate standard was described by the United States Supreme Court in Employment Division, Department of Human Resources v. Smith, 494 U.S. 872, 878-79 (1990) where the court held that a neutral, generally applicable law or regulation does not offend the free exercise clause even if the law has an incidental-- i.e., unintended--effect on religious practice. Here, Steve would have a difficult time arguing that the prison's regulation is not "neutral". Thus, the prison's contact visitation rules are unquestionably constitutional under this standard as they do not discriminate against religion on their face. They apply to all prisoners, and Steve would have a difficult time claiming that the rules are aimed at a particular religion.

##### B. Federal Free Exercise and Prisoners (15 points)

The Supreme Court has also established a more specific Free Exercise test regarding prison rules. The Court in Turner v. Safley, 482 U.S. 78, 89 (1987) gave deference to prison rules that were "reasonably related to legitimate penological interests." Id. at 89. In Turner the Supreme Court reasoned that this deferential standard was required to prevent courts from becoming unduly involved in the "intractable problems" of prison administration. Id. at 84-89. The Court listed four factors that are relevant to determining whether a regulation is reasonable. Id. at 89.

The first factor requires "a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." Id. (internal citations omitted). The Court has held that prison security is not only a legitimate interest, it is a compelling governmental interest. Larson v.

Cooper 90 P.3d 125, 129 (Alaska 2004) (internal citations and quotations omitted). Moreover, limitations on contact visits are rationally related to this interest. Id. (internal citations and quotations omitted).

Here, limiting the introduction of contraband is directly related to prison security and thus there appears to be a valid rational connection between the governmental interest and the regulation. Steve might argue that, since he has no convictions for the use of weapons or controlled substances, subjecting him to a rule that is designed to limit the introduction of contraband is unreasonable. But, the Larson court rejected a similar argument. Moreover, while not explicitly stated as a reason for the limited contact rule, it could be argued that unmonitored and prolonged contact between the couple might well place Linda in danger given Steve's history of violence towards Linda.

The second Turner factor requires courts to examine "whether there are alternative means of exercising the right that remain open to prison inmates." Id. (internal citations and quotations omitted). The "alternative means" factor merely requires that adherents not be "deprived of *all* forms of religious exercise," not that they remain free to engage in the prohibited activity. Id.

The question here then is whether the prohibition against physical contact between Steve and Linda deprives Steve of all forms of religious exercise. Arguably, it does not as Steve and Linda may pray together; they are just not allowed to do so while in prolonged physical contact.

The third Turner factor requires courts to consider "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." Id.

It is not absolutely clear what impact allowing Steve and Linda to embrace during prayer would have on guards and other inmates. But one could imagine that the close monitoring of the couple during an hour long prayer would place some burden on the guards and might decrease visitation opportunities for other inmates.

The final Turner factor requires courts to consider whether there are any "ready alternatives" to the policy in dispute. Id. at 130. The Supreme Court made it clear, however, that "[t]his is not a 'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." Id. at 131. The Court further suggested that only those alternatives that would accommodate the prisoner's rights at "*de minimis* cost to valid penological interests" could be considered relevant to a court's inquiry into whether a regulation is reasonable. Id. at 131. As stated above the increased monitoring of Steve and Linda would likely rise above the level of *de minimis* and thus it

cannot be said that there is an obvious easy alternative to the prison's contact visitation rules.

## II. Alaska's Free Exercise Clause (60 points)

### A. General Free Exercise under the Alaska Constitution (40 points)

Article I sec. 4 of the Alaska Constitution states that "No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof."

The seminal Alaska case on the free exercise clause is Frank v. State, 604 P.2d 1068 (Alaska 1979). In Frank the Alaska Supreme Court, established the following three part test: The free exercise clause may be invoked by a person against state action (or inaction) only where: (1) there is a religion involved; (2) the conduct in question is religiously based; and (3) only where the claimant is sincere. Id. at 1070 (internal citations omitted).

If this test is met, then the state must show a compelling state interest to not accommodate religious practices or beliefs. Specifically, the state must show a "substantial threat to public safety, peace or order or where there are competing governmental interests that are of the highest order and are not otherwise served." Id. at 1070-73. Further, the fact that there is a compelling state interest itself is not enough. The burden is on the state to establish actual harm to the state interest. The Frank court stated: "The question is whether the interest, or any other, will suffer if an exemption is granted to accommodate the religious practice at issue." Id. at 1073.

Absent such actual harm to a compelling state interest, the Alaska Constitution requires an exemption from the laws at issue to accommodate religious practices. Id. at 1073-74.

It should be noted that this very high standard differs from the standard adopted by the Federal Courts in interpreting the Federal Constitution where the law is facially neutral and of general applicability. See Swanner v. Anchorage Equal Rights Com'n, 874 P.2d 274, 279 (Alaska 1994). The Alaska Supreme Court has explicated rejected this lower standard and has reiterated the application of the "compelling state interest" standard with respect to the Alaska Constitution. See id. at 280-81.

Under the Frank standard, Steve would argue, under the Alaska Constitution, that: religion is involved; the conduct in question is religiously based (praying while embracing on the advice of a pastor); and there is no indication that he is not sincere in his religious beliefs. Under this framework for the prison's rules to be constitutional the prison must show that allowing Steve and Linda to embrace would pose a substantial threat to public safety and order. The state

could argue that this burden is met because of Steve's assaultive history against Linda.

C. Alaska Free Exercise and Prisoners (20 points)

However, the Larson court "tempered" the application of Frank with regards to prisoners holding: "subjecting the day-to-day judgements of prison officials to an inflexible strict-scrutiny analysis would seriously hamper the ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." Larson v. Cooper 90 P.3d 125, 132 (Alaska 2004) (internal citations and quotations omitted).

Applying this more deferential standard, the Larson court held that prison rules that limited physical contact did not violate Alaska's free exercise clause because of the increased financial and security burdens that would be placed on the prison. Id. at 132-33.

Accordingly, it is unlikely that Steve would prevail under the free exercise clause of the Alaska Constitution.

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Steve's state and Federal constitutional claims will revolve around the details of the 1<sup>st</sup> Amend No establishment of Religion and Free Exercise of Religion : 14<sup>th</sup> Amend Equal protection analysis at the Fed level and at the Alaska State level.

Under the Federal Constitution the 14<sup>th</sup> Amendment Appoints and designates the 1<sup>st</sup> Amendment Applicable to the states as well as the Fed govt. The 1<sup>st</sup> Amendment ~~is~~ is called one of the Fundamental Rights of the citizens of the U.S. The 1<sup>st</sup> Amend requires NO establishment of Religion in the government, But allows the Free exercise of Religion by citizens. These Rights of the 1<sup>st</sup> Amend are Applicable to the Fed government through the 1<sup>st</sup> Amend and are Applicable



to the state government through the 14<sup>th</sup> Amend.

Here, Steve is incarcerated in the state of Alaska prison.

Therefore Steve is entitled to his Fundamental Rights of the 1<sup>st</sup> Amend ~~and~~ exercise of Religion and no establishment of Religion.

No establishment of Religion

The 1<sup>st</sup> Amend states the government shall not establish a Religion, ie promote, fund, encourage, demand, require a specific Religion or the practice thereof.

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In this case if Steve claims he wants freedom to practice his religion by ~~the~~ "embracing in prayer," it will not require the state prison to establish, fund, encourage, require, demand etc a specific religion. By allowing Steve to "embrace in prayer" the state prison will not be establishing a religion under the 1<sup>st</sup> Amend. Therefore under the 1<sup>st</sup> "no establishment of religion" Steve is not asking the state prison to violate the Fed constitution and he should be allowed to "embrace in prayer."

## Free Exercise of Religion

The 1<sup>st</sup> Amend states it is a fundamental right of every citizen to be able to freely exercise their own religion and religious practices. In this case IF steve honestly + truly believes that "embracing in prayer" is the only way to exercise his religion and religious beliefs, then he must be allowed to practice his religion. Therefore under the 1<sup>st</sup> Amend, steve must be allowed to exercise freely his religious practices.

# Equal Protection

The Equal Protection clause of the 14th Amend demands that every person be treated equally under the law. If separate classes of people are created and they are treated differently then an Equal Protection claim may be brought.

In this case, 2 classes of people are established, the non "embracing in prayer" class and the "embracing in prayer" class.

Therefore the equal protection analysis must be sought.

## Fed Equal Protection

The Fed Equal Protection analysis requires strict scrutiny for any 1<sup>st</sup> Amendment Fundamental Rights ~~is~~ violations. This is the highest degree of scrutiny and require the state to prove the law is necessary for a compelling purpose. (Intermediate ~~requires~~ and Rational Basis are not req'd here so I will not discuss them)

In this case the ~~state~~<sup>prison</sup> must prove that not allowing their NO "embracing in prayer" law

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§ For a necessary + compelling  
purpose. The ~~is~~ prison will argue  
that they are trying to keep  
contraband + weapons out of  
the jailed community whereas Steve  
will argue his 1st Amend Rt.  
If there is no other way to  
make sure contraband + weapons  
are kept out of the jailed  
community the court will probably  
Rule in favor of the prison.  
unless there is a necessary + compelling  
purpose for the law, Steve will  
be able to "embrace in prayer"

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## State Equal Protection

The state equal protection analysis is unique in Alaska. Since this case is in a state of AK prison, the Equal Protection analysis will be under the state analysis rather than the Fed analysis.

AK state EP analysis does not separate into 3 separate categories.

Rather it is a sliding scale Basis.

The court will look at the personal interest of the person and the

purpose of the law. Upon balancing

these 2 factors, the minimum

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Reid is a substantial +  
Fair Justice.

In this case ~~steve's~~ personal  
interest is his Fundamental  
Rt to free exercise of Religion  
The prison purpose of the law  
is to keep out contraband +  
weapons to protect the jailed  
community. The court will  
probably hold that protecting  
the jailed community outweighs  
steve's interest in "embracing in prayer"  
therefore steve will probably be  
denied his Right to practice a  
religion he truly and Authentically Believes  
in



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# D) Steve's State Constitutional Claims

## Freedom of Religion (Free Exercise)

Under the Alaska Constitution, all persons have the right to the free exercise of their religious beliefs, AS A

fundamental right. Steve should argue the prison prohibition on touching his wife during prayer directly inhibits Steve from practicing his religion while in prison, a constitutional denial of his right to free exercise of religion.  
In questions involving the free exercise of religion,

Alaska Courts apply a 3 part test. Courts consider:

- 1) whether a religion is involved;
- 2) whether the party's religious belief is sincere, &
- 3) what is the nature of the governmental regulation that adversely affects the religious practice.

Here, Steve may argue his new-found religion requires Steve & his wife <sup>to pray</sup> together for as long as possible. <sup>The State is an actor as the prison rule is adversely affecting Steve.</sup> Steve may

therefore assert his impact of praying with his

wife, Linda, is religiously motivated, & that the conduct in question (i.e., touching his wife while they pray together) satisfies element #1.

As to the second element, the sincerity of Steve's belief / conduct, the court would want to elicit testimony from Steve's pastor as to the tenets of Steve's religion, to determine whether Steve's desire to have physical contact with his wife is firmly grounded in a sincere religious belief or practice.

As to the 3rd element of the religious exercise test, the court will consider what effect the "contact" prohibition of the prison has upon Steve's right to freely exercise his religion.

Although the freedom to exercise one's religion is a fundamental right, the prison also has a legitimate "penological interest" in maintaining safety & security at Alasca prisons. Because it is likely that people could very possibly try to pass contraband or weapons from a visitor to an inmate if they were allowed to have extended physical contact with each other, the court could probably hold in favor of the prison in prohibiting Steve from touching Linda while they prayed together at the prison.

2 EQUAL PROTECTION CLAIM

Steve could argue the prison's "contact prohibition"

violates his right to the equal protection of the laws since it prohibits him from freely exercising his religious practices while in prison, while allowing non-inmates to freely

prayer & touch. The State is an actor here as the prison regulation impinges upon Steve's right to freely exercise his religion. By touching his wife while they pray at the prison. Alaska courts apply a sliding-scale test

to determine whether a government rule that provides dissimilar treatment to 2 similarly-situated groups violates equal protection.

The court analyzes the nature of the right that is affected, the purpose of the state law in question, & then balances the purpose of the law against the right that is affected. Alaska courts require, at a minimum, that a law have a fair & substantial relationship to a

legitimate State interest. Alaska Courts are free to apply  
A stricter test to determine a law's validity than the federal test, as the  
AK Constitution provides broader freedoms in certain areas.

In cases involving fundamental rights,  
such as the freedom of exercise of religion,  
the courts require the State to demonstrate  
that the law is necessary to fulfill a  
compelling state interest.

Here, the state has an important &  
compelling interest in maintaining safety,  
security & order in AK prisons. The  
anti-contact provision is necessary to make  
sure prison visitors do not pass  
weapons or other contraband to prison  
inmates under the guise of affection or,  
in this case, prayer between a husband  
inmate & his visitor-wife.

Stone's claim could fail under an EQUAL protection analysis, because the State need to regulate safety & security in prison outweighs Stone's asserted need to touch his wife while they pray.

### 2 Federal Claims -

Stone can argue the prison rule violates his freedom to exercise his religion under the 1st Amendment to the US Constitution, as applied to the States by the 14th Amendment.

Federal Equal protection analysis requires a court to apply strict scrutiny in cases where state regulations impinge upon the

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exercise of a fundamental right.

Under the federal strict scrutiny analysis, the State has the Burden of proving the law is necessary to fulfill a compelling government objective.

Here, the prison may validly argue the prison must be able to place restrictions upon physical contact between inmates & visitors, as a penological interest in maintaining safety in the prison.



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I. State Action

Since an agency of the state, the state prison, is acting here, there is clearly state action. Accordingly, any action by an Alaskan agency must not only comport with the U.S. Constitution, but also with the possibly narrower and more stringent Alaska state Constitution.

II. Free Exercise of Religion

Steve may assert that the prison rules burden his free exercise of religion under the first Amendment to the U.S. constitution and the Alaska state Constitution. Federal law applies the standard established in the recent *Smith* case, a U.S. Supreme Court case, which holds that a rational basis test applied to free exercise claims and the purpose of the law in question must have been to burden religion. A law that burdens the free exercise of religion as applied only is constitutional under *Smith*. Alaska law, however, applies the more rigid test formulated in the *Swanner* case, which holds that a law's purpose can be neutral, but still may be unconstitutional under the Alaska state Constitution, if the law burdens religion as applied. In *Swanner*, a landlord would not rent apartments to unmarried couples. Because of the landlord's religious convictions, the landlord believed that renting to "fornicators" was wrong. However, a state law and city ordinance prohibited landlords from discrimination in who they rent to based on marital status. The Alaska Supreme Court formulated a test to determine if a law unconstitutionally burdens the free expression of religion. The burdened party must show that religion is involved, that the burdened party's actions were based on religion, and that the burdened party is sincere in their religious belief. If these questions are answered in the

affirmative, the burden shifts to the state to show that the law is necessary to maintain order and safety, or that the law furthers a compelling government purpose of the highest order. The Court held that Mr. Swanner, the landlord, had met his burden of showing his religion was sincere, but that prohibiting discrimination based on marital status is a compelling government purpose of the highest order, and the law was upheld.

Tangentially, Mr. Swanner refilled his claim in federal court, seeking review under the *Smith* standard. Interestingly, the federal court found Mr. Swanner's claim valid under the *Smith* standard, but not under the *Swanner* standard. Today, there appears to be a split in authority in federal courts over which test to apply. However, the *Swanner* test remains good law in Alaska and is applicable here.

Here, applying the *Swanner* standard, it is clear that religion is involved and that Steve's desire to challenge the prison rules are based on religion. It also appears that Steve is sincere in his belief. The facts do not indicate that Steve is not motivated by sincere religious belief. Assuming that Steve can show this, the burden shifts to the state. Here, the first and second prong of the test are implicated. The prison has an interest in not allowing physical contact between inmates and visitors in order to prohibit the introduction of contraband. This appears to be a legitimate concern. Clearly, order and safety of other inmates and guards may be compromised if contraband is introduced. It is also a reasonable assumption that some inmates may take advantage of a more flexible approach to religious practices and use the process to gain introduction of contraband. Therefore, the state most likely has a strong interest in the law in order to maintain order and safety.

Similarly, the state most likely has a compelling interest of the highest order in rehabilitating inmates. Part of the purpose of the penal system is punitive. The state may argue that by giving inmates a lot of freedoms, even if they are religiously based and sincere, destroys this purpose of the penal system. Furthermore, many inmates may abuse this privilege and that

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would run contrary to the purpose of prisons in the first place. It is most likely that the government would also be able to meet their burden of showing that the law here is of a compelling government interest of the highest order. The prison rule is most likely constitutional.

### III. Equal Protection

Steve may also have an equal protection claim here. Equal Protection is based on the notion that two similarly situated parties should not be treated different. This arises from the U.S. Constitution's 5th Amendment's guarantee of "equal protection under the laws of the U.S." This has been extended to the states under the 14th Amendment. Equal Protection jurisprudence in Alaska is different, however, than under the federal jurisprudence. Alaska equal protection law is based on a sliding scale instead of a rigid tiered approach in the federal system. Alaska law looks to see how the two parties are being distinguished, then asks what is the nature and strength of the interest being burdened, then looks to the purpose for the law. Alaska law then calls for a balancing test to be performed between the nature of the burdened interest and the state's interest in the law.

Here, the distinguishment is between someone of Steve's religion, which requires intimate physical contact to perform religious ceremony, and people of other religions, which do not require such contact. The nature of Steve's interest is relatively strong because religion is traditionally regarded in our culture as an important freedom and virtue. The government, however, also has a very strong interest in maintaining order in prisons and regulating the introduction of contraband. Steve may argue, here, that the government may assert that interest in a different manner by searching the inmates after each religious session, and that the law is overbroad for that stated interest. However, the government can counter with the

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notion that such a system is inefficient and not necessarily fool proof. Again, as discussed above, the government also has an interest in reforming prisoners and instituting punitive measures, which giving inmates the right to see visitors in such a manner severely compromises. In sum, the government's interest most likely outweighs Steve's interest, and the law will probably be upheld under Equal Protection scrutiny.

#### IV. Substantive Due Process

Substantive Due Process is very similar to the Equal Protection Analysis and share a common jurisprudential history. Many of the early federal "equal protection" type of claims were filed as substantive due process claims. A substantive due process claim is appropriate where a fundamental right is involved, but the burdened party is not being treated differently than other similarly situated parties. While it is possible that Steve may assert an equal protection claim, a due process claim is also open to him.

Alaska due process analysis is similar to the analysis under the U.S. Constitution. If a fundamental right is involved, the state must have a compelling government interest and the law must be narrowly tailored to fit the purpose. Religion is most likely to be viewed as a fundamental right. Steve should argue that the law is not narrowly tailored to fit the stated purpose, restricting contraband. The jail can search the prisoners after the religious ceremony. This is a strong argument. However, it is clear that the government also has other interests in punitive measures against prisoners. However, since the stated basis for the law is to restrict contraband, Steve may have some success with this claim.

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Steve may attempt to assert a substantive due process claim, a procedural due process claim, an equal protection claim, a free exercise claim, an establishment clause claim, a free speech claim, and a privacy claim.

I. Substantive due process

In Alaska, where a fundamental right is not involved, substantive due process requires only that the state has passed a law with a rational relation to a legitimate state purpose. It assures only that laws are not entirely arbitrary.

Here, Steve has no viable sub. due pro. claim. The state's regulation preventing his embracing-facilitated prayer is rationally related to the legitimate state aim of ensuring prison safety.

There would appear to be no federal substantive due process claim either as this does not involve a fundamental right separate and apart from rights governed by more specific amendments (see below).

II. Procedural due process

In Alaska, as in the Federal system, procedural due process claims are governed by the Eldridge factors. First, the court looks to the importance of the liberty or property interest denied a

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claimant and to the benefits additional procedures would have conferred onto the claimant.

Second, it looks to the risk of error associated with the process that denied that liberty/property interest. Finally, it balances against the cost of the requested procedure against the state's interest in efficiency and cost-minimization.

Here Steve was deprived of a potentially viable liberty interest. He cannot freely associate with his wife. That said, he has no viable pro. due. pro. claim as the deprivation was imposed attendant to his sentencing for assault and the courts would clearly find that process satisfactory.

### III. Equal Protection

In the State of Alaska, equal protection of the laws is afforded by a "sliding scale" analysis. After determining that the challenged law discriminates or differentiates persons into separate classes, the court, first, the court looks to the importance of the equal protection right which has been assailed by the law, second, it looks to the government's purpose in enacting the law and, third, balances the one against the other. At minimum, Alaska requires that there be a "fair and substantial fit" between the government's regulation and its aim--a minimum requirement that is more exacting than the minimum level required by Federal analysis.

Federal equal protection analysis is quantized. First, federal courts will look to see if a law is discriminatory on its face. If it is, the court will determine whether the discriminated-against class is "suspect," "quasi-suspect," or not suspect. Laws employing a suspect classification must meet the exacting strictures of strict scrutiny--they must be defended by the state as necessary to achieve a compelling state purpose. Laws employing a quasi-suspect must be defended by the state as

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substantially related to an important state aim. Finally, laws deploying non-suspect classifications need only be rationally related to a legitimate state purpose; the claimant has the burden of proving that the state law fails in that regard and the courts will go out of their way to rescue a law and impute a legitimate aim to it (Williams Lee Optical).

Here, Steve can claim that the law discriminates against the incarcerated on its face. He might also allege a disparate impact claim against his religion, but absent some showing of state animus that claim would be a non-starter in both state and federal court. He might also claim that it discriminates against those wedded to the incarcerated.

For federal purposes, classification according to incarceration status is not a suspect classification. Because the law affects prison safety, it will be upheld.

Similarly, it is unlikely that the state courts would deploy much more than the "fair and substantial" fit analysis here, and the law is fairly and substantially related to prison safety. Certainly the denial of more involved physical contact would so-adjudicated. The time-limitation imposed by the state is, to be sure, more arbitrary, but here again, seeming fairly and substantially related to safety concerns.

Steve would not seem to have a viable equal protection claim.

#### IV. Free Exercise

In the federal system, the Smith-Lukumi rubric holds that religious adherents can claim no

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exemption from a neutral, generally applicable law, absent a showing of animus.

Here Steve cannot show animus, the law is facially neutral as between various religious sects, and generally applies to all persons incarcerated (a class that can include any religious or non-religious person.) Steve thus has no federal free exercise claim.

Alaska still deploys the strict scrutiny analysis of Yoder-Sherbert, however. Under the state-nuanced regime, the court will look to see, first, whether religion is involved in the claim, second, whether religion motivates the conduct at issue, and third, whether the claimant's religious belief is sincere. If all three strictures are met, the court will grant an exemption unless denial is necessary to achieve a compelling state purpose. In this context, the supreme court has noted that only public safety, peace and good order, and other interest of "the highest order" will justify denying an exemption.

There is no evidence on the facts that Steve's new-found religious belief is insincere and it definitely would seem to be involved and (at least to a large degree) motivate his desire for protracted embracing. The court would then ask whether the two limits imposed by the law--physical and temporal--are truly necessary.

More than likely the court would grant a temporal exemption and permit Steve to embrace for his minimum required one hour. It would be difficult for the state to show that time-limited contact is vital to effect prison safety.

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The limits on involved physical contact presents a closure question, but given the option of

close monitoring of the contact and subsequent searches of the prisoner's person (to find any contraband conveyed), the court would likely grant this exemption as well.

V. Establishment clause

Steve might argue that the rules are hostile to his religion and, as such establish some alternate form of religion in the state. This will be unavailing.

Federal and state courts both deploy the Lemon test in this area. Under the test, laws must, first, be primarily motivated by a secular purpose, second, have the primary effect of neither advancing nor inhibiting religion, and third, not involve excessive entanglement with religion.

Steve cannot show any of the prongs have been violated; the law is motivated by, and has the primary purpose of effecting prison safety and involves no entanglement with religion.

VI. Free Speech

Steve might also argue that he has an expressive right to meet and associate with Linda. This claim will also fail him.

Alaskan and Federal analysis is substantially similar here. Content-neutral laws in non-public fora are valid if regulations of time, place and manner which are substantially related to achieve an important state purpose and leave open alternate channels of communication. Laws may be even more exacting where the government acts not in its "governmental" mode, but in its "managerial

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mode". It may, for instance, ban leafleting on military bases.

Here, the state likely has managerial authority to regulate speech and expressive Spence conduct in the prison. Even absent that, however, the state could surely show that it was substantially related to the important interest of prison safety, and all Steve is still free to express whatever he would like to Linda in his meetings and/or letters.

## VII. Privacy

Finally, Steve might argue, similar to Breese (involving hair length) or Ravin (involving marijuana usage in the home) that he has some viable privacy interest in praying with Linda. That would seem to fail.

Alaska deploys a Katz test to determine the threshold question of whether a viable privacy interest is impugned by a challenged law. First, the claimant must have had an objective expectation of privacy. Second, that expectation must be one society is willing to accept as reasonable.

Here, as a prisoner, Steve did not likely expect unfettered access to his wife; most certainly society would not so-adjudge such an expectation as reasonable.

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Free Exercise of Religion

Steve may assert both state and federal claims in challenging the prison rules that prohibit him from embracing his wife while praying. Under the federal Constitution, persons are guaranteed the right to free exercise of religion. (This right is only protected against action by the government. The prison is an arm of the government, enforcing laws and punishments imposed by the state so the constitution applies to the prison's rules.) However, an individual's right to free exercise of religion is often in competition with other goals of the state of rights of other individuals. The test under the federal Constitution was outlined in *Smith*, where the USSC held that if a law that affects an individual's right to exercise religion is neutral and generally applicable then it is valid, even if it incidentally affects someone's exercise of religion. On the other hand, if the law is not neutral but targets religious practices specifically, the law must pass strict scrutiny review, being narrowly tailored to achieve a compelling state interest.

Here, the prison rule that limits physical contact between inmates and visitors does affect Steve's practice of his religion. This rule is apparently neutral and generally applicable in that it applies to all contact that isn't brief in nature and does not target religiously based physical contact. Consequently, the prison rules would be upheld under federal law.

Even if a court found that the rule is not neutral, it should withstand strict scrutiny review. The state has a compelling interest in keeping contraband out of the prison for the safety of the inmates and prison staff. The limit on physical contact is closely tailored to achieving that interest although Steve could argue that performing a full body search on each of the individuals involved and then allowing them contact would be a least restrictive alternative. Given the intrusive nature of such a solution, however, Steve would probably lose under that argument and the prison rule would be upheld.

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Alaska state law, however, provides at least as much, and probably more, protection than does the federal test. The Alaska constitution also guarantees the right to free exercise of religion but it has adopted the Swanner test. Under the Swanner test, if a law is neutral, the plaintiff must first show that 1) a religion is involved, 2) the conduct at issue is religiously based, 3) the religious beliefs are sincere. The burden then shifts to the state to show that it has a compelling state interest in not granting an exemption for the religion involved. The state can meet this burden by showing that the law is necessary to protect public safety, peace and order OR by showing that there are state interests involved of the highest magnitude that cannot be served by other means and that granting the exemption would actually harm the interest the state is attempting to achieve. This test was further developed in the Frank case which involved a Native taking a moose out of season for a religious funeral potlatch. The court held that an exemption should be granted.

Here, Steve can show that a religion is involved because he is apparently part of an organized religion that has a pastor and everything. The conduct at issue, praying while embracing, is religiously based because their family pastor has directed them, as part of religious worship, to pray together while embracing for as long as possible. Arguments could be made over whether Steve's religious beliefs are sincere. Steve and Linda have just recently become religious and the practice seems highly suspect given Steve's situation as an inmate. However, the facts indicate that Steve has become "very religious" and the fact that they are willing to pray together for an hour seems sincere. Steve could probably make this part of his case.

The burden would then shift to the state. The state could show that it has a compelling state interest in keeping contraband out of the prison in order to protect the safety of individuals there as well as to keep order and peace. If weapons or drugs were getting into the prison, people could be injured, especially when those things are in the hands of convicted violent

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offenders.

As discussed above, while there may be alternatives to the rule limiting contact, such alternatives would be even more intrusive into a person's rights (such as their right to privacy) and probably would not provide as much protection against the transfer of contraband as the current rule provides.

Additionally, the state is generally granted more freedom in regulating conduct at a prison even when it infringes on constitutional rights than it does when regulating citizens on the street.

#### Right to Privacy

The Alaska Constitution explicitly contains a right to privacy rather than being found in the "pneumbras" of the constitution as the federal courts have found the federal right to privacy. Thus, while Steve could make a privacy right claim under either constitution (since the federal right is applied against the states through the 14th amendment) he would probably have a better chance under the Alaska constitution since it seems to offer more protection than the federal constitution.

Under the privacy right, the court will first look at whether a privacy right exists. The court will ask whether 1) the person has a subjective privacy interest in the choice or activity being impaired by the rule and then at 2) whether the privacy interest is one that society is objectively willing to recognize as a reasonable privacy interest. If the answer to each of those is "yes", the court must still balance the privacy interest against the interests of society. This is kind of a sliding scale approach in which the closer the privacy interest comes to the center of personal autonomy, the greater the burden on the state to show that the legislation is justified.

Here, Steve has a privacy interest in enjoying religious/spiritual and physical closeness with his wife. Aspects of the relationship between husband and wife have been held by the

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courts to reach to level of a fundamental right. Society also generally recognizes that the husband/wife relationship is sacrosanct and deserves to be protected from undue government intrusion.

Society also has a interest, however, in keeping contraband out of the hands of violent felons, the stated purpose of the prison rule. This interest, as discussed above, is best achieved by limiting contact between inmates and visitors. While the burden on the government to show that the rule is narrowly tailored to achieve the interest may be great, the government should be able to meet the burden because this is the least restrictive means of achieving the interest since other alternatives (such as strip searching and etc) would be much more intrusive into personal autonomy.

#### Substantive Due Process

Where a fundamental right is being implicated by a rule or regulation, it must pass strict scrutiny review to be valid. Under strict scrutiny review, the rule must be narrowly tailored to achieve a compelling state interest. Free exercise of religion is a fundamental right since it is guaranteed in the 1st amendment. However, the prison rule, as discussed above, is narrowly tailored and is the least restrictive means of achieving prisoner safety.

#### Equal Protection

Steve's right to equal protection may also be implicated. First, Steve must show that the government is treating similarly situated people differently. He could argue that felons are being treated differently than non-felons or that felons in medium security prisons are being treated differently than people in low security prisons. Steve might not win such an argument since the people involved are not actually similarly situated, some are convicted felons and some are not.

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If the court did find that the state was treating similarly situated people differently, then Alaska would apply a sliding scale approach where the court would weigh: 1) the interest impaired by the rule, 2) the purposes of the state's action, 3) the government's interest in using the particular means to achieve the stated goals. The interest impaired is the most important factor because depending on how important it is, the greater or lessor the burden on the government to justify its actions.

The federal government applies strict scrutiny review if a suspect classification is involved: race, national origin, ethnic identity. It applies intermediate level review to quasi suspect clases such as gender, where the rule must be significantly related to an important state interest. And applies rational basis review to other classes, where the plaintiff must show that the rule is not rationally related to achieve a legitimate state interest.