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Health and Welfare; testing of prostitutes for Acquired Immune Deficiency Syndrome

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guardian⁴ notice of the autopsy.⁵ Furthermore, Chapter 739 requires that the internal organs be kept with the body, if feasible, after the autopsy is completed.⁶

Under Chapter 739, the coroner's office, agency or person performing an autopsy must give written notice⁷ to the custodial parent or guardian when an autopsy is performed on the body of a minor who is less than one year of age.⁸ Under Chapter 739, if the minor's body is recovered by the coroner at the minor's place of residence, notice that an autopsy may be performed on the body must be given at that time or at the next feasible opportunity.⁹

CH

4. *Id.* § 159.017 (definition of guardian).

5. 1987 Nev. Stat. ch. 739, sec. 1, at ___ (enacting NEV. REV. STAT. § 440.____). Notice may be given in person, by telephone or by mail. *Id.*

6. *Id.*

7. Notice may be personally delivered or mailed to the last known address of the parent or guardian if the name and address are known after a diligent search. 1987 Nev. Stat. ch. 739, sec. 1, at ___ (enacting NEV. REV. STAT. § 440.____).

8. *Id.*

9. *Id.*

Health and Welfare; testing of prostitutes for Acquired Immune Deficiency Syndrome

NEV. REV. STAT. §§ 41.____, § 201.____, 439.____ (amended).
AB 550 (Dubois); 1987 STAT. Ch. 762

Under existing law, all houses of prostitution must be licensed.¹ Chapter 762 provides that any person engaged in prostitution² outside a registered house³ is guilty of a misdemeanor.⁴ Persons arrested for violations of Chapter 762 must submit to an Acquired Immune Deficiency Syndrome (AIDS) detection test.⁵

1. NEV. REV. STAT. § 244.345 (registration of houses of prostitution).

2. *Id.* § 201.295 (amended by 1987 Nev. Stat. ch. 762, at____) (definition of prostitute).

3. *Kuban v. McGimsey*, 96 Nev. 105, 605 P.2d 623 (1980) (legislature reserved to each county under 200,000 the question of whether to allow prostitution, but requires licensing in those counties).

4. 1987 Nev. Stat. ch. 762, sec. 2, at ___ (enacting NEV. REV. STAT. § 201.____).

5. 1987 Nev. Stat. ch 762, sec. 3, at ___ (enacting NEV. REV. STAT. § 439.____). *See id.*

Existing law requires a physician to report to the police the names of prostitutes known to be afflicted with a venereal disease.⁶ Chapter 762 extends existing law by providing that the agency administering the AIDS test must report the results to the arresting law enforcement agency and the arrested person.⁷ Further, existing law prohibits a person infected with a venereal disease from engaging in an occupation which may allow the disease to be transmitted.⁸ Under Chapter 762, a prostitute who continues to work in the profession after notification of a positive AIDS test, is guilty of a felony.⁹ Chapter 762 also imposes liability on owners and operators of houses of prostitution which employ infected prostitutes.¹⁰

COMMENT

Chapter 762 raises the question of whether mandatory blood testing of persons arrested for illegal prostitution can survive a constitutional attack.¹¹ Mandatory blood testing for AIDS may violate an individual's constitutional rights to privacy¹² and procedural due process.¹³ While the Supreme Court has recognized a right to privacy,¹⁴ statutes which infringe upon that right have been upheld when designed to protect public health and welfare.¹⁵ For example, in *Jacobsen v.*

sec. 7, at ____ (enacting NEV. REV. STAT. § 439.____) (Board of Health cannot approve any test which is not considered to be at least 95% reliable).

6. NEV. REV. STAT. § 441.050 (definition of venereal disease). *See id.* § 201.140 2.

7. 1987 Nev. Stat. ch. 762, sec. 3, at ____ (enacting NEV. REV. STAT. § 201.____).

8. NEV. REV. STAT. § 441.230. *See also id.* § 202.140 1 (person afflicted with venereal disease who has intercourse is guilty of a misdemeanor). *See also id.* § 202.150 (person with venereal disease who willfully exposes self to another is guilty of a misdemeanor).

9. *Id.* § 201.295 (amended by 1987 Nev. Stat. ch. 762, sec. 4, at ____).

10. 1987 Nev. Stat. Ch. 762, sec. 6, at ____ (enacting NEV. REV. STAT. § 41. ____) (liability for injuries caused to persons exposed to AIDS as a result of that employment). NEV. REV. STAT. § 193.120 (definition of a felony). *See also* Kathleen K. v. Robert B., 150 Cal. App. 3d. 992, 996, 198 Cal. Rptr. 273, 276 (1984) (allowing civil actions to be brought by persons who have contracted venereal diseases).

11. *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (right to be free from unwarranted government intrusion).

12. *See* U.S. CONST. amends. I, IV, V, IX, XIV (penumbra of rights combining to form right to privacy).

13. *See* U.S. CONST. amend. IV (right to be free from unreasonable search and seizure).

14. *See generally* *Roe v. Wade*, 410 U.S. 113 (1973) (right to privacy regarding abortion); *Eisendstat v. Baird*, 405 U.S. 438 (1972) (right to privacy regarding contraception); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (right to privacy arises from penumbra of rights guaranteed in constitution). In *Paul v. Davis*, 424 U.S. 693, 713 (1976) the right to privacy protected matters dealing with marriage, procreation, contraception, family relations and child rearing and education. *But see* *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 66 (1973) (limitations on sexual privacy).

15. *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905) (allowing statute that compels smallpox vaccination).

Massachusetts,¹⁶ the court held that public health considerations in requiring smallpox vaccinations outweighed the minimum infringement on an individual's privacy caused by the administration of the vaccine.¹⁷ Similarly, the potential for public harm caused by AIDS transmission through prostitution¹⁸ may be considered such a threat to public health that the infringement of individual rights would be justified.¹⁹ While the bodily intrusion in a blood test is similar to a vaccination, blood testing involves further governmental intrusion into a person's private affairs with the analysis and storing of the individual's blood.²⁰ Even this greater intrusion may be allowed because of the state interest in controlling the spread of AIDS.²¹

Under *Schmerber v. California*,²² probable cause is required for searches involving mandatory blood testing.²³ The *Schmerber* court reasoned that the privacy interests protected by the Fourth Amendment forbid intrusions on the mere chance desired evidence may be obtained.²⁴ Thus, a probable cause finding can justify an intrusion for physical evidence.²⁵ Chapter 762 authorizes a blood test to establish whether a person is inflicted with AIDS.²⁶ Therefore, Chapter 762 may be inconsistent with *Schmerber* because it does not seek evidence for the underlying violation.²⁷ While there is authority that prostitution constitutes probable cause to believe one is infected with a venereal disease, it is not clear that this alone will justify a blood

16. *Id.*

17. *Id.* See also *Brown v. Stone*, 378 So. 2d 218 (Miss. 1979) (finding state interest in compulsory vaccination sufficient to override religious interest), *cert. denied*, 449 U.S. 887 (1980). But see *Whalen*, 429 U.S. at 599 (1977) (individual has fundamental right to avoid governmental intrusion into personal matters).

18. See Closen, *AIDS: Testing Democracy*, 19 J. MARSHALL L. REV. 835, 842 (1986). See also Dolgin, *AIDS: Social Meanings and Legal Ramifications*, 14 HOFSTRA L. REV. 193 (1985) (potential social harm posed by AIDS). See generally Robinson, *AIDS and the Criminal Law*, 14 HOFSTRA L. REV. 91, 99 (1985) (spread of AIDS through prostitution).

19. Note, *Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274 (1986). Courts have already allowed mandatory AIDS testing in prisons. *Lareau v. Mansohn*, 651 F.2d 96 (2d. Cir. 1981). Since 1985, all military personnel have been tested for AIDS. Closen, *AIDS: Testing Democracy*, 19 J. MARSHALL L. REV. 837, 908 (1986). Courts have also upheld laws requiring blood tests to screen for venereal diseases for those persons seeking marriage licenses. See *Peterson v. Widule*, 157 Wis. 641, 147 N.W. 966 (1914). Even if a compelling state interest is found, regulations that infringe on fundamental rights should be tailored to meet the recognized state interest. *Roe v. Wade*, 410 U.S. 113, 165 (1973).

20. Note, *Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274, 1287.

21. *Id.*

22. 384 U.S. 757.

23. *Id.* at 768.

24. *Id.*

25. *Id.* at 769.

26. 1987 Nev. Stat. § 201.140 2.

27. *Id.*

test for AIDS.²⁸ To uphold Chapter 762 as constitutional under *Schmerber*, courts must find that prostitution constitutes probable cause to believe the person arrested for prostitution is infected with AIDS.²⁹

DAH

28. See generally *Ex Parte Clemente*, 61 Cal. App. 666, 215 P. 698 (1923) (suspicion of prostitution reasonable grounds to believe one is infected with venereal disease). See also *Ex Parte Martin*, 188 P. 2d 287 (1948) (denial of bail because suspicion of prostitution probable cause to believe one is inflicted with a venereal disease).

29. See *Schmerber*, 384 U.S. at 768. See also *Robinson v. California*, 370 U.S. 660 (1962). (while having a disease alone cannot be a criminal act, acts by persons infected with diseases can be criminal). But see *Powell v. Texas*, 392 U.S. 574 (1968) (upheld statute making public intoxication illegal, even where defendant is an alcoholic).

Health & Welfare; adoption requirements

NEV. REV. STAT. § 127.____ (new); §§ 127.005, 127.053, 127.057, 127.070, 127.110, 127.220, 127.230, 127.280 (amended).
SB 272 (Committee on Judiciary); 1987 STAT. Ch 773

Under existing law, the Welfare Division of the Department of Human Resources (Welfare Division) must prescribe rules and establish reasonable minimum standards for regulating child-placing agencies.¹ Chapter 773 requires the Welfare Division to establish the procedures used in placing children for adoption.²

Under existing law, consent by a parent or child to an adoption executed in the state³ is not valid unless the consent: (1) Is in writing,

1. NEV. REV. STAT. § 127.230 1 (amended by 1987 Nev. Stat. ch. 773, sec. 14, at ____). Child-placing agency means the Welfare Division of the Department of Human Resources or a nonprofit corporation organized under Nevada Revised Statutes sections 81.290-81.340 and licensed by the Welfare Division to place children for adoption or permanent free care. 1987 Nev. Stat. ch. 773, sec. 13, at ____ (enacting NEV. REV. STAT. § 127.220 2).

2. 1987 Nev. Stat. ch. 773, sec. 14, at ____ (enacting NEV. REV. STAT. § 127.230 1(c)) (including adoptions in which the natural parent has limited knowledge of the prospective adoptive parent). The petitioner must file an affidavit with the court setting forth any fees, donations or expenses they have paid in furtherance of the adoption. The affidavit must be filed within 15 days after the petition is filed, or 5 months after the child begins to live in their home, whichever is later. A copy of the affidavit must be sent to the Welfare Division, but the affidavit requirement may be waived by the court if one of the petitioners or the spouse of a petitioner is related to the child within the third degree of consanguinity. 1987 Nev. Stat. ch. 773, sec. 3, at ____ (enacting NEV. REV. STAT. § 127.____).

3. NEV. REV. STAT. § 127.053 (or consented to outside Nevada for use in Nevada).