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ATTORNEY GENERAL OPINION NO. 87-7

TO: Director A. I. Murphy
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Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. What is the extent of the venereal disease examination required by Idaho Code § 39-604 to be conducted upon all persons confined or incarcerated in city, county and state prisons?

2. Which city, county, or state entity is responsible for paying the cost of such examination and the resulting treatment referred to in Idaho Code § 39-604?

3. Does the reference to "isolation or quarantine" in Idaho Code § 39-604 refer only to persons identified in Idaho Code § 39-603 or does it include persons having the venereal diseases enumerated in Idaho Code § 39-601?

4. Would the isolation or quarantine, as provided by Idaho Code § 39-604 for the period of time stated, "until cured," for persons who are infected with venereal disease at the time of the expiration of their term of imprisonment violate the rights of an incarcerated person recognized under the first, fifth, eighth and fourteenth amendments to the United States Constitution as well as the Constitution of the State of Idaho?

CONCLUSIONS:

1. Each incoming inmate confined to a detention facility in Idaho must be given a blood examination in order to detect the existence of AIDS.

2. The state is responsible for medical costs incurred by state detention facilities for the examination and treatment of venereal disease, including the detection and treatment of prisoners found to be infected with AIDS.

3. The reference to "isolation or quarantine" in Idaho Code § 39-604 does include persons who have been identified as having been infected by a venereal disease included in Idaho Code § 39-601. Thus, prisoners having AIDS may be isolated or quarantined while they serve their sentences if state health officials first determine that such a quarantine is necessary to protect the public health.

4. Prison officials can not continue to hold in quarantine those persons whose terms of imprisonment have expired unless other classes of AIDS victims are also subjected to similar quarantine.

ANALYSIS:

Question 1:

Idaho Code § 39-604 states:

> All persons who shall be confined or imprisoned in any state, county or city prison in this state shall be examined for and, if infected, treated for venereal diseases by the health authorities of the county or their deputies.

In 1986 the Idaho legislature amended Idaho Code § 39-601, which defined those diseases that would be considered venereal diseases, to read as follows:

> Syphilis, gonorrhea, acquired immuno-deficiency syndrome (AIDS), AIDS related complexes (ARC), other manifestations of HTLV-III (human T-cell lymphotrophic virus-type III) infections and chancroid, hereafter designated as venereal diseases, are hereby declared to be contagious,

> infectious, communicable and dangerous to public health . . . (Emphasis added.)

Reading the above two statutes together it is apparent that Idaho Code § 39-604 requires any detention facility in Idaho that accepts prisoners for confinement to test those persons for AIDS. At the present time the only known method by which a person may be identified as having been infected by AIDS is an examination of the person's blood. A blood test, referred to as an ELISA test, detects the presence of antibodies stimulated by the body's exposure to the AIDS-causing HTLV-III virus. The ELISA test can be administered to individuals during a routine medical examination. Levine & Bayer, Screening Blood, Public Health and Medical Uncertainty, in AIDS: The Emerging Ethical Dilemmas, Hastings Center Rep., Aug. 1985 at 8.

Section 39-604 defines the persons to be tested in the future tense: "All persons who shall be confined or imprisoned." The use of the words "shall be" connotes a prospective application of the statute, rather than a retrospective application. See Unsatisfied Claim and Judgment Fund Board v. Bowman, 249 Md. 705, 241 A.2d 714 (1955). The legislature chose not to change those words when it amended § 39-601 to include AIDS as a venereal disease. Therefore, this office concludes that § 39-604 only requires AIDS testing for incoming prisoners. It should be noted that this conclusion does not prohibit prison officials from testing prisoners who are already incarcerated if they determine it is necessary to do so.

Mandatory testing and quarantine of people infected with contagious diseases have traditionally been upheld as valid exercises of the state's police power and have withstood constitutional challenge. See A. Gray, The Parameters of Mandatory Public Health Measures and the AIDS Epidemic, 20 Suffolk L. Rev. 504, 511 (1986). However, most such cases were decided at a time when courts presumed that state actions taken within the police power were constitutional. See W. Parmet, AIDS and Quarantine: The Revival of an Archaic Doctrine, 14 Hofstra L. Rev. 53, 60 (1985). Today, constitutional doctrine is radically different. Courts routinely subject to constitutional scrutiny regulations that previously would have been justified as coming within the police power. Id. at 76-77. Thus it is necessary to predict how the courts would assess the constitutionality of the mandatory testing provisions of §§ 39-601 through 604.

The traditional standard for constitutional review of state law requires only that the statute bear some rational relationship to legitimate state purposes. Cleburne v. Cleburne Living Center, 473 U.S. ____, 87 L.Ed.2d 313, 320 (1985); Bell v. Wolfish, 441 U.S. 520, 561 (1979). However, where a regulation is directed

against a "suspect class" or impinges on fundamental rights, a higher standard of review is triggered: the regulation must be necessary to advance a compelling state interest. Cleburne at ____, 87 L.Ed.2d at 320. This higher level of scrutiny is sometimes performed under the rubric of the equal protection clause (Id.), and sometimes under the due process clause. See Roe v. Wade, 410 U.S. 113, 155 (1973).

Suspect classes have generally been limited to race, alienage or national origin. Cleburne at ____, 87 L.Ed.2d at 320. Additionally, classes based on sex and illegitimacy, while not recognized as suspect, have received a heightened level of scrutiny. Id. Prisoners in general, and incoming prisoners in particular, do not constitute a "suspect class" and thus their mandatory testing should not invoke a heightened level of scrutiny under the equal protection clause.

Nor is a court likely to rule that mandatory testing seriously impinges on prisoners' fundamental rights thus invoking heightened scrutiny under the due process clause.[1] Prisoners do not forfeit all their fundamental rights when they enter prison. They retain freedom of speech and religion, freedom from racial discrimination and the rights of equal protection and due process. Bell v. Wolfish, 441 U.S. 520, 545 (1979). They also retain the right to privacy. Cumbey v. Meachum, 694 F.2d 712, 714 (10th Cir. 1982). However, the fact of confinement, as well as the legitimate goals and policies of the penal institution, limit these retained constitutional rights. Bell at 546. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." Price v. Johnson, 334 U.S. 266, 285 (1948). In Bell, the Supreme Court stated: "given the realities of institutional confinement, any reasonable expectation of privacy that a detainee retained would be of a diminished scope." Bell at 556. Accordingly, the Court upheld body-cavity searches conducted every time a prisoner came into contact with an outsider, specifically stating that such searches could be held without probable cause. Id. at 560. The Court held further that such searches do not violate the fourth amendment

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[1]It should be noted that this is a general statement. Certain prisoners might refuse to allow a blood test on religious grounds. See Smallwood-El v. Coughlin, 589 F. Supp. 692 (S.D.N.Y. 1984). This opinion does not address whether a compulsory blood test would violate such a prisoner's first amendment rights.

prohibition against unreasonable search and seizure. Such a right, if it applies at all in prison, is greatly diminished by the realities of confinement and the need for prison security. Id. at 559. If a forced body-cavity search does not violate a prisoner's right to privacy, it is unlikely that a compulsory blood test would do so. Compulsory immunizations of school children, which involve a bodily intrusion similar to that of a blood test, have been held on balance not to invade the right to privacy. Hanzel v. Arter, 625 F. Supp. 1259, 1262 (S.D. Ohio 1985).

Given that the state's interest in stopping the spread of AIDS in the prison population is legitimate, it still must be decided whether the state's methods are rationally related to those interests. In Bell v. Wolfish, supra, the Court balanced the security interest of the penal institution against the prisoners' diminished expectation of privacy and held that forced body-cavity searches conducted without probable cause were a constitutionally permissible means to enforce prison security. Bell at 560. Such a balancing test would also be applied to compulsory blood tests for AIDS. The state's interests must be balanced against the prisoners' limited expectations of privacy and freedom from search and seizure. Prison authorities not only have a strong interest in containing the spread of contagious diseases within the prison and in protecting their own staff members, they may have an affirmative duty to do so. Failure to provide adequate protection against the spread of communicable diseases can violate the eighth amendment's prohibition of cruel and unusual punishment. See Jones v. Diamond, 636 F.2d 1364, 1374 (5th Cir. 1981), overruled on other grounds; International Woodworkers v. Champion International, 790 F.2d 1174 (5th Cir. 1986); Smith v. Sullivan, 553 F.2d 373, 380 (5th Cir. 1977). Given the strong state interest in stopping the spread of communicable diseases, the high risk status of prison populations generally, the prisoners' limited fundamental rights, and the fact that a blood test is presently the only available means to detect the AIDS virus, it is likely that a reviewing court would hold that compulsory blood tests are rationally related to a legitimate state interest and are therefore constitutional.

Conclusion:

Each incoming inmate confined to a detention facility in Idaho must be given a blood examination to detect the existence of AIDS.

Question 2:

Idaho Code § 39-604 states:

> All persons who shall be confined or imprisoned in any state, county or city prison in this state shall be examined for and, if infected, treated for venereal diseases by the health authorities of the county or their deputies . . . .

At first glance, this section would appear to require the county to shoulder the burden of paying for the examination and treatment of state prisoners with venereal diseases. However, the section does not expressly require the county to pay for the examinations, but only to perform them.[2]

This office believes it would be inappropriate to require counties or health districts to pay the medical expenses of state prisoners. To do so would place an inequitable burden on counties in which state prisons are located. History shows that counties have never been required to pay for the examination and treatment of all venereal disease cases. In 1921, the same year the legislature enacted §§ 39-601 through 604, the legislature appropriated $5000 to the Department of Public Welfare for venereal disease control. 1921 Sess. Laws, Ch. 94, p. 188. According to the Department of Health and Welfare, this money was spent to confine and treat venereal disease patients at the State Farm. The legislature continued to appropriate such funds for some years thereafter. See e.g., 1923 Sess. Laws, ch. 199, p. 315; 1925 Sess. Laws, ch. 211, p. 383.

In 1947, the legislature enacted Idaho Code § 20-209 which states:

> The state board of correction shall have the control, direction and management of such correctional facilities as may be acquired by law for use by the state board of correction and of the present penitentiary of the state and all property owned or used in connection

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[2]It should be noted that counties are no longer charged with the enforcement of quarantine laws, as they were in 1921 when § 39-604 was enacted. In 1947, the legislature amended the Idaho Code to create health districts which are now the primary agent for enforcing the state's quarantine laws. See Idaho Code § 39-415. This opinion should not be read as requiring health district authorities to perform venereal disease examinations upon prisoners. Because prison authorities already perform such tests as part of each incoming prisoner's physical examination. it would be superfluous to require district health officials to do so.

> therewith, and shall provide for the care, maintenance and employment of all inmates now or hereinafter committed to its custody. (Emphasis added.)

This section clearly requires the state to provide for the medical needs of inmates in state custody. It should be noted that the state is also constitutionally obligated to provide medical care to those it is punishing by incarceration. Estelle v. Gamble, 429 U.S. 97, 103 (1976). Because of the statutory and constitutional obligations and because § 39-604 does not specifically allocate the cost of inmate examination and treatment to the counties, we believe the state is obligated to bear the cost of examining incoming prisoners at, and of treating AIDS victims in, the state penitentiary.

Conclusion:

The state is responsible for the medical costs incurred by state detention facilities for the examination and treatment of venereal disease, including the detection and treatment of prisoners found to be infected with AIDS.

Question 3:

Idaho Code § 39-604 provides that space may be set aside in any state, county or city prison to establish a clinic or hospital to isolate and quarantine two different classes of persons: (1) "all persons who may be confined or imprisoned in any such prison and who are infected with venereal disease at the time of the expiration of their terms of imprisonment," and (2) "in case no other suitable place for isolation or quarantine is available, such other persons as may be isolated or quarantined under the provisions of section 39-603." In lieu of such isolation, both classes of persons may be allowed to report to a licensed physician.

The section does not specifically authorize the quarantine of prisoners before the expiration of their sentences. However, § 39-604 should be read in conjunction with its accompanying sections, 39-601 and 39-603. A consistent reading of these sections would authorize county health officials to isolate or quarantine prisoners found to be infected with AIDS. It is our opinion that any additional restrictions placed upon the prisoner by virtue of a quarantine would not be constitutionally impermissible. The Supreme Court has stated that: "The transfer of an inmate to less amenable and more restrictive quarters for nonputative reasons is well within the terms of confinement ordinarily contemplated by a prison sentence." Hewitt v. Helms, 459 U.S. 460, 465 (1983). Prison officials have broad discretion

in the administration of their prisons and incarcerated individuals retain "only a narrow range of protected liberty interests." Id. at 465. Following these statements, courts have upheld the quarantine of prisoners with AIDS, finding no significant deprivation of liberty in the restriction of such prisoners to limited parts of the prison. Cordero v. Coughlin, 607 F. Supp. 9 (D.C.N.Y. 1984).

However, it should be emphasized that a condition precedent to any quarantine, whether within or without a state prison, is a finding by the appropriate health officials that a quarantine is necessary to protect the public health. Idaho Code § 39-603 states:

> State, county and municipal health officers, or their authorized deputies, within their respective jurisdictions, are hereby directed and empowered, when in their judgment it is necessary to protect the public health, to make examinations . . . to require persons infected with venereal disease to report for treatment . . . and also, when in their judgment it is necessary to protect the public health, to isolate or quarantine persons affected with venereal disease. (Emphasis added.)

Therefore, before prisoners in the state penitentiary could be quarantined, it would be necessary for prison authorities to obtain a judgment from officials of the State Department of Health and Welfare that such a quarantine was necessary to protect the public health.

Conclusion:

Any prisoner who is determined to be infected with a venereal disease, including AIDS, may be isolated or quarantined while serving his or her sentence if state health officials first determine that such a quarantine is necessary to protect the public health.

Question 4:

A discussion of this question involves the differentiation between the terms incarceration and quarantine. Incarceration involves an act pursuant to a judicial order whereby a person is placed in a jail or prison as a form of punishment for committing a criminal offense as defined by statute. Criminals that are confined in prison by judicial process are confined up to a stated maximum time period. Continued confinement beyond that maximum is

a violation of their constitutional rights under the due process clause of the fifth amendment and the prohibition against cruel and unusual punishment under the eighth amendment to the United States Constitution. See Weber v. Willingham, 356 F.2d 933 (10th Cir. 1966).

Quarantine, on the other hand, is the enforced isolation of a person who has been found to harbor a disease that endangers the public health. Normally it is an action taken by public health officials, not by law enforcement officers. While quarantines were routine when § 39-604 was enacted in 1921, they are only used in rare circumstances today. The courts traditionally upheld the validity of quarantine orders issued by public health officials, especially where specifically authorized by statute. However, most such quarantine cases were decided before the modern evolution of constitutional doctrine. Today, courts routinely scrutinize the constitutionality of regulations which previously would have come under the rubric of the "police power" and thus considered free from judicial review. See our discussion of this topic in Question 1.

Commentators have questioned whether AIDS quarantines could stand up to constitutional scrutiny. Such quarantines could seriously impinge on important liberty interests of individuals and several modern cases suggest that such a severe restraint on liberty could only be justified if it were narrowly tailored to effectuate its stated purpose and was necessary to achieve the state's goal of stopping the spread of the disease. See W. Parmet, AIDS and Quarantine: The Revival of an Archaic Doctrine, 14 Hofstra L. Rev. 53, 82-83 (1985). Given the limited manners in which AIDS is presently known to be transmitted from person to person, it is likely that a quarantine would not be held "necessary" to achieve the state's objectives.

No cases have yet decided whether a general quarantine of AIDS victims could withstand constitutional scrutiny. As mentioned earlier, the quarantine of AIDS victims in prisons has been upheld as constitutional. Cordero v. Coughlin, 607 F.Supp. 9-10 (S.D.N.Y. 1984). However, the applicability of such decisions outside the confines of a prison is highly questionable. Obviously, the deprivation of liberty inherent in a quarantine would be much more severe for non-prisoners and would receive a higher level of scrutiny. Such a quarantine would probably not withstand constitutional scrutiny under prevailing medical knowledge as to how AIDS is communicated.

The continued isolation and confinement of prisoners beyond the expiration of their terms of imprisonment would violate the equal protection clause of the fourteenth amendment if non-prisoners are not similarly quarantined. Sections 39-601, 603

and 604 do not violate equal protection on their face: they provide for the quarantine of all persons infected with venereal diseases, both prisoners and non-prisoners. However, a law which is valid on its face may deny equal protection if administered as to unjustly discriminate between persons in similar circumstances. Yick Wo v. Hopkins, 118 U.S. 356 (1886). Thus, if Idaho Code § 39-604 were used to quarantine prisoners beyond the expiration of their jail term, but no other classes of AIDS victims were subjected to similar quarantine, it is likely that a court would find this unequal application of the law to be violative of equal protection. Some courts have expressed a willingness to uphold the selective application of laws unless "the selection was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification." Oyler v. Boyles, 368 U.S. 448, 456 (1962). However, limiting quarantines to ex-prisoners would almost certainly be arbitrary: it would not be based on any statutory directions and there are no special circumstances making ex-prisoners a greater health threat than other AIDS victims.

Conclusion:

Prison officials can not continue to hold in quarantine those persons whose terms of imprisonment have expired unless other classes of AIDS victims are also subjected to similar quarantine.

AUTHORITIES CONSIDERED

1. United States Constitution

   a. First Amendment

   b. Fourth Amendment

   c. Eighth Amendment

   d. Fourteenth Amendment

2. U.S. Supreme Court Cases

   a. Cleburne v. Cleburne Living Center, 473 U.S. ____, 87 L.Ed.2d 313 (1985)

   b. Roe v. Wade, 410 U.S. 113 (1973)

   c. Bell v. Wolfish, 441 U.S. 520 (1979)

   d. Price v. Johnson, 334 U.S. 266 (1948)

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

f. Yick Wo v. Hopkins, 118 U.S. 356 (1886)

g. Oyler v. Boyles, 368 U.S. 448 (1962)

h. Estelle v. Gamble, 429 U.S. 97 (1976)

3. U.S. Courts of Appeal Cases

a. Cumbey v. Meachum, 684 F.2d 712 (10th Cir. 1982)

b. Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981)

c. Weber v. Willingham, 356 F.2d 933 (10th Cir. 1966)

4. U.S. District Court Cases

a. Smallwood-El v. Coughlin, 589 F.Supp. 692 (S.D.N.Y. 1984)

b. Hanzel v. Arter, 625 F.Supp. 1259 (S.D. Ohio 1985)

c. Cordero v. Coughlin, 607 F.Supp. 9 (D.C.N.Y. 1984)

5. Idaho Statutes

a. Idaho Code § 39-601

b. Idaho Code § 39-603

c. Idaho Code § 39-604

d. Idaho Code § 31-3505

e. Idaho Code § 31-3506

f. Idaho Code § 39-415

6. Idaho Session Laws

a. 1921 Sess. Laws, ch. 94, p. 188

b. 1923 Sess. Laws, ch. 199, p. 315

c. 1925 Sess. Laws, ch. 211, p. 383

7. Cases From Other Jurisdictions

a. Unsatisfied Claim and Judgment Fund Board v. Bowman, 249 Md. 705, 241 A.2d 714 (1955)

8. Other Authorities

a. Levine E. Bayer, Screening Blood, Public Health and Medical Uncertainty, in AIDS: The Emerging Ethical Dilemmas, Hastings Center Rep. Aug. 1985 at 8.

b. A. Gray, The Parameter of Public Health Measures and the AIDS Epidemic, 20 Suffock L. Rev. 504 (1986)

c. W. Parmet, AIDS and Quarantine: The Revival of an Archaic Doctrine, 14 Hofstra L. Rev. 53 (1985)

d. Note, The Constitutional Rights of AIDS Carriers, 99 Harvard L. Rev. 1274 (1986)

e. Note, Quarantine: An Unreasonable Solution to the AIDS Dilemma, 55 Cincinnati L. Rev. 217 (1986)

DATED this 10th day of August, 1987.

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