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Prisoner AIDS Testing: A Comment on Dunn v. White

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PRISONER AIDS TESTING: A COMMENT ON *DUNN V. WHITE*

Given the magnitude and complexity of the AIDS problem, prison systems must devise careful practices and policies both to protect against the spread of the virus, and to treat those already infected. *Dunn v. White*[1] raises concerns with the balance between judicial deference to administrative penological decisionmaking and the court's responsibility to protect the constitutional rights of incarcerated individuals. A case of first impression specifically holding that the fourth amendment does not protect prisoners from nonconsensual AIDS testing, *Dunn* fails to qualify its sweeping rule with any procedural requirements. After *Dunn*, the state need not put forth even a small measure of evidence that either the nonconsensual testing is being performed pursuant to some plan for using the information, or that such a plan furthers an actual state interest in performing the test. While fourth amendment analysis does not necessarily preclude a state from forcing a prisoner to undergo an AIDS test, *Dunn* opens the door to state abuse of prisoners by failing to require that state testing programs meet constitutional standards.

This note discusses recent fourth amendment analytical trends of the United States Supreme Court as background for the case and explains the basic rationales supporting the limitation of prisoners' constitutional rights. It presents the proposition that even despite the usual lower level of constitutional guarantees afforded to prisoners, the *Dunn* court gave constitutionally inadequate treatment to the plaintiff's claims. First, the court failed to thoroughly analogize this case with the cases it purported to follow. Second, it reached conclusions based upon assumption rather than evidence. Third, Dunn's claim was dismissed although clearly *not* ripe for dismissal under appropriate Fed. R. Civ. P. 12(b)(6) (Rule 12(b)(6)) standards. This note also questions whether the broad holding of *Dunn* represents an open invitation for state abuses to prisoners' fourth amendment rights.

I. AIDS AND PRISONS

The incidence of acquired immune deficiency syndrome in prison is widely believed by inmate advocacy organizations to be much higher than that in the general population for several reasons.[2] According to the Centers for Disease Control in Atlanta, 74% of all AIDS infections are transmitted by unprotected homosexual activity and 17% by the sharing of needles by intravenous drug users.[3] Unprotected homosexual activity in prison, although undocumented, is believed to be rela-

1. 880 F.2d 1188 (10th Cir. 1989).
2. N.Y. Times, Dec. 17, 1989, (N.J. ed.) at 1, col. 4.
3. *Id.*

tively common. Because of the scarcity of needles and the resultant likelihood that an infected needle might be shared often, intravenous drug use is more insidious in prison than on the outside.[4] More than 5,400 confirmed AIDS cases were reported through October 1989 by the Federal Bureau of Prisons, state prison systems, and a sample of 38 local jail systems. This constituted a 606% increase from 1985 figures.[5] At the National Commission on AIDS meeting in New York in August, 1990, several doctors,[6] citing the "failure of prohibition," urged the Commission to support decriminalization of drug use because, in their view, relieving the AIDS epidemic in prisons will remain difficult as long as the nation persists in imprisoning drug users.[7]

While it would seem that testing and segregating inmates might be logical solutions, the following problems have been identified. Tests for AIDS are not reliable because they identify only the presence of *antibodies*, not the presence of the infectious HIV virus which causes AIDS.[8] This means that an inmate testing negative for HIV could actually be an infectious carrier of the disease for a period of years before his body enters the second stage of the disease, seroconversion, and begins to produce detectable antibodies.[9] One administrator believes that during this undetected-yet-infectious period, prisoners having a false sense of security from negative tests might decide to ignore health care preventative measures and engage in high risk activities.[10] In addition, most prisons in the United States refuse to distribute condoms and clean needles because to do so would admit that rules are being broken.[11]

Segregating HIV-positive inmates is counterproductive for both healthy and infected inmates, according to the chief of HIV services at the Vacaville, California prison, where segregation was implemented in 1985. "Segregating HIV positives creates the myth and feeling that other inmates don't have to worry about getting infected."[12] Segregated HIV-positive prisoners at Vacaville brought a class action suit for constitutional violations and entered into a consent decree with the state allowing them to desegregate, at least during the day to participate in educational activities, job training, recreation, and use of the library.[13]

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4. *Id.*

5. *Prisons' Care Systems Swamped by Aids Epidemic*, 5 AIDS Policy & L. (BNA) No. 16, at 3 (September 5, 1990)[hereinafter *Prisons' Care Systems*].

6. Robert L. Cohen, medical director of St. Vincent Hospital's AIDS Center in New York City and National Commission members Drs. Don C. Des Jarlais and Harlon Dalton, *Id.*

7. *Id.*

8. Note, *In Prison with AIDS: The Constitutionality of Mass Screening and Segregation Policies*, 1988 U. ILL. L. REV. 151, 155, 167.

9. *Id.* at 154.

10. Sampson, Letter to Editor, The Independent, May 29, 1990, at 16.

11. *Prisons' Care Systems*, *supra* note 5, at 4.

12. *Id.*

13. Gates v. Duekmejian, No. Civ S-87-1636 LKK JFM (E.D. Cal. Dec. 8, 1989). *See also Settlement Reached on Care of HIV - Positive Prisoners*, 4 Aids Policy & L. (BNA) No. 23, at 6 (Dec. 13, 1989).

II. FOURTH AMENDMENT ANALYSIS

A. *Background*

The fourth amendment protects a citizen's reasonable expectations of privacy[14] against intrusions by the government. Justice Brandeis has called the "right to be let alone [ ] the most comprehensive of rights and the right most valued by civilized men."[15] The amendment declares: "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[16]

B. *Traditional Analysis*

Under older traditional fourth amendment analysis, the constitutionality of the search or seizure typically turned upon such paramount issues as whether the activity constituted a search or seizure, whether probable cause[17] existed to justify the state's activity, or whether a warrant was necessary. Typically, courts determined:[18] 1) whether a search has taken place and was conducted pursuant to a valid warrant or was conducted pursuant to a recognized exception to the warrant requirement; 2) whether the search was based upon probable cause (or lesser suspicion because it was minimally intrusive); and 3) whether the search was conducted in a reasonable manner.

C. *One Category of Modern Analysis: Special Governmental Needs*

Justice Thurgood Marshall first used the term "special needs" cases in referring to a recently-evolved category of fourth amendment opinions of the Supreme Court. These cases upholding searches and seizures despite the absence of probable cause or, in some cases even suspicion, make use of an analysis that balances "special" governmental need against the privacy interest of the individual.[19] The Court first moved away from the strict probable cause standard, allowing a search despite the lack of any individualized suspicion, in an administrative inspection case, *Camara v. Municipal Court*.[20] Although there the Court required an administrative warrant to prove the search was performed pursuant to a fair and impartial plan, it considered the governmental

14. Katz v. United States, 389 U.S. 347 (1967).

15. Olmstead v. United States, 277 U.S. 438, 478 (1928)(Brandeis, J., dissenting)(overruled by *Katz*, 389 U.S. 347).

16. U. S. CONST. amend. IV.

17. Probable cause may relate to the belief a crime was committed, a particular person is an offender, whether a search will be fruitful, or whether an item taken is evidence of an offense.

18. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 641-42 (1989)(Marshall, J., dissenting).

19. *Id.* at 641.

20. 387 U.S. 523 (1967).

intrusion less than a full-blown search.[21] Further, the Court justified the search by balancing society's interest in conducting health, safety or fire inspections against the individual's interest in resisting intrusion.[22] The following year, the Court used the balancing test to hold that police officers could "stop and frisk" with less than probable cause because this intrusion was likewise considered less than a full-blown search.[23] In recent years the Court has departed further from the probable cause standard, frequently finding governmental intrusions constitutional despite a lack of probable cause or individualized suspicion.[24] In cases where the Court has permitted governmental searches and seizures absent some measure of suspicion, it has required that the governmental activity be pursuant to some recognized fair and impartial plan benefiting a legitimate state interest.[25] Balancing, with or without probable cause, has now become the norm in fourth amendment analysis.[26] It is clear that in either a civil or criminal context, the greater the level of governmental intrusion upon the person or property of the individual, the greater the justification and stricter the controls for search or seizure must be.[27]

The new "special needs" analysis considers these issues: 1)

21. *Id.* at 537.

22. *Id.* at 534-39.

23. Terry v. Ohio, 392 U.S. 1 (1968)(holding that reason to suspect, rather than probable cause, justified the intrusion).

24. Michigan Dep't of Police v. Sitz, 110 S. Ct. 2481 (1990)(no probable cause necessary to justify "sobriety checkpoint" stops to further governmental interest in highway safety, so long as pursuant to fair and impartial plan where *all* drivers are stopped); Colorado v. Bertine, 479 U.S. 367 (1987)(inventory search of vehicle absent individualized suspicion permissible under the fourth amendment if pursuant to standardized procedures); Delaware v. Prouse, 440 U.S. 648 (1979)(police officers may *not* stop drivers randomly without reason to suspect); Almeida-Sanchez v. United States, 413 U.S. 266 (1973)(permitting routine, non-probable cause searches of baggage, vehicles and persons at the borders to further government interest in protecting against illegal aliens; however, the government, in protecting against smuggling activity, must meet a reason to believe standard in order to justify deeply intrusive personal searches); Camara v. Municipal Court, 387 U.S. 523 (1967)(no probable cause necessary to obtain a warrant for a particular dwelling, but warrant requirement eliminates inspector's untrammeled discretion, by requiring him to show the inspection is part of an impartial administrative plan to further interest of government in health, safety and fire code inspections).

25. *Supra* note 24.

26. "The test of reasonableness under the Fourth Amendment . . . requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." Bell v. Wolfish, 441 U.S. 520, 559 (1979). *See* O'Connor v. Ortega, 480 U.S. 709, 725 (1987)(balancing the need for "the efficient and proper operation of the workplace"); Griffin v. Wisconsin, 483 U.S. 868, 878 (1987)(balancing need to preserve "the deterrent effect of the supervisory arrangement" of probation); New Jersey v. T. L. O., 469 U.S. 325, 341 (1985)(balancing "the substantial need of teachers and administrators for freedom to maintain order in the schools"); Winston v. Lee, 470 U.S. 753 (1985)(balancing the probable cause that evidence of a crime could be found against individual's interest in avoiding surgical intrusion to remove the bullet).

27. Gooding v. U.S., 416 U.S. 430, 464 (1974)(Marshall, J., dissenting); Blackburn v. Snow, 771 F.2d 556, 565 (1st Cir. 1985); United States v. Afanador, 567 F.2d 1325, 1328 (5th Cir. 1978). *See generally* Schmerber v. California, 384 U.S. 757 (1966)(intrusion into a DUI suspect's body for blood testing requires both probable cause and a warrant, unless delay would threaten the loss or destruction of the evidence); Carroll v. United States, 267 U.S. 132 (1925)(search of a car requires only probable cause); Terry v. Ohio, 392 U.S. 1 (1968)(a police officer's stop and frisk of a citizen is justified by reason to suspect).

whether the governmental action infringed upon the fourth amendment rights of the individual; 2) the governmental interest being addressed by the search or seizure;[28] 3) whether a logical nexus exists between the search or seizure activity and the governmental interest pursued;[29] 4) whether the governmental activity was conducted in a reasonable manner,[30] and, in the absence of any individualized suspicion, pursuant to a fair procedure;[31] and 5) whether the government has demonstrated that its interests outweigh the privacy expectations of the individual.[32]

1. Warrants and Probable Cause: Substitution of "Nexus" and "Fair Procedure"

It appears that the warrant requirement has been virtually eliminated from cases falling within the "special needs" category,[33] most likely because search warrants require a showing of probable cause, no longer a constitutional requisite under the new "special needs" category of cases.[34]

Under the more traditional fourth amendment model, the nexus requirement used in the "special needs" analysis is totally unnecessary because probable cause establishes the requisite reasonableness linking the governmental interest and the search and seizure activity. Likewise, the requirement for an equitable and fair procedure by officials in determining who shall be searched or seized,[35] while essential to the "special needs" analysis, is superfluous under the established form because the question of who shall be searched or seized is answered automatically by the probable cause requirement. If, indeed, there is a true balancing of interests under the traditional model, that element of individualized suspicion acts as a stabilizer on behalf of the individual. Under fourth amendment analysis in the "special needs" category, if no individualized

28. *See* Delaware v. Prouse, 440 U.S. 648, 658-59 (1979).

29. New Jersey v. T.L.O., 469 U.S. 325, 341 (1985)("One must determine whether the search . . . was reasonably related in scope to the circumstances which justified the interference in the first place."); O'Connor v. Ortega, 480 U.S. 709, 726 (1987)("The search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive . . ."); Turner v. Safley, 482 U.S. 78, 89-90 (1987)(referring to constitutional rights in general, including fourth amendment rights, the court states "[T]here must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it. Thus, a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational.").

30. New Jersey v. T.L.O., 469 U.S. 325 (1985)(the Court's analysis for reasonableness under the fourth amendment included examination of the manner in which Mr. Choplick conducted the search of T.L.O.'s purse; the requirement that the manner of search be reasonable is implicit in the opinion.).

31. *See* National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989).

32. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 679 (1989).

33. *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Griffin v. Wisconsin, 483 U.S. 868 (1987); O'Connor v. Ortega, 480 U.S. 709 (1987); New Jersey v. T.L.O., 469 U.S. 325 (1985).

34. *Id.*

35. *See* Michigan Dep't of Police v. Sitz, 110 S. Ct. 2481, 2487 (1990).

suspicion is involved, the elements of *fair procedure* and *nexus* appear to furnish the reasonableness automatically supplied by probable cause under the traditional model.

2. Special Needs Analysis in the Prison Context

"Special needs" analysis in the prison context is somewhat skewed. Prisoners' privacy interests are given less weight for two reasons: the need for preserving institutional security,[36] and the notion that prisoners generally retain a lower level of constitutional rights.[37] While honoring the policy of judicial deference to prison decisionmaking,[38] the Court requires prison officials to "put forward" a legitimate penological interest to justify the regulation.[39] However, the level of evidence needed to "put forward" a state interest has never been specified. Instead, it is only clear that some evidence is necessary.[40] Additionally, the impact of the constitutional accommodation on prison guards, inmates and resources must be evaluated, as well as whether an alternate means of accomplishing the penological goal could be employed, to insure that a regulation is not an exaggerated response to a perceived need.[41]

III. FACTS OF *DUNN V. WHITE*

Prisoner Terry Dunn filed a *pro se* civil rights action[42] in the United States District Court for the Northern District of Oklahoma, alleging that state prison officials had both assaulted him and, by threatening disciplinary segregation, forced him to submit to an AIDS test despite his religious objections and without benefit of a hearing. Dunn's com-

36. Bell v. Wolfish, 441 U.S. 520, 547 (1979).

37. Hudson v. Palmer, 468 U.S. 517, 523-24 (1984)(prisoners retain those rights not inconsistent with imprisonment or the objectives of incarceration).

38. *Bell*, 441 U.S. at 547.

39. Turner v. Safley, 482 U.S. 78, 89 (1987).

40. *Id.*; Walker v. Sumner, 917 F.2d 382, 385 (9th Cir. 1990)("Prison officials must 'put forward' a legitimate governmental interest to justify their regulation . . . and must provide *evidence* that the interest proffered is the reason why the regulation was adopted or enforced."). *See* Block v. Rutherford, 468 U.S. 576, 578 n.1, and 579 (1984)(demonstrating state interest by showing of evidence); Swift v. Lewis, 901 F.2d 730, 732 (9th Cir. 1990)("prison officials must at least produce some evidence that their policies are based on legitimate penological justifications"). *Accord* Caldwell v. Miller, 790 F.2d 589, 598-600 (7th Cir. 1986)(it is only after prison officials have put forth such evidence that courts defer to the officials' judgment); Wilson v. Schillinger, 761 F.2d 921, 925 (3rd Cir. 1985), *cert denied*, 475 U.S. 1096 (1986).

41. *Turner*, 482 U.S. at 90.

42. 42 U.S.C. § 1983 (1988) states "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." A governmental agency (for example, a state department of corrections) can be a "person" acting under color of law if it implements a decision officially adopted and promulgated by that body's officers, or "visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." Monell v. Department of Social Services, 436 U.S. 658, 690-691 (1978).

plaint was dismissed by the district court for failure to state a claim and the Tenth Circuit affirmed. Although the court of appeals failed to recognize any valid procedural due process claim raised by the plaintiff regarding a hearing,[43] the court believed his allegations supported claims under the first and fourth amendments, as incorporated into the fourteenth amendment.[44] This case discussion is limited to only those facially-supported claims.

IV. FOURTH AMENDMENT ANALYSIS IN *DUNN V. WHITE*

After briefly summarizing Supreme Court rationales regarding prison cell and body cavity searches, the court turned to address the elevated level of intrusion represented by governmental search and seizure of bodily fluids. Because the question of forced AIDS testing was one of first impression, the court relied on analyses from four search and seizure cases that involved testing the plaintiffs' bodily fluids for evidence of drug use.[45] Drug testing was found to be unconstitutional in only one of the four cases, *Berry v. District of Columbia*.[46] A "special needs" balancing analysis was used in each of the four cases. After first deciding that removal of bodily fluids constitutes a search for fourth amendment purposes, each court considered the following factors in varying degrees: 1) the nature and scope of the governmental interest in the testing; 2) an examination of the governmental interest for procedural safeguards used to choose who would be tested and testing methodology;[47] 3) the logical nexus between the governmental testing and the state's interest; and 4) the privacy interest of the plaintiff weighed against the governmental need for testing. The *Dunn* court did not utilize all of these elements in its analysis. Rather, it seemed to pick and

43. Dunn v. White, 880 F.2d 1188, 1198 (10th Cir. 1989).

44. *Id.* at 1190. The due process clause of the fourteenth amendment applies to the states those selectively incorporated Bill of Rights guarantees found to be "fundamental to the American scheme of justice." Duncan v. Louisiana, 391 U.S. 145, 149 (1968); Wolf v. Colorado, 338 U.S. 25, 27 (1949) (incorporating the fourth amendment); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)(incorporating the free exercise clause of the first amendment).

45. *Dunn*, 880 F.2d at 1192-94. The four cases relied upon by the court in *Dunn* were: Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Berry v. District of Columbia, 833 F.2d 1031 (D.C. Cir. 1987); and Spence v. Farrier, 807 F.2d 753 (8th Cir. 1986).

46. In *Berry*, pretrial detainees were foreclosed from leaving prison unless they submitted to drug testing of their bodily fluids. The state interest was perceived by the *Berry* court to be other than the stated interest in prison security. The case was remanded for further factual development regarding the state's interest. It is apparent that the Tenth Circuit attributed this finding of unconstitutionality to the "criminal context" of the case, saying, "We agree . . . that searches in the noncriminal context such as this one [*Dunn v. White*] raise different constitutional concerns than those implicated in *Berry*." *Dunn*, 880 F.2d at 1192.

47. In Spence v. Farrier, 807 F.2d 753, 755 (8th Cir. 1986), one important reason for holding the search of prisoners' bodily fluids to be constitutional was that the state's procedure for choosing who would be tested did not "unnecessarily [expose] prisoners to the risk of harassment," the rationale being that because it was truly random the procedure did not lend itself to abuse.

choose among the elements, paying lip service to some and ignoring one completely.

A. *The Nature and Scope of the State's Interest*

In *Dunn*, the State of Oklahoma never supported its "interest" in testing for AIDS with a scintilla of evidence. It neither put forth a showing that it *had* a plan for the treatment or segregation of AIDS victims, nor that it was in the process of formulating one. Vaguely, it stated that "protecting inmates from exposure to a fatal venereal disease is the *sort of* legitimate penological goal which outweighs the Appellant's necessarily limited religious rights."[48] This is as close as the state came to supporting the state interest requirement of the fourth amendment analysis.

The *Dunn* court was quick to supply the State of Oklahoma with the requisite state interest through assumption and generalization, rather than evidence.[49] Perhaps the greatest reason for finding a state interest without any showing of evidence was the frightfulness of the AIDS epidemic itself. The court openly admitted that it reached the conclusion of a state interest based upon the seriousness of the disease and its transmissibility.[50] In effect, the court said that state prisons, in testing for AIDS, automatically overcome the burden of showing a state interest because the disease itself is seen as a monumental problem.

If states need not demonstrate a state interest, then they may test prisoners for any reason, so long as they conclusively plead an interest in controlling or treating AIDS. The court of appeals in *Dunn* went a step further to make this clear: the State of Oklahoma was held to have a state interest in controlling and treating AIDS at the same time that the court inconsistently presumed that the state neither attempted to control the spread of AIDS nor attempted to treat those already infected.[51]

B. *Examination of State's Interest for Procedural Safeguards And Testing Methodology*

The *Dunn* court contended that its analysis followed the reasoning of the *Von Raab* and *Skinner* balancing tests.[52] The Supreme Court in

48. Brief for Appellees at 3 (emphasis added), Dunn v. White, 880 F.2d 1188 (10th Cir. 1989)(No. 88-2194).

49. Dunn v. White, 880 F.2d 1188, 1195-96 (10th Cir. 1989)(the court provided several rationales: "prevention of the spread of AIDS in prison would justify the intrusion. . . ; [t]he goal of controlling the spread of venereal disease may justify coerced medical testing . . . ; an attempt to ascertain the extent of the problem is certainly a legitimate penological purpose. . . ; "[the prison] has an interest in making an extra effort to protect prisoners from a fatal disease. . . ; the prison, as caretaker, has an interest in diagnosing and providing adequate health care to those already infected with AIDS. . .").

50. "In light of the seriousness of the disease and its transmissibility, we conclude that the prison has a substantial interest in pursuing a program to treat those infected with the disease and in taking steps to prevent further transmission. We further conclude that the prison's substantial interest outweighs plaintiff's expectation of privacy." *Id.* at 1196.

51. "[W]e must assume that the prison does not currently use the information it gathers *either* to *treat* or to *control* the spread of AIDS." *Id.* at 1196 (emphasis added).

52. "Under the reasoning in *Skinner* and *Von Raab*, this court must therefore balance

those cases, however, scrutinized the governmental interest in laborious detail, inspecting both essential, equitable elements of procedure and the methodology implemented by the testing program. In contrast, the *Dunn* court examined no governmental interest because no evidence of such interest was put forth. Unlike the Court's examination of the regulatory schemes in both *Von Raab* and *Skinner*, the *Dunn* court asserted that, for purposes of *its* analysis, it would assume that the State of Oklahoma had no plan of AIDS treatment to be examined.[53] Thus, constitutional safeguards were wholly ignored, leaving a hollow, unqualified holding. In essence, the court held that prisoners do not have a bodily integrity fourth amendment right to protection against nonconsensual AIDS testing by the state.

The court did put forth a rationale for excluding the element of regulatory scrutiny from its analysis. It stated, inaccurately, that the plaintiff did not *directly* challenge the prison's program of AIDS treatment or lack of any program, nor did he challenge the failure of the state to segregate AIDS prisoners.[54] However, the plaintiff *did* challenge the state's interest, claiming that since the prison neither treated nor segregated AIDS victims, it could *not have* a legitimate penological goal.[55] Despite this, the Tenth Circuit perfunctorily declared that the "complex constitutional issues arising from such allegations [were] not currently before us."[56] To the contrary, such issues were before the court in this case both because the plaintiff raised them and because an examination of the governmental program is essential to a thorough fourth amendment analysis under the Supreme Court cases which the court purported to follow. For example, in *National Treasury Employees' Union v. Von Raab*,[57] the suspicionless drug testing of U.S. Customs personnel applying for promotion to certain key positions was held reasonable under the fourth amendment. While evidence on the record of bribes, trickery and danger supported the governmental interest in drug testing,[58] the most compelling evidence was the carefully scrutinized governmental program itself.[59] Part of the program did not seem adequately tailored to suit the governmental interest and was thus remanded for further examination by the court of appeals.[60] It can be stated with certainty that careful evaluation of both the regulatory program, and the logical nexus between governmental goals and the pro-

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the intrusiveness of the blood test against the prison's need to administer the test." *Id.* at 1194.

53. *Id.* at 1196.

54. *Id.* at 1196, n.4.

55. Reply Brief for Appellant at 4, Dunn v. White, 880 F.2d 1188 (10th Cir. 1989)(No. 88-2194).

56. *Dunn*, 880 F.2d at 1196, n.4.

57. 489 U.S. 656 (1989).

58. *Id.* at 669.

59. *Id.* at 666. ("[t]he purposes of the program are to deter drug use among those eligible for promotion to sensitive positions within the Service and to prevent the promotion of drug users to those positions. These substantial interests . . . present a special need . . . ."). *See id.* at 660-63.

60. *Id.* at 677-79.

gram, was absolutely essential to the Court's analysis. Because the *Dunn* court purported to follow the reasoning of *Von Raab*,[61] the careful scrutiny of any governmental testing program was, of necessity, before the court in *Dunn*, however the court may have justified its refusal to recognize the issue.

C. *Logical Nexus Between State's Interest and Testing*

It is ironic that the *Dunn* court found a logical nexus[62] between the stated governmental interest and an AIDS testing program where "the prison does not currently use the information it gathers either to treat or to control the spread of AIDS."[63] Perhaps to justify such a finding, the court offered the statement that "[t]he prison will ultimately bear responsibility for decisions on segregation and treatment, and certainly it is reasonable to attempt to avoid making such decisions in a vacuum."[64] Nowhere in the four opinions relied upon by the *Dunn* court[65] did the Supreme Court or the circuit courts find a nexus between an unsupported interest and unexamined regulatory scheme justifiable simply because the government will ultimately bear responsibility for whatever decisions it reaches.

D. *Privacy Interest of the Plaintiff Weighed Against the Governmental Need for Testing*

The court had little difficulty reaching the decision that the "prison's substantial interest outweighs plaintiff's expectation of privacy."[66] Reflection upon this decision invites consideration of the tandem philosophies of the United States Supreme Court, often in tension, that intertwine throughout prisoners' rights cases.[67] The Court has a long history of judicial restraint regarding decisionmaking in this area, reasoning that prison officials are better equipped to determine their own health and safety policies.[68] Moreover, the separation of powers principle requires that courts refrain from encroaching upon territory properly lying within the province of legislatures and their agency off-

61. Dunn v. White, 880 F.2d 1188, 1194 (10th Cir. 1989). The court also claimed to follow the reasoning of Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989), using the same analysis.

62. *Dunn*, 880 F.2d at 1196.

63. *Id.*

64. *Id.*

65. *Skinner*, 489 U.S. 602; National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Berry v. District of Columbia, 833 F.2d 1031 (D.C. Cir. 1987); Spence v. Farrier, 807 F.2d 753 (8th Cir. 1986).

66. Dunn v. White, 880 F.2d 1188, 1196 (10th Cir. 1989).

67. O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987)(the Court reaffirms its stance on refusal to substitute its judgment for the judgment of those charged with running a prison); Procunier v. Martinez, 416 U.S. 396, 404-06 (1974)(despite the deference standard, courts must hear valid constitutional claims).

68. Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 128 (1977); Meachum v. Fano, 427 U.S. 215, 228-29 (1976); Cruz v. Beto, 405 U.S. 319, 321 (1972).

spring.[69] On the other hand, the Court has steadfastly applied strict scrutiny, despite separation of powers arguments, whenever the civil rights of citizens, particularly "discrete and insular minorities," are threatened by governmental powers.[70] Justice Edwards of the D.C. Circuit writes:

> Indeed, the special place of prisoners in our society makes them more dependent on judicial protection than perhaps any other group. Few minorities are so 'discrete and insular,' so little able to defend their interests through participation in the political process, so vulnerable to oppression by an unsympathetic majority. Federal courts have a special responsibility to ensure that the members of such defenseless groups are not deprived of their constitutional rights.[71]

It is clear, regardless of whether prisoners are a "discrete and insular minority," that incarceration does not mandate that the Court abandon its protective role regarding constitutional rights. In *Procunier v. Martinez*,[72] the Court explained that "a policy of judicial restraint *cannot encompass* any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights."[73] Justice Brennan, writing for the concurrence in *Rhodes v. Chapman*,[74] pointed out that "lower courts have learned from repeated investigation and bitter experience that judicial intervention is *indispensable* if constitutional dictates — not to mention considerations of basic humanity — are to be observed in the prisons."[75]

V. DOES *DUNN V. WHITE* INVITE CONSTITUTIONAL ABUSES?

In his dissent in *Dunn v. White*, Justice McKay, stressing that the majority's holding was far too sweeping, suggested that because of the known seriousness of AIDS, a prison would now not need to show even its claimed interest.[76] Typical governmental abuses of AIDS prisoners were brought to light at the August, 1990 National Commission on AIDS meeting in New York City.[77] The American Civil Liberties Union (ACLU) reported that convicts in Alabama, for example, are routinely tested for HIV without either their consent or knowledge. If they test positive, they are isolated and then transferred to a special HIV prison

69. Bell v. Wolfish, 441 U.S. 520, 548 (1979). *Accord*, Turner v. Safley, 482 U.S. 78, 85 (1987).

70. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

71. Doe v. District of Columbia, 701 F.2d 948, 960 n.14 (D.C. Cir. 1983)(referring to Carolene Products Footnote No. 4). For an excellent discussion on this subject, see Comment, *Sentenced to Prison, Sentenced to AIDS: The Eighth Amendment Right to be Protected from Prison's Second Death Row*, 92 DICK. L. REV. 863, 872-77 (1988).

72. 416 U.S. 396 (1974).

73. *Id.* at 405-06(emphasis added)(citing Johnson v. Avery, 393 U.S. 483, 486 (1969)).

74. 452 U.S. 337 (1981).

75. *Id.* at 354.

76. Dunn v. White, 880 F.2d 1188, 1199 (10th Cir. 1989).

77. *Prisons' Care Systems*, *supra* note 5, at 4.

ward. They are given no AIDS counseling and often are told they have only days to live. They must scrub toilet seats and telephones after use and are forced to dispose of their garbage in bright red trash bags. Confidentiality is impossible to maintain because even their clothes are stamped "HIV."[78]

Letters to the ACLU from prisoners describe the "living hell" that confronts HIV-positive inmates. They write of physical and verbal abuse from prison guards and health workers, lack of counseling, irregular treatment, and difficulty in consulting medical specialists outside prison. One prisoner wrote that inmates taken to see specialists were placed in leg irons and handcuffs, despite their weakened condition. "I have witnessed inmates tossed around, in pain . . . the circulation [was] cut off from the hands because of the tightness of the handcuffs."[79]

This is not to suggest that such abuses are prevalent in the Tenth Circuit. But if prisons were required to make a showing of state interest to justify AIDS testing, and if the court would uphold constitutional procedural safeguards, such abuses might be avoided. Attorneys for states within the Tenth Circuit relying on the *Dunn* precedent might advise their clients that AIDS testing within prisons has not been found to violate prisoners' fourth amendment privacy interests, regardless of whether or not the testing is performed pursuant to a plan meeting constitutional muster. Because the court refused to require any showing of a constitutionally adequate program in *Dunn*, discriminatory, punitive, experimental, or non-confidential testing has not been specifically proscribed. *Walker v. Sumner*[80] typifies constitutional loopholes left open by such a precedent; its holding is essentially the McKay dissent in *Dunn*.

A. Walker v. Sumner

In *Walker*, Andrew Walker, the *pro se* plaintiff, alleged that his nonconsensual AIDS blood test violated his fourth amendment rights.[81] The blood tests were allegedly part of a state healthcare workers training program that used prisoners as practice specimens so that students could learn to administer the AIDS test properly. Walker alleged that when he refused the test, because he had already been tested at the prison, he was threatened by a guard with a taser gun[82] until he submitted. The district court, holding that prison officials had a paramount interest in identifying carriers of the AIDS virus and that an AIDS test is reasonably related to that legitimate penological objective, granted summary judgment to the state. The Ninth Circuit reversed, saying:

> Prison authorities cannot rely on general or conclusory assertions to support their policies. Rather, they must first identify

78. *Id.*
79. *Id.*
80. 917 F.2d 382 (9th Cir. 1990).
81. The plaintiff also alleged his eighth amendment rights had been violated.
82. A taser gun "operates by firing a tiny dart, attached to the gun with wires, into the prisoner . . . administering a low amperage, high voltage electrical shock, which temporarily incapacitates the prisoner." Michenfelder v. Sumner, 860 F.2d 328, 330 (9th Cir. 1988).

> the specific penological interests involved and then demonstrate both that those specific interests are the actual bases for their policies and that the policies are reasonably related to the furtherance of the identified interests. An evidentiary showing is required as to each point. . . [w]e do not know for example whether the samples were being collected purely for statistical purposes, whether the prison officials intended to isolate AIDS carriers, whether they planned to provide some form of medical treatment for those who tested HIV positive, or even whether they would use the results for any purpose at all. Without a further explanation, general protestations of concern for the welfare of . . . the prison community are simply insufficient to render the involuntary seizure of blood specimens, *even from prison inmates*, constitutionally reasonable.[83]

VI. First Amendment Claim

Dunn claimed two additional bases of protection from nonconsensual AIDS testing: his religious beliefs under the first amendment, and an Oklahoma statute granting exemption from such testing to those with certain religious beliefs.

In its examination of the first amendment claim, the court depended upon *Wisconsin v. Yoder*[84] to preclude the plaintiff's complaint from surviving a Rule 12(b)(6) motion to dismiss, saying "[a] philosophical and personal choice 'does not rise to the demands of the Religion Clauses.' "[85] But, as Judge McKay pointed out in his dissent, this concept has been recently rejected by the Supreme Court in *Frazee v. Illinois Dep't of Employment*.[86] To substantiate a first amendment claim after *Frazee*, it is enough for a plaintiff to show a sincere religious belief, regardless of whether that belief is responsive to a particular organized religion. The *Dunn* court further contended that the plaintiff's religious affirmations were vague and conclusory, stating "at no time has he gone any further than merely reciting the word 'religion.' "[87] But Dunn *did* go beyond merely reciting the word "religion" when he defined his understanding of the word religious for the court, as "relating or devoted to the divine or that which is held to be of ultimate importance,"[88] and explaining that religion for him is a set of such beliefs.[89]

In examining the Oklahoma statute raised by the plaintiff,[90] the court questioned whether the statutory religious exemption applies to

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83. Walker v. Sumner, 917 F.2d 382, 386-87 (9th Cir. 1990)(emphasis added).

84. 406 U.S. 205, 216 (1972).

85. Dunn v. White, 880 F.2d 1188, 1197 (10th Cir. 1989) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972)).

86. 489 U.S. 829, 834 (1989)("we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization.").

87. *Dunn*, 880 F.2d at 1197.

88. Reply Brief for Appellant at 3, Dunn v. White, 880 F.2d 1188 (10th Cir. 1989)(No. 88-2194).

89. *Id.*

90. Okla. Stat. tit. 63 § 1-516.1 (1984).

prisoners.[91] The court perceived this query as irrelevant, however, holding that this exemption would *not* apply to Dunn's religious beliefs. Despite the lack of any evidence regarding the plaintiff's specific beliefs, the court decided the Oklahoma exemption did not apply to Dunn because it is only for those "who, because of religious belief, in good faith select[] and depend[] upon spiritual means or prayer for the treatment or cure of disease."[92] Again, the court supplied an assumption in place of evidence, this time concluding that the plaintiff's personal religious beliefs could not possibly fall within the exemption, thus denying him any protection provided by the very statute he himself raised in defense of his claim. The Supreme Court has held that Rule 12(b)(6) does not countenance dismissals based on a judge's disbelief of a plaintiff's factual allegations.[93] Clearly, some evidentiary showing was required.

VII. *DUNN V. WHITE* FROM A PROCEDURAL STANDPOINT

Granting Rule 12(b)(6) motions is generally looked upon with disfavor because doing so contradicts the basic judicial precept that a case should be tried on the proofs, rather than on the pleadings.[94] Thus, when considering motions to dismiss, courts should both construe complaints liberally and view them in the light most favorable to the plaintiff.[95]

Dunn came before the court of appeals as a review of the district court's dismissal of the complaint for failure to state a claim under Rule 12(b)(6). However, the case clearly was not ripe for dismissal. Rule 12(b)(6) motions call upon the court to make two decisions: first, whether a claim showing entitlement to relief has been stated,[96] and second, whether, based on law and fact, relief can be granted on such a claim.[97] In *Dunn*, the court maintained that the plaintiff's allegations of religious beliefs facially supported both a fourth and a first amendment claim,[98] thus passing the first hurdle of the 12(b)(6) analysis. The sec-

91. *Dunn*, 880 F.2d at 1197.

92. *Id.* (quoting OKLA. STAT. tit. 63 § 1-516.1 (1984)).

93. Neitzke v. Williams, 490 U.S. 319, 327 (1989).

94. Carss v. Outboard Marine Corp., 252 F.2d 690 (5th Cir. 1958); Rennie & Laughlin, Inc. v. Chrysler Corp., 242 F.2d 208 (9th Cir. 1957); Buchler v. United States, 384 F. Supp. 709 (E.D. Cal. 1974); Beenken v. Chicago & Northern R.R., 367 F. Supp. 1337 (N.D. Iowa 1973). *See* Action Repair Inc. v. American Broadcasting Cos., 776 F.2d 143 (7th Cir. 1985)(Courts should not make judgment calls on allegations in pleadings, dismissal at summary judgment stage more appropriate).

95. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

96. Davis H. Elliot Co. v. Caribbean Utilities Co., 513 F.2d 1176 (6th Cir. 1975); MacKenzie v. International Union of Operating Engineers, 472 F. Supp. 1025 (N.D. Miss. 1979); Pointer v. American Oil Co., 295 F. Supp. 573 (S.D. Ind. 1968); Bing v. General Motors Acceptance Corp., 237 F. Supp. 911 (E.D.S.C. 1965); Hoffman v. Weider, 217 F. Supp. 172 (D.N.J. 1963).

97. Davis v. Passman, 442 U.S. 228 (1979). Also, in considering a Rule 12(b)(6) motion to dismiss, the court may consider legal arguments presented in briefs and matters which are the subject of judicial notice. United States General, Inc. v. Schroeder, 400 F. Supp. 713 (E.D. Wis. 1975); Schwartz v. Commonwealth Land Title Ins. Co., 374 F. Supp. 564 (E.D. Pa. 1974).

98. Dunn v. White, 880 F.2d 1188, 1190 (10th Cir. 1989).

ond hurdle of the analysis requires the court to accept the plaintiff's allegations of fact[99] and every fairly deducible inference therefrom[100] as true for purposes of the motion. The court is authorized to dismiss a claim based upon a dispositive issue of law only "if, as a matter of law, 'it is clear that no relief could be granted under *any set of facts* that could be proved consistent with the allegations.' "[101] The fourth amendment claim was dismissed because the court refused to examine the state's interest, substituting its own assumptions for evidence. The first amendment claim was dismissed because the court assumed that Dunn's religious beliefs could not factually support a first amendment claim;[102] nor could they support a claim under the Oklahoma statutory exemption.[103] However, the court asserted that Dunn never expressed what his specific religious beliefs were.[104] The opinion did not explain how an allegation could provide facial support for a first amendment claim,[105] and yet simultaneously be so insubstantial as to fail to support a first amendment claim.[106] If indeed facts were missing, as the court believed and articulated, then the facially-supported claim was not ripe for dismissal. Because a plaintiff's complaint need only show that he or she holds a sincere religious belief,[107] further questions of fact should be left for appropriate future resolution by the finder of fact. Furthermore, the mandate of *Hughes v. Rowe*[108] requiring an indulgent interpretation of a *pro se* plaintiff's allegations, was virtually ignored by the court in practice, although alluded to in an early part of the opinion.[109]

CONCLUSION

Because of *Dunn v. White*, prisoners' fourth amendment rights in the context of AIDS testing has become a misnomer in the Tenth Circuit. It is interesting to note the willingness of the court to supply assumptions in place of evidence. For example, it found an (assumed) fourth amendment state interest without requiring a scintilla of evidence, and later

99. United States v. Mississippi, 380 U.S. 128 (1965).

100. Mitchell v. King, 537 F.2d 385, 386 (10th Cir. 1976).

101. Neitzke v. Williams, 490 U.S. 319, 327 (1989)(quoting Hishan v. King, 467 U.S. 69, 73 (1984))(emphasis added).

102. "The mere assertion of generic religious objections is not sufficient to invoke first amendment protections." *Dunn*, 880 F.2d at 1197.

103. "[T]he exemption [in OKLA. STAT. tit. 63, Sec. 1-516.1 (1984)] is for those 'who, because of religious belief, in good faith select[] and depend[] upon spiritual means or prayer for the treatment or cure of disease.' Plaintiff's vague allegation that he declined AIDS testing on generic 'religious grounds' *does not implicate* this exemption." *Id.* (citations omitted)(emphasis added).

104. "Plaintiff did not accompany his allegation with any details about his religious faith, nor did he allege what tenet of his faith required that he refuse the test." *Id.*

105. "Plaintiff's factual allegations that he refused consent to a medical test on religious grounds, and was then forced to submit to the test, at least facially support claims under the first and fourth amendments, as incorporated into the fourteenth." *Id.* at 1190.

106. "[P]laintiff has supported his first amendment claim with only a conclusory allegation of religious exemption." *Id.* at 1198.

107. Frazee v. Illinois Dep't of Employment, 489 U.S. 829, 834 (1989).

108. 449 U.S. 5, 9-10 (1980).

109. Dunn v. White, 880 F.2d 1188, 1190 (10th Cir. 1989).

supplied the plaintiff himself with an (assumed) set of disadvantageous religious beliefs that precluded him from possible exemption from AIDS testing under the Oklahoma statute. This is judicial deference at its worst. By refusing to require any evidence, the court's decision was based upon nothing but its own assumptions. *Dunn v. White* may represent an abatement of individual rights resulting from governmental needs perceived to be so monumental that constitutional safeguards may be overlooked, particularly in light of the plaintiff's prisoner status. What is so disturbing about this case also illustrates one very serious problem inherent in the fourth amendment balancing analysis itself: in deciding whether or not a governmental intrusion is permissible under the fourth amendment, absent any individualized suspicion requirement, the scales may be tipped in favor of the government simply because the individual's need for privacy is viewed by some courts as eminently disproportionate in relation to any given governmental need. In this context, Justice Marshall warns:

> Precisely because the need for action against [a perceived danger] is manifest, the need for vigilance against unconstitutional excess is great. History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. The World War II relocation-camp cases, the Red Scare and McCarthy-Era internal subversion cases are only the most extreme reminders that when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.[110]

Monica Brion

110. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 635 (1989)(Marshall, J., dissenting).