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Mandatory AIDS Testing: The Slow Death of Fourth Amendment Protection?

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Mandatory AIDS Testing: The Slow Death of Fourth Amendment Protection?

The Surgeon General has estimated that 1.5 million persons in the United States are infected with the Human Immunodeficiency Virus, more commonly called AIDS.[1] As a result of this estimate, the Surgeon General has classified AIDS as an epidemic.[2] The rapid spread of the disease in recent years together with the prevalence of the disease among controversial members of society[3] has generated wide-spread fear of AIDS.[4] Until 1988, California law prevented AIDS testing of any person without that person's written consent.[5] In 1988, the California legislature passed several important bills requiring AIDS testing of prostitutes,[6] sex offenders,[7] and prisoners.[8] The legislature also enacted a bill allowing crime victims to request AIDS testing of the person charged with committing the crime against them.[9] California voters also passed Proposition 96 which allows peace officers, emergency personnel, and victims of certain sex crimes

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1. C. EVERETT KOOP, M.D., SC.D., SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME, (U.S. Department of Health and Human Services, Oct. 22, 1986) at 12. Throughout this note, the Human Immunodeficiency Virus will be referred to as the AIDS virus.

2. *Id.* at 3.

3. Prostitutes, male homosexuals and bisexuals, and drug addicts. *Id.* at 15, 18, 19.

4. *Id.* at 3. Fear of the disease also has generated some controversial solutions to the problem such as mandatory testing of the entire population, quarantine of AIDS victims, and identification of AIDS carriers by a visible sign or marking. *Id.* at 33, 34.

5. CAL. HEALTH & SAFETY CODE § 199.22 (West Supp. 1989).

6. 1988 Cal. Stat. ch. 1597, secs. 2, 3, 4, at ____ (enacting CAL. PENAL CODE §§ 647f, 1202.1, 1202.6, 12022.85).

7. *Id.*

8. 1988 Cal. Stat. ch. 1579, sec. 1, at ____ (enacting CAL. PENAL CODE §§ 199.222, 7500-7553).

9. 1988 Cal. Stat. ch. 1088, secs. 1, 1.5, at ____ (enacting CAL. HEALTH & SAFETY CODE § 26, and CAL. PENAL CODE § 1524.1).

to request testing of defendants who assault them.[10] These mandatory AIDS testing laws present constitutional issues concerning the fourth amendment.

Part I of this note will discuss the legal background of the mandatory AIDS testing legislation.[11] More specifically, Part I will discuss existing law governing communicable disease control, past AIDS legislation, the particular provisions of the bills themselves, and the legislative development of the bills.[12] Part II will define and discuss the two types of government searches, criminal and administrative, that implicate fourth amendment protection.[13] The different constitutional standards for these searches will also be discussed.[14] Part III will apply the constitutional standards to the mandatory AIDS testing legislation to determine whether the legislation will survive constitutional scrutiny.[15]

I. LEGAL BACKGROUND

A. Communicable Disease Control

The government has a duty to protect the public from the spread of communicable disease.[16] In furtherance of this duty, California law allows the state health department to quarantine, isolate, inspect, and disinfect persons whenever necessary to preserve and protect the public health.[17] The state health department may take steps to prevent the spread of any contagious disease, including quarantining communicable disease carriers[18] and requesting law enforcement author-

10. 1988 Cal. Stat. prop. 96, sec. 1, at ____ (enacting CAL. HEALTH & SAFETY CODE §§ 199.95-.99).
11. *See infra* notes 16-77 and accompanying text.
12. *Id.*
13. *See infra* notes 78-201 and accompanying text.
14. *Id.*
15. *See infra* notes 202-275 and accompanying text.
16. City and County of San Francisco v. Boyle, 191 Cal. 172, 177, 215 P. 549, 553, (1923).
17. CAL. HEALTH & SAFETY CODE § 3051 (West 1979). Every health officer has a duty to take any measures necessary to prevent the spread or additional occurrence of any communicable disease. *Id.* § 3110 (West 1979).
18. See *id.* § 3053 (West 1979). *See also id.* §§ 3194 (West 1979) (duty of local health officer to ascertain cases of infectious venereal disease, and to take all measures reasonably necessary to prevent the transmission of infection), 3285 (West 1979) (duty and power of local health officer to ascertain all cases of infectious tuberculosis, and to inspect, examine and quarantine all persons known to be infected).

ities to order convicted prostitutes to submit to examination and blood testing for venereal disease.[19]

Since 1985 California law has distinguished AIDS[20] from other communicable diseases by prohibiting the testing of any person's blood for the AIDS antibody without that person's written consent.[21] The legislature recognized that AIDS was spreading rapidly and intended to control the spread of the disease by facilitating the development of an AIDS vaccine[22] that would be used to immunize many different high-risk population groups, such as homosexuals, bisexuals, prostitutes, and drug abusers.[23] An effective vaccine was supposed to eliminate the risk of contracting AIDS in the same way the polio and smallpox vaccines eliminated the risk of contracting those diseases.[24] However, to date, no AIDS vaccine has been

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19. *In re* Clemente, 61 Cal. App. 666, 666-67, 215 P. 698, 698-99 (1923) (police detained proprietor of a house of prostitution and tested her blood for venereal disease based because she was a convicted prostitute). *See* Reynolds v. McNichols, 488 F.2d 1378, 1383 (10th Cir. 1973) (reaffirming the detention and testing of prostitutes for venereal disease as a valid exercise of state power to protect the public health).

20. The Acquired Immune Deficiency Syndrome (AIDS) virus is transmitted through the exchange of bodily fluids, either through sexual contact with an infected person's semen or vaginal secretions, or through contact with an infected person's blood. *See* KOOP, *supra* note 1, at 16. Therefore, persons who have many sexual partners, or use intravenous drugs, are at a high risk of infection. *Id.* at 15, 19. In America, male homosexuals, bisexuals, drug addicts and prostitutes dominate the high risk behavior group. *Id.* The AIDS virus then travels into the blood stream through small tears in the lining of the vagina or rectum that occur during intercourse. *Id.* at 16. When this occurs, the body produces antibodies, which can be detected in the blood through testing from two weeks to three months after infection. *Id.* at 10. A person infected with the virus may never develop symptoms of the disease, but may be capable of infecting others. *Id.* Others develop a less serious form of AIDS called AIDS Related Complex, and still others develop full-blown AIDS. *Id.* Full-blown AIDS attacks the body's immune system, weakening it to such a degree that the victim eventually dies of other diseases such as tuberculosis, pneumonia, or cancer. *Id.* There is no known cure for AIDS or a vaccine to prevent AIDS. *Id.*

21. CAL. HEALTH & SAFETY CODE § 199.22 (West Supp. 1989). A physician or surgeon treating a patient must determine that the patient's consent is informed consent. *Id.* No person may be compelled to identify any person who has taken an AIDS test. *Id.* § 199.20 (West Supp. 1989). Any person who negligently or willfully discloses the results of an AIDS test to any third party may suffer civil and criminal penalties. *Id.* § 199.21 (West Supp. 1989). *See also id.* §§ 199.21(i) (West Supp. 1989) (there are no criminal or civil sanctions for disclosure of AIDS tests in accordance with reporting requirements to the state department or the Centers for Disease Control), 199.25(d) (West Supp. 1989) (physicians can disclose AIDS test results to the spouse or person the physician reasonably believes to be the spouse of the patient without being civilly or criminally liable), 199.21(f) (West Supp. 1989) (the results of AIDS tests may not be used for the determination of insurability or suitability for employment).

22. *Id.* § 199.45(a)-(b) (West Supp. 1989).

23. *Id.* § 199.45(c) (West Supp. 1989).

24. *Id.* (West Supp. 1989). The legislature intends to provide compensation to any person who is injured by the use of a vaccine. *Id.* § 199.47 (West Supp. 1989). The legislature has mandated strict products liability for all vaccine-caused damages, and has established an AIDS Vaccine Victims Compensation Fund. *Id.* §§ 199.49, 199.50. (West Supp. 1989). In establishing

developed.[25] Therefore, the mandatory AIDS testing legislation discussed in this note may be viewed as an alternative method to controlling the spread of AIDS.[26]

B. Senate Bill 2643

1. Requests for Testing by Crime Victims

Section 199.22 of the California Health and Safety Code prevents anyone from testing any person's blood for AIDS without that person's written consent.[27] S.B. 2643 makes an exception to section 199.22 by allowing crime victims to request the court to order the defendant charged with the crime tested for the AIDS virus.[28] Under S.B. 2643, the court may issue a search warrant ordering the testing of the defendant's blood if the court finds probable cause to believe that the accused committed the offense[29] and probable cause to believe that blood, semen, or any bodily fluid capable of transmitting the AIDS virus has been transferred from the defendant to the victim.[30]

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the AIDS Vaccine Research and Development Grant Program to facilitate the development of a vaccine, the legislature stated that the long term solution to the elimination of AIDS lies in conducting vaccine research. *Id.* §§ 199.55, 199.56 (West Supp. 1989).

25. KOOP, *supra* note 1, at 10.

26. *See infra* notes 27-77 and accompanying text.

27. CAL. HEALTH & SAFETY CODE § 199.22(a) (West Supp. 1989).

28. 1988 Cal. Stat. ch. 1088, sec. 1.5, at ____ (codifying S.B. 2643 and enacting CAL. PENAL CODE § 1524.1(b)(1)). The prosecutor must inform the victim of their right to make this request. *Id.* (enacting CAL. PENAL CODE § 1524.1(c)(1)). The local health officer may disclose test results to the victim and the accused, but if the test is positive, no disclosure will be made without offering or providing counseling. *Id.* (enacting CAL. PENAL CODE § 1524.1(g)). The victim may disclose the test results if necessary to protect the health of the victim's family or sexual partners. *Id.* (enacting CAL. PENAL CODE § 1524.1(i)).

29. S.B. 2643 does not specify which offenses committed allow the victim to request testing. 1988 Cal. Stat. ch. 1088 sec. 1.5, at ____ (codifying S.B. 2643 and enacting CAL. PENAL CODE § 1524.1(b)(1)). However, since testing may only be ordered upon a finding of probable cause that blood, semen, or any bodily fluid capable of transmitting the AIDS virus was transferred from the defendant to the victim, then the legislature intended that the offense charged involve some type of physical force or violence. *Id.*

30. *See id.* The local health officer must arrange for the administration of all AIDS tests. *Id.* (enacting CAL. PENAL CODE § 1524.1(f)). Positive test results will not be disclosed to the victim or accused unless confirmed by appropriate confirmatory tests. *Id.* The first AIDS test usually administered is the Enzyme-Linked Immunosorbent Assay (ELISA), which detects the presence of AIDS antibodies in the blood. U.S. PUBLIC HEALTH SERVICE CENTERS FOR DISEASE CONTROL, *What About AIDS Testing?* in AMERICA RESPONDS TO AIDS 2-3 (1988). If the blood shows a positive reaction to the ELISA test, a second test is needed. *Id.* The second test given will either be a Western Blot or IFA, and will confirm the results of the ELISA test. *Id. See also* Clifford & Iuculano, *AIDS and Insurance: The Rationale for AIDS-Related Testing*, 100 HARV. L. REV. 1806, 1812 (1987) (an AIDS testing series consisting of two ELISA tests followed by the Western Blot test is considered 99.9% accurate).

Before issuing the search warrant, the court must conduct a hearing at which both the defendant and the victim may be present to support or contest issuance of the search warrant.[31] This hearing must be conducted after the preliminary hearing is concluded if a preliminary hearing is required.[32] The results of this AIDS test must not be used in any criminal proceeding as evidence of either guilt or innocence.[33] To assist the victim in deciding whether to request testing, the victim will be referred to pretest counseling.[34]

2. *Legislative Development of S.B. 2643*

The legislature's primary intent in enacting S.B. 2643 is to inform certain crime victims whether they are at risk of contracting the AIDS virus.[35] Although the purpose behind S.B. 2643 has remained the same while the bill underwent several important legislative changes, the probable cause standards for issuance of a search warrant for testing a defendant became more stringent as the bill was amended.[36] For instance, in the first five versions of the bill, a search warrant could have been issued upon a finding of probable cause that bodily fluids had been transferred between the defendant and the victim.[37] In the final version of the bill, the legislature added the additional requirement that there be probable cause that the defendant committed the crime.[38] In the final version, the legislature also prevented the prosecution from using the results of the tests as criminal evidence

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31. 1988 Cal. Stat. ch. 1088, sec. 1.5, at ____ (codifying S.B. 2643 and enacting CAL. PENAL CODE § 1524.1(b)(2)). Only affidavits, counteraffidavits, and medical records are admissible at the hearing to support or rebut the issuance of a search warrant. *Id.*

32. *See id. See also* CAL. PENAL CODE § 859(b) (Deering 1983) (a person charged with a felony is entitled to a preliminary examination within 10 days of arraignment).

33. 1988 Cal. Stat. ch. 1088 sec. 1.5, at ____ (codifying S.B. 2643 and enacting CAL. PENAL CODE § 1524.1(k)).

34. *Id.* (enacting CAL. PENAL CODE § 1524.1(c)(1)).

35. *Id.* (enacting CAL. PENAL CODE § 1524.1(a)).

36. *Compare* S.B. 2643, 1987-88 Cal. Leg. Reg. Sess. (as amended Apr. 4, 1988) *with* S.B. 2643, 1987-88 Cal. Leg. Reg. Sess. (as amended Apr. 20, 1988); S.B. 2643, 1987-88 Cal. Leg. Reg. Sess. (as amended May 5, 1988); S.B. 2643, 1987-88 Cal. Leg. Reg. Sess. (as amended June 21, 1988); *and* S.B. 2643, 1987-88 Cal. Leg. Reg. Sess. (as amended Aug. 2, 1988).

37. *Compare* S.B. 2643, 1987-88 Cal. Leg. Reg. Sess. (as amended Feb. 19, 1988) *with* S.B. 2643, 1987-88 Cal. Leg. Reg. Sess. (as amended Apr. 4, 1988); S.B. 2643, 1987-88 Cal. Leg. Reg. Sess. (as amended Apr. 20, 1988); S.B. 2643, 1987-88 Cal. Leg. Reg. Sess. (as amended May 5, 1988); *and* S.B. 2643, 1987-88 Cal. Leg. Reg. Sess. (as amended June 21, 1988).

38. S.B. 2643, 1987-88 Cal. Leg. Reg. Sess. (as amended Aug. 2, 1988).

of guilt or innocence.[39] And later versions ofthe bill greatly emphasized pretest counseling for the victim.[40] Ultimately the bill passed both the Assembly and the Senate unanimously.[41]

C. *Proposition 96*

1. *Request For AIDS Testing by Emergency Personnel and Victims of Sex Crimes*

Proposition 96 is similar to S.B. 2643 in allowing compulsory AIDS testing without written consent.[42] However, Proposition 96 differs from S.B. 2643 because it allows only victims of certain sex crimes to request AIDS testing of the person charged with the sex crime.[43] Proposition 96 allows victims of rape, statutory rape, sodomy, forcible oral copulation, and various other sex crimes[44] to request the court to test the defendant charged with the crime for the AIDS virus and other communicable disease that may be transmitted through the exchange of bodily fluids.[45] Proposition 96 also allows peace officers, firefighters, and emergency personnel to request the court to test any defendant for AIDS and other communicable diseases.[46] However, only defendants charged with interfering with a peace officer, firefighter or emergency personnel's official duties by biting, scratching, spitting or transferring blood or other bodily fluids may be tested.[47] If the court finds probable cause to believe a possible

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39. *Id.*

40. *Compare* S.B. 2643, 1987-88 Cal. Leg. Reg. Sess. (as amended Apr. 4, 1988) *with* S.B. 2643, 1987-88 Cal. Leg. Reg. Sess. (as amended Apr. 20, 1988), *and* S.B. 2643, 1987-88 Cal. Leg. Reg. Sess. (as amended June 21, 1988). Later amended versions include the use of confirmatory tests on any positive test result. *See e.g.*, S.B. 2643, 1987-88 Cal. Leg. Reg. Sess. (as amended June 21, 1988).

41. SENATE RECESS HISTORY, 1987-88 Cal. Leg. Reg. Sess., Oct. 5, 1988 at 1016.

42. *See supra* notes 27-41 and accompanying text (previous discussion of S.B. 2643). *Compare infra* notes 42-58 and accompanying text (discussion of Proposition 96).

43. 1988 Cal. Stat. prop. 96, sec. 1, at ____ (enacting CAL. HEALTH & SAFETY CODE § 199.96).

44. *See* CAL. PENAL CODE §§ 261 (definition of rape), 261.5 (definition of statutory rape), 262 (definition of rape of a spouse), 266b (definition of abduction to live in an illicit relationship), 266c (definition of rape with a foreign object), 286 (definition of sodomy), 288 (definition of lewd or lascivious acts with a child under 14), and 288a (definition of oral copulation) (West 1988).

45. 1988 Cal. Stat. prop. 96, sec. 1, at ____ (enacting CAL. HEALTH & SAFETY CODE § 199.96).

46. *Id.* (enacting CAL. HEALTH & SAFETY CODE § 199.97).

47. *Id.*

transfer of bodily fluid[48] between defendant and victim has occurred, the defendant will be ordered to provide a blood specimen.[49] Test results are not admissible evidence in any criminal or juvenile proceeding.[50] Proposition 96 makes no provisions for prerequest counseling of the victim of a sex crime or any personnel permitted to request testing under the initiative.[51]

2. *Development of Proposition 96*

The original proponent of Proposition 96 is Sherman Block, the Los Angeles County Sheriff.[52] According to Sheriff Block, the initiative was designed to safeguard crime victims and public safety personnel by making available information regarding risks to their health and relieving them of fear of infection from all communicable diseases including AIDS.[53]

The lengthy process the proponent of an initiative must go through to qualify for the ballot caused the similarity between S.B. 2643 and Proposition 96.[54] To qualify for the November 1988 election, the final version of Proposition 96 had to be filed with the county clerk or registrar of voters not later than 131 days (June 30, 1988) before the state-wide election.[55] Before this date the initiative had to meet individualized deadlines for securing and verifying signatures.[56] As

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48. The bodily fluids as specified in the legislation are blood, saliva, semen or other bodily fluids. *Id.*

49. *Id.* Copies of the test results will be sent to the victim, the accused, the officer in charge if defendant is incarcerated, and the chief medical officer where defendant is incarcerated. *Id.* Proposition 96 also allows medical personnel in prisons, jails and similar facilities who receive any information that an inmate at a facility has been exposed or is infected with the AIDS virus to disclose such information to the officer in charge. *Id.* (enacting CAL. HEALTH & SAFETY CODE § 199.99). The court will order testing under the same standard as that for sex offenders. *Id.* (enacting CAL. HEALTH & SAFETY CODE § 199.97).

50. *Id.* (enacting CAL. HEALTH & SAFETY CODE § 199.98).

51. *Id.* (enacting CAL. HEALTH & SAFETY CODE §§ 199.95, 199.96, 199.97, 199.98, 199.99).

52. *See* Telephone conversation with Sheriff Sherman Block, March 15, 1989 (notes on file at the *Pacific Law Journal*).

53. See *id.* Before proposing Proposition 96 Sheriff Sherman Block, together with State Senator Ed Davis, tried to gain passage of S.B. 1158, which allowed persons formally charged with sexual assault to be tested for sexually transmitted diseases, including AIDS. Telephone conversation with Sheriff Sherman Block, March 14, 1989 (notes on file at the *Pacific Law Journal*). The victim of the sexual assault would be informed of the results of the defendant's blood test. *Id.* According to Sheriff Block, S.B. 1158's opponents would not agree to approve the bill if testing for AIDS was included in the legislation. *Id.* Following the defeat of S.B. 1158 in 1987, Sheriff Block introduced Proposition 96. *Id. See also* 1988 Cal. Stat. prop. 96, sec. 1, at ____, (enacting CAL. HEALTH & SAFETY CODE § 199.95) (intent of Proposition 96).

54. CAL. CONST. art. II, § 8 (definition and procedure for ballot initiatives) (West 1983).

55. *Id.* § 8(c).

56. CAL. ELEC. CODE § 3513 (West 1977).

of June 30, 1988, S.B. 2643 had not yet been enacted into law.[57] Therefore, at the time Proposition 96 was formally placed on the ballot for the November election, it was unclear whether S.B. 2643 would be enacted by the legislature.[58]

D. Senate Bill 1007

1. Testing Prostitutes and Sex Offenders

Senate Bill 1007 requires that persons convicted of prostitution[59] and various sex offenses[60] submit to an AIDS test.[61] Prostitutes convicted for the first time will, as a condition of probation and before being sentenced, also be ordered to attend an AIDS education program.[62] On a second or subsequent conviction for prostitution, the prostitute will be ordered to submit to a second AIDS test.[63] If the prostitute has tested positive for AIDS on a prior conviction and is subsequently convicted of prostitution again, the prostitute will be guilty of a felony.[64] Sex offenders who subsequently commit another

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57. *See* SENATE RECESS HISTORY, 1987-88 Reg. Sess., Oct. 5, 1988, at 1016 (approved by the Governor September 20, 1988 and filed with the Secretary of State September 21, 1988).

58. Sheriff Block also stated that S.B. 2643 suffers from two important defects. Telephone conversation with Sheriff Sherman Block, March 14, 1989 (notes on file at the *Pacific Law Journal*). First, S.B. 2643 only allows testing for AIDS, but excludes other communicable diseases that may be transmitted through an exchange of bodily fluids. *Id.* Second, S.B. 2643 only allows a judge to issue a search warrant authorizing AIDS testing of the defendant after the preliminary hearing is concluded. *Id.* According to Sheriff Block, these two aspects of S.B. 2643 jeopardize a crime victim's health and mental well being. *Id.* Therefore, it is unlikely that Sheriff Block and other supporters of Proposition 96 would have withdrawn the initiative from the ballot even if S.B. 2643 had been enacted into law before the final deadline for submission of Proposition 96. *Id.*

59. CAL. PENAL CODE § 647(b) (West Supp. 1989) (anyone who solicits, agrees to engage in, or engages in any act of prostitution is guilty of a misdemeanor).

60. *Id.* §§ 261 (definition of rape), 261.5 (definition of statutory rape), 262 (definition of rape of a spouse), 286 (definition of sodomy), and 288a (definition of oral copulation) (West 1988).

61. 1988 Cal. Stat. ch. 1597 secs. 1-2, at ____ (codifying S.B. 1007 and enacting CAL. PENAL CODE §§ 647f, 1202.1). Each person tested will be informed of the test results. *Id. See generally*, 1987 PAC. L.J. REV. NEV. LEGIS. 142, 142-43 (prostitutes arrested for engaging in prostitution outside a registered house must submit to an AIDS test).

62. 1988 Cal. Stat. ch. 1597, sec. 3, at ____ (codifying S.B. 1007 and enacting CAL. PENAL CODE § 1202.6(a)).

63. 1988 Cal. Stat. ch. 1007, sec. 3, at ____ (codifying S.B. 1007 and enacting CAL. PENAL CODE § 1202.6(b)).

64. *Id.* (enacting CAL. PENAL CODE § 647(f)). The county probation officer, in consultation with the county health officer, will establish procedures for the testing of every defendant, and will furnish written test results to: (1) the court in which defendant is to be sentenced; (2) the county health officer; and (3) the State Department of Health Services. *Id.* (enacting CAL. PENAL CODE § 1202.6(e)).

sex offense with the knowledge that they have AIDS or carry the AIDS antibody will receive a three-year sentence enhancement for each violation in addition to the sentence imposed for the crime.[65]

2. *Legislative Development of S.B. 1007*

S.B. 1007 allows AIDS testing of prostitutes and sex offenders to determine whether the prostitute or sex offender has AIDS and to

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65. *See id.* (enacting CAL. PENAL CODE § 12022.85). The prosecutor may use previous AIDS test results as proof of knowledge. *Id.* § 12022.85(c). *See* 1988 Cal. Stat. ch. 1579 sec. 2, at ____ (codifying S.B. 1913 and enacting CAL. HEALTH & SAFETY CODE § 199.222 and CAL. PENAL CODE §§ 7500-7553). Senate Bill 1913 allows law enforcement personnel and inmates who believe they have come into contact with certain bodily fluids of an inmate in a correctional institution, or person in custody, whether or not charged with a crime, to report the incident and request AIDS testing of that inmate. *Id.* (enacting CAL. HEALTH & SAFETY CODE § 7510(a)). The chief medical officer (CMO) of the facility has discretion to test any inmate if the CMO concludes the inmate exhibits clinical symptoms of AIDS. *Id.* (enacting CAL HEALTH & SAFETY CODE §§ 7511(a), 7512.5). Any inmate who initially refused testing while in jail, custody or on probation may suffer revocation of his release, probation or sentence. *Id.* (enacting CAL. HEALTH & SAFETY CODE § 7519(a)). Refusal by a parolee or probationer to submit to a test may be a parole or probation violation. *Id.* (enacting CAL. HEALTH & SAFETY CODE § 7519(b)). The legislature, in enacting S.B. 1913, intends to prevent the spread of AIDS within correctional institutions and to protect inmates, law enforcement personnel, and custodial staff from the AIDS infection. *Id.* (enacting CAL. HEALTH & SAFETY CODE § 7500(b),(c)). The legislature believes testing is necessary because of the high number of violent acts that occur in correctional institutions, as well as the danger of the rapid spread of AIDS within the close confines of a jail or prison. *Id.* Furthermore, the legislature intends to protect the public from the spread of AIDS through contact with a released prisoner who may be infected with AIDS. *Id.* The legislature also believes that AIDS testing of prisoners would provide necessary information for effective disease control within jails and prisons. *Id.* (enacting CAL. HEALTH & SAFETY CODE § 7500(f)). Since inmates may be criminally punished for failing to submit to testing, a search and seizure of an inmate's blood may be perceived as a search for criminal evidence. *Id.* (enacting CAL. HEALTH & SAFETY CODE § 7519(b)). This search may not survive constitutional scrutiny because the search does not require probable cause for discovering evidence of AIDS in an inmate's blood, and the presence of the AIDS virus in an inmate's blood is not a crime. *Id.* (enacting CAL. HEALTH & SAFETY CODE § 7510(a)). *See* Robinson v. California, 370 U.S. 661 (1962) (a law which makes affliction with a disease a criminal offense when the defendant has committed no crimes while afflicted is cruel and unusual punishment in violation of the eighth amendment). A search may be deemed an administrative search if the government's interest in protecting the health and welfare of society outweighs an inmate's privacy interest in his blood. Camara v. Municipal Court, 387 U.S. 523 (1967). *See also* Hudson v. Palmer, 468 U.S. 517 (1984) (prisoner has no reasonable expectation of privacy in his cell); Bell v. Wolfish, 441 U.S. 520 (1979) (a body cavity search in prison does not violate an inmate's fourth amendment rights against unreasonable searches and seizures); Peranzo v. Coughlin, 608 F. Supp. 1504 (S.D. N.Y. 1985) (reliability of drug tests as a basis for imposing disciplinary sanctions against inmates). *But see* Lareau v. Manson, 651 F.2d 96 (2nd Cir. 1981) (prisoners requested testing of all inmates for communicable disease in order to protect their own health in an over-crowded prison). *See generally*, Closen, *AIDS: Testing Democracy-Irrational Responses to the Public Health Crisis and the Need for Privacy in Serologic Testing*, 19 J. MARSHALL L. REV. 835, 912 (1986) (testing for AIDS in prisons); Moss, *AIDS in Prison-To Test or Not?*, A.B.A.J., Jan. 1989 at 17 (inmates of state prisons take both sides of dispute over mandatory AIDS testing in prison); Robinson-Haynes, *A Prison within a Prison*, The Sacramento Bee, Feb. 19, 1989, at A1, A16, col. 1 (segregation of inmates infected with AIDS in California prisons).

make the result of a positive AIDS test part of this person's criminal record.[66] A positive AIDS test may be used for sentence enhancement in the event of a subsequent criminal conviction for the same offense.[67] Testing is also used to inform the person of the results of the test and the consequences of a subsequent conviction for prostitution or a sex crime.[68] The initial version of Senate Bill 1007 dealt strictly with prostitutes.[69] In the second amended version, the requirement for testing sex offenders was added, but no sentence enhancement for committing a subsequent offense with knowledge of a positive AIDS test was imposed.[70]

The most major changes were made in the third amended version when the bill was revived over one year later.[71] The third amended version provided that prostitutes arrested for their first offense are to be tested and ordered to attend an AIDS education program as a condition of sentencing or probation.[72] The third amended version also provided for the second AIDS test on a subsequent arrest.[73] It also included the sentence enhancement provision for sex offenders[74] and provided for pretest and posttest counseling for both the victim and the offender.[75] Further, the third amended version required the county health officer to develop an AIDS education program if none is operating in the county.[76] S.B. 1007 passed through the Senate by a vote of 26 to 2 and the Assembly by unanimous vote.[77]

II. Constitutional Implications of Mandatory Aids Testing

The discussion of California's mandatory AIDS testing legislation in this note is limited to federal and state interpretation of the

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66. 1988 Cal. Stat. ch. 1597, sec. 2, 3 at ____ (codifying S.B. 1007 and enacting Cal. Penal Code §§ 1202.1(a), 1202.6(b), (c)).
67. *Id.* (enacting Cal. Penal Code §§ 647f, 12022.85(a)).
68. *Id.* (enacting Cal. Penal Code §§ 1202.6(c), 647f).
69. S.B. 1007, 1987-88 Cal. Leg. Reg. Sess., (as amended March 4, 1988).
70. S.B. 1007, 1987-88 Cal. Leg. Reg. Sess., (as amended May 4, 1988).
71. S.B. 1007, 1987-88 Cal. Leg. Reg. Sess., (as amended June 20, 1988).
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. Senate Recess History, 1987-88 Reg. Sess., Oct. 5, 1988, at 299. *See generally*, Governor's Veto Message, Assembly Bill 2319 (Sept. 30, 1988), in Assembly Daily Journal, 1987-88 Reg. Sess., Sept. 30, 1988, at ____ (the Governor vetoed S.B. 2319, which required testing of prostitutes, because it provided an option for making a subsequent act of prostitution with a positive AIDS test result a misdemeanor or a felony).

constitutional issues raised by a person's right under the fourth amendment to be free from unreasonable searches and seizures.[78] This note does not address the potential challenges to the AIDS legislation under the express right to privacy found in Article I, section 19 of the California Constitution.[79]

A. *Searches Under the Fourth Amendment*

The fourth amendment to the United States Constitution protects people against unreasonable searches and seizures by the government.[80] The United States Supreme Court in *United States v. Katz*[81] defined a "search" under the fourth amendment.[82] Before government action will constitute a search under the fourth amendment, a person must exhibit a subjective expectation of privacy in the thing being searched.[83] In addition, the expectation of privacy in the thing being searched must be reasonable and recognized by society.[84] Only when these two criteria are met does the government action in question constitute a search under the fourth amendment.[85] The United States Supreme Court in *Schmerber v. California*[86] held that a compulsory blood test by the government constitutes a search under the fourth amendment.[87]

A search of the human body for information found in a person's blood can be for criminal or administrative purposes. A criminal search involves bodily intrusion for the purpose of securing evidence to be used in a criminal proceeding.[88] An administrative search involves government intrusion into the home, business, or body to obtain information used to regulate public health or the condition of a person's home or business.[89] Intrusions of this type are conducted

78. *See* U.S. CONST. amend. IV. ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."). *See also* CAL. CONST. art. I, § 13 (incorporation of the fourth amendment into the California Constitution).
79. CAL. CONST. art. I, § 19.
80. *See* U.S. CONST. amend. IV. *See also* CAL. CONST. art. I, § 13.
81. 389 U.S. 347 (1967).
82. *Id.* at 361 (Harlan, J., concurring).
83. *Id.*
84. *Id.*
85. *Id.*
86. 384 U.S. 757 (1966).
87. *Id.*
88. *Schmerber*, 384 U.S. at 757.
89. *See* Camara v. Municipal Court, 387 U.S. 523 (1966); New York v. Burger, 107 S. Ct. 2636 (1987); O'Connor v. Ortega, 480 U.S. 709 (1987).

for purposes such as maintaining adequate safety standards in homes,[90] monitoring business practices,[91] monitoring employees of government agencies or departments,[92] or protecting the public from the spread of contagious disease.[93]

Searches under the fourth amendment are unlawful only if unreasonable.[94] The reasonableness of the search is determined by balancing the intrusion against the government interest in performing the search.[95] A criminal search conducted pursuant to a warrant supported by probable cause is usually considered reasonable.[96] However, the reasonableness of an administrative search has been judged by much different standards from those for criminal searches.[97] For example, the United States Supreme Court has held that the warrant and probable cause requirements are unnecessary for certain administrative searches.[98] Consequently, the standard by which to determine the reasonableness of a search of a person's blood will depend on whether the search is conducted for criminal or administrative purposes.

1. Federal Standards Governing Criminal Searches

In *Schmerber v. California*, the United States Supreme Court upheld a warrantless blood alcohol test of a defendant incident to

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90. *Camara*, 387 U.S. at 526-27 (search by state health department inspector for housing code violations).

91. *Burger*, 107 S. Ct. at 2640 (warrantless search by police of auto dismantling yard).

92. National Treasury Employees' Union v. Von Raab, 57 U.S.L.W. 4338 (1989) (drug testing by urinalysis of certain customs employees).

93. *In re* Clemente, 61 Cal. App. 666, 666-67, 215 P. 698, 698-99 (venereal disease testing of the proprietor of a house of prostitution).

94. U.S. CONST. amend. IV.

95. *Camara*, 387 U.S. at 534.

96. Skinner v. Railway Labor Executives' Ass'n, 57 U.S.L.W. 4324, 4328 (1989). *See also* U.S. CONST. amend. IV ("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"), Illinois v. Gates, 462 U.S. 213, 238 (1983) (probable cause is a practical, common-sense decision by a magistrate that, given all the circumstances, there is a fair probability that evidence of a crime will be found in a particular place). *But see* People v. Scott, 21 Cal. 3d 284, 293, 578 P.2d 123, 127, 128, 145 Cal. Rptr. 876, 880 (1978) (when a criminal search warrant authorizing bodily intrusion is sought, in addition to finding probable cause, the court must apply an additional balancing test to determine whether the character of the search is appropriate).

97. *See infra* notes 123-97 and accompanying text (discussion of federal and state cases establishing fourth amendment standards for administrative searches).

98. *Burger*, 107 S. Ct. 2636, 2643. *See also* O'Connor v. Ortega, 480 U.S. 709, 725 (1987) (probable cause requirement is impracticable for legitimate work-related, non-investigatory intrusions).

his arrest for drunk driving.[99] The Court stated that the blood test was not unreasonable because the evidence (alcohol) would have dissipated from the defendant's blood before a search warrant could have been obtained.[100] Barring the particular emergency in this case, the Court stated that intrusions into the human body are subject to the same standards as those for obtaining a criminal search warrant for a dwelling.[101]

In *Winston v. Lee*,[102] the United States Supreme Court denied the government's motion for an order directing a defendant charged with armed robbery to undergo surgical removal of a bullet.[103] Petitioner, the Commonwealth of Virginia, asserted that the bullet provided strong evidence of the defendant's guilt.[104] The Court stated that the surgical removal of the bullet constituted a search under the fourth amendment.[105] In determining the reasonableness of the proposed search, the Court stated that probable cause and warrants were merely threshold requirements, and that additionally the individual's interest in privacy and security must be balanced against the government's interest in obtaining the evidence.[106] The Court stated that the government interest in obtaining the bullet did not outweigh the defendant's privacy interest in his body for three reasons.[107] First, the surgery was potentially dangerous to the defendant.[108] Second, surgical removal of a bullet was much more severe than the blood alcohol test administered in *Schmerber*.[109] Third, the government had substantial additional evidence on which to convict the defendant.[110] Therefore, the search of the defendant's body was unreasonable.[111]

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99. Schmerber v. California, 384 U.S. 757, 772 (1966).

100. *See id.* at 770, 771. *See also* People v. Hawkins, 6 Cal. 3d 757, 761-762, 493 P.2d 1145, 1150-51, 100 Cal. Rptr. 281, 286-87 (1972) (warrantless blood alcohol test of defendant may only be administered as a search incident to arrest).

101. *See Schmerber*, 384 U.S. at 770 (intrusions into the human body are forbidden on the mere chance that desired evidence may be obtained). *See also* People v. Scott, 21 Cal. 3d 284, 292, 578 P.2d 123, 126, 145 Cal. Rptr. 876, 879 (1978) (quoting People v. Bracamonte, 15 Cal. 3d 394, 401-403, 540 P.2d 624, 630-31, 124 Cal. Rptr. 528, 534-35 (1975)) (a clear indication that criminal evidence will be found in a bodily intrusion required more than probable cause to believe the search would produce the evidence); CAL. PENAL CODE § 1525 (requirements for search warrant).

102. 470 U.S. 753 (1985).

103. *Id.* at 767.

104. *Id.* at 765.

105. *Id.* at 759.

106. *Id.* at 763.

107. *Id.* at 761-66.

108. *Id.* at 765.

109. *Id.* at 766.

110. *Id.* at 765-66.

111. *Id.* at 767.

2. *State Interpretation of Criminal Searches*

In *People v. Scott*[112], the California Supreme Court expanded fourth amendment protection beyond the federal standards set forth in *Schmerber*.[113] In *Scott*, the court struck down a trial court order for a physical examination of a defendant charged with child molestation as a violation of the fourth amendment.[114] The defendant was ordered to undergo testing for trichomoniasis after tests on the victim revealed she was infected with the disease.[115] The court stated that circumstances permitting intrusions into the body must be particularly limited because they may easily violate principles of dignity and privacy that the fourth amendment protects.[116] Therefore, the court held that when a criminal search warrant authorizing bodily intrusion is sought, the court must impose a balancing test to determine whether the character of the search is appropriate in addition to finding probable cause to believe the search will reveal evidence.[117] Factors to be considered in the balancing test include the reliability of the method employed, the seriousness of the suspected criminal offense, the probability that the evidence will be found, the importance of the evidence, and the availability of a less intrusive means to obtain the evidence.[118] These factors must be balanced against the severity of the intrusion upon the person.[119] Consequently, an intrusion into the body may be unreasonable even when conducted pursuant to a

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112. 21 Cal. 3d 284, 578 P.2d 123, 145 Cal. Rptr. 876 (1978).

113. *Id.* The United States Constitution guarantees a minimum level of protection for all citizens. However, states are free to go beyond this minimum level of protection. For example, in People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975), the California Supreme Court refused to follow the United States Supreme Court's interpretation of the fourth amendment in United States v. Robinson, 414 U.S. 218 (1973), in which a full body search incident to arrest was upheld. *Brisendine*, 13 Cal. 3d at 551, 554, 531 P.2d at 1114, 1116, 119 Cal. Rptr. at 330, 332. Instead, the court interpreted California's virtually identical state constitutional guarantee to permit only a "patdown" search for weapons in similar circumstances. *Id.* at 546. *See also In re* Lance W., 37 Cal. 3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (1975) (holding that article I, section 28(d) of the California Constitution (Victim's Bill of Rights) abrogated independent state court exclusionary rules as a remedy for violations of the fourth amendment.

114. *Scott*, 21 Cal. 3d 284, 296, 578 P.2d 123, 129, 145 Cal. Rptr. 876, 882.

115. *Id.* at 289, 578 P.2d at 125, 145 Cal. Rptr. at 878.

116. *Id.* at 293, 578 P.2d at 127, 145 Cal. Rptr. at 880.

117. *Id.*

118. *Id.*

119. *Id.*

warrant if the requested examination is overly intrusive, prolonged, or unsafe.[120]

Accordingly, if compulsory AIDS testing is considered a criminal search, then the government must obtain a criminal search warrant supported by probable cause that the evidence will be found in the person's blood unless exigent circumstances exist precluding the issuance of a warrant.[121] Also, because AIDS testing involves an intrusion into the human body to obtain a blood sample, the *Scott* balancing test must be applied to determine whether the search is necessary and appropriate.[122]

3. *Federal Standards Governing Administrative Searches*

Administrative searches involving government invasion of private property and bodily intrusion are subject to less stringent fourth amendment standards than criminal searches.[123] Administrative searches are different from criminal searches because their purpose is regulatory rather than to obtain criminal evidence.[124] Because of this difference, courts have interpreted the administrative or legislative regulations under which an administrative search is conducted to be an adequate substitute for probable cause.[125] The reasonableness of an administrative search is therefore determined not by probable cause, but instead by balancing the government's interest in searching as evidenced by the legislative or administrative scheme against the intrusion imposed upon the party being searched.[126] For example, in *Camara v. Municipal Court*,[127] the United States Supreme Court overturned an individual's criminal conviction for failure to allow state health inspectors to search his home for housing code violations without a warrant.[128] The Court stated that warrantless administrative inspections are a search under the fourth amendment because individuals have an interest in limiting the circumstances in which the

120. *Id.* at 294, 578 P.2d at 127, 145 Cal. Rptr. at 880.
121. *See supra* notes 99-122 and accompanying text (previous discussion of fourth amendment standards applicable to criminal searches).
122. *Id.*
123. *See infra* notes 127-97 and accompanying text.
124. Camara v. Municipal Court, 387 U.S. 523, 535 (1967).
125. *Id.* at 538.
126. *Id.* at 539.
127. 387 U.S. 523 (1967).
128. *Id.*

government may enter their homes.[129] Also, these individuals are subject to criminal punishment for refusing to permit the inspection.[130] The Court further stated that searches for administrative purposes are reasonable only if conducted pursuant to a warrant.[131] A warrant provides a way to verify the need for and scope of the search.[132] However, the Court stated that a warrant supported by probable cause in the criminal sense is not applicable to administrative searches.[133] The Court held that probable cause exists for an administrative warrant if there is a valid public interest in conducting the search.[134] This interest must be evidenced by legislative or administrative standards governing the inspection.[135] These standards may be based on the condition of the entire surrounding area, the passage of time, or the nature of the place to be inspected, but not necessarily on knowledge of the condition of the individual dwelling.[136] The government interest will then be balanced against the competing private interests to determine whether the government interest is reasonable.[137] If a valid public concern justifies the intrusion, there is "probable cause" to conduct the search.[138]

In 1987, the United States Supreme Court in *New York v. Burger*[139] extended the scope of administrative searches by upholding inspection by police of an auto dismantling yard without a warrant, notice, individual suspicion of wrongdoing, or probable cause.[140] The Court stated that when the privacy interests of the business owner are lowered because the industry is closely regulated, and the government interests are heightened,[141] a warrantless search may be reasonable if three criteria are met.[142] First, there must be a substantial government interest in the regulatory scheme pursuant to which the inspection is made.[143] Second, the warrantless inspection must be necessary to

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129. *Id.* at 531.
130. *Id.*
131. *Id.* at 532.
132. *Id.* at 532.
133. *Id.* at 538.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 539.
138. *Id.*
139. 107 S. Ct. 2636 (1987).
140. *Id.* at 2652.
141. The state has a substantial interest in regulating the vehicle dismantling industry because of the high incidence of auto theft associated with the industry. *Id.* at 2643.
142. *Id.* at 2644.
143. *Id.*

further the regulatory scheme.[144] Third, the regulatory statute must perform three basic functions of the warrant: advise the owner that the search is being made pursuant to the law;[145] apprise the owner that his property will be subject to periodic inspection for specific purposes;[146] and finally, limit the search in time, place, and scope.[147]

The police, however, when conducting the administrative search, may also uncover evidence of crime.[148] In addressing this issue, the Court stated that a state may address a major social problem both administratively and through penal sanctions.[149] A regulatory scheme, if properly administrated, is not illegal because police may arrest or seize evidence of crime while inspecting.[150]

In *O'Connor v. Ortega*,[151] the United States Supreme Court expanded the scope of administrative searches by public employers by upholding a state hospital official's search of a physician's office.[152] Hospital supervisors searched the physician's office while he was on administrative leave and seized personal items that were used in an administrative proceeding that resulted in the physician's discharge.[153] The Court classified the search as administrative because the public employer (the hospital) searched only for work-related reasons, not to enforce any criminal law or to retrieve criminal evidence.[154] In concluding that the physician had a reasonable expectation of privacy in his desk and file cabinets, and that the hospital's actions were thus a search under the fourth amendment, the Court remanded the case for a determination of whether the search was reasonable.[155] The Court stated that deciding the reasonableness of the search required balancing the employee's legitimate expectation of privacy against the government's need for supervision, control, and efficient operation of the work place.[156] The Court also stated that a standard of probable cause is not appropriate in administrative searches by public employers because the burden imposed by the probable cause

144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 2651.
149. *Id.*
150. *Id.*
151. 480 U.S. 709 (1987).
152. *Id.*
153. *Id.* at 713.
154. *Id.* at 722-23.
155. *Id.* at 719, 729.
156. *Id.* at 725.

requirement would hamper the effectiveness and efficient operation of the workplace.[157] Instead, the Court stated that a standard of reasonableness in all the circumstances was correct.[158]

The United States Supreme Court has recently expanded the scope of administrative searches to allow drug testing of public employees.[159] In *Railway Labor Executives' Association v. Burnley,*[160] the Supreme Court reversed the Ninth Circuit Court of Appeals' decision which struck down the Federal Railroad Administration's regulations mandating warrantless blood and urine tests of railroad employees for drugs after certain train accidents, fatal incidents, and rule violations.[161] After deciding that the blood and urine tests as conducted by the railroad constituted a search under the fourth amendment, the Court concluded that the drug tests were reasonable despite the lack of requirements for a warrant or probable cause that particular individuals were impaired.[162] The Court stated that the railroad's interest in ensuring the overall safety of the railroad by regulating the conduct of employees who engaged in safety oriented tasks constituted "special needs" that justified abandonment of the usual warrant and probable cause requirements.[163] Specifically, the Court stated that a warrant or individualized suspicion requirement would serve no purpose because the industry regulations are defined so specifically that there would be virtually nothing for an neutral magistrate to evaluate.[164] Also, the employee's expectations of privacy are lowered because the railroad industry is already highly regulated.[165] Finally, the warrant and individualized suspicion requirements would unduly burden the railroad, hindering the objectives of the testing program.[166] The Court held that the strong government interest in maintaining safe railroads, coupled with documented past

157. *Id.*
158. *Id.*
159. Skinner v. Railway Labor Executives' Ass'n, 57 U.S.L.W. 4324 (1989), National Treasury Employees Union v. Von Raab, 57 U.S.L.W. 4338 (1989).
160. 57 U.S.L.W. 4324 (1989).
161. *Id.* at 4332.
162. *Id.* at 4328-32.
163. *Id.* at 4330-32.
164. *Id.* at 4329.
165. *Id.* at 4330-31.
166. *Id.* at 4331-32. The Court stated that the delay in obtaining a warrant could result in the destruction of valuable evidence, since drugs and alcohol are dissipated from the blood and urine at a rapid rate. *Id.* Furthermore, the Court stated that an individualized suspicion requirement could impede the railroad's ability to obtain valuable information in post-crash situations because such situations are often chaotic and it would be extremely difficult to determine which employees contributed to the cause of the accident because of drug or alcohol use. *Id.*

incidents of accidents caused by employees impaired by drugs or alcohol, outweighed any privacy interest the railroad employees had in the contents of their blood or urine.[167]

The Supreme Court affirmed in part[168] the Fifth Circuit Court of Appeals' decision to uphold drug testing of customs employees in *National Treasury Employees Union v. Von Raab.*[169] The Court stated that drug screening by urinalysis as required of Customs Service employees requesting transfers to different departments impacted the employee's reasonable expectation of privacy under the fourth amendment.[170] The Court then stated that the drug testing was for administrative purposes to determine suitability for employment.[171] Using a balancing test like that used in *Camara* and *O'Connor v. Ortega*, the Court stated that the reasonableness of the search must be determined by balancing the government interest in the search against the intrusion upon the party being searched.[172] Taking into account the scope and manner of the search, it's administrative nature, the government's need to ensure that customs employees were drug free and able to function effectively, the drug test's effectiveness, and the lack of a less intrusive means to achieve the same result, the Court held that the government's interest in conducting the search outweighed the employee's expectation of privacy in his urine.[173]

Although the Supreme Court has yet to consider the constitutionality of AIDS testing under the fourth amendment, a federal district court has specifically decided the constitutionality of AIDS testing for administrative purposes.[174] In *Glover v. Eastern Nebraska Community Office of Retardation*,[175] the court struck down a state employer's mandatory requirement of an AIDS test as an unreasonable search under the fourth amendment.[176] The employer, a residential agency providing services for the mentally retarded, required AIDS testing of employees with direct patient contact because of numerous

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167. *Id.* at 4332.
168. The Court affirmed the Fifth circuit's decision concerning drug testing of custom's employees directly involved in drug related activities or those employees that carry firearms, but vacated and remanded for further proceedings the court of appeals' decision allowing testing of employees with access to classified materials. National Treasury Employees Union v. Von Raab, 57 U.S.L.W. 4338, 4340 (1989).
169. *Id.*
170. *Id.* at 4341.
171. *Id.*
172. *Id.* at 4341-44.
173. *Id.*
174. Glover v. Eastern Neb. Community Office of Retardation, 686 F. Supp. 243 (D. Neb. 1988) (the Office of Retardation is a state agency).
175. 686 F. Supp. 243 (D. Neb. 1988).
176. *Id.* at 251.

past incidents of biting, scratching, and hitting that normally occurred between patients and employees of the agency.[177] The agency justified the testing as an administrative function designed to promote a safe work environment for the employees and patients.[178] Using the standard in *O'Connor v. Ortega*, the Court balanced the employees' reasonable expectation of privacy in their blood against the agency's interest in a safe work environment and found that the mandatory AIDS test was not justified in light of the constitutional intrusion upon the employees.[179] Specifically, the court examined the employer's justification for testing (a safer work place) and determined that since AIDS cannot be transmitted through casual contact with patients and can rarely be transferred through biting or scratching, testing as a means of controlling the spread of the disease did not justify violating the employees' constitutional protections against unreasonable search.[180]

4. *State Interpretations of Administrative Searches*

The California Supreme Court, in *Ingersoll v. Palmer*[181] upheld the constitutionality under the fourth amendment of a sobriety checkpoint where motorists were briefly detained while being observed for evidence of alcohol impairment.[182] Drivers who appeared intoxicated were given field sobriety tests and were later arrested if determined to be impaired.[183] After categorizing the checkpoint procedures as a

177. *Id.* at 245-46.
178. *Id.* at 250.
179. *Id.* at 250. *See also* Owner-Operators Indep. Driver's Ass'n v. Burnley, 705 F. Supp. 481, 485 (N.D. Cal. 1989) (injunction granted against the Secretary of Transportation's implementation of drug testing of drivers of commercial vehicles both randomly and in post-accident situations because the regulations lack necessary particularized findings of drug use in the industry necessary to justify intrusiveness of the search). *But see* National Treasury Employees Union v. Von Raab, 57 U.S.L.W. 4338, 4344 (1989) (mandatory drug testing for customs employees seeking transfer to certain jobs was upheld as a reasonable search under the fourth amendment despite the lack of conclusive evidence of drug use among customs employees); Jones v. McKenzie, 833 F. 2d 335, 341 (D.C. Cir. 1987) (drug testing by urinalysis of public school system employees is reasonable where: (1) The employee's duties have a direct impact on the physical safety of young school children; (2) The testing is conducted as part of a routine, reasonably required, employment-related medical examination; and (3) The test employed is one that has a logical relationship to the employer's legitimate safety concerns).
180. *Glover*, 686 F. Supp. at 251.
181. 43 Cal. 3d 1321, 241 Cal. Rptr. 42, 743 P.2d 1299 (1987).
182. *Ingersoll*, 43 Cal. 3d at 1347, 241 Cal. Rptr. at 60, 743 P.2d at 1317.
183. *Id.* at 1327, 241 Cal. Rptr. at 46, 743 P.2d at 1303. Arrests made after motorists were given the field sobriety test were based on probable cause and the general principles of criminal detention and arrest applied. *Id.* at 1346, 241 Cal. Rptr. at 59, 743 P.2d at 1316.

seizure under the fourth amendment, the court classified the seizure as administrative rather than for the purposes of discovering criminal evidence (blood alcohol) because the regulatory purpose of the program was to keep intoxicated drivers off the roadway and to promote public safety.[184] Therefore, probable cause was not necessary to detain, observe, and question persons proceeding through the checkpoint.[185] Instead, the court determined the reasonableness of the seizure by weighing the government's interest in deterring drunk driving and ensuring public safety on the roadways against the intrusion upon motorists proceeding through the checkpoint.[186] The court found the checkpoint procedure to be a de minimis intrusion upon the fourth amendment rights of those drivers considering the location, duration, and operating procedures of the checkpoint.[187]

State courts have interpreted the fourth amendment to allow health officials to test convicted prostitutes for communicable diseases.[188] For example, in *In re Clemente*,[189] the Second District Court of Appeal held that testing the blood of the proprietor of a house of prostitution did not violate her fourth amendment rights because her profession furnished reasonable grounds to believe that she was infected with a communicable disease.[190] The health department was held to have the power to test her to control the spread of venereal disease.[191] An individual determination that the proprietor was infected with the disease was not necessary.[192]

In *Ex Parte Dillon*,[193] the Second District Court of Appeal distinguished between testing known prostitutes and people arrested for

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184. *Id.* at 1328, 241 Cal. Rptr. at 47, 743 P.2d at 1304.
185. *Id.*
186. *Id.* at 1338-47, 241 Cal. Rptr. at 54-60, 743 P.2d at 1311-17.
187. *Id.* at 1347, 241 Cal. Rptr. at 60, 743 P.2d at 1317.
188. *See infra* notes 189-97 and accompanying text. *See generally*, Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53 (1985) (historical treatment of prostitutes involving quarantine and testing for venereal disease).
189. 61 Cal. App. 666, 215 P. 698 (1923).
190. *Id.* at 667, 215 P. at 699.
191. *Id. See* Reynolds v. McNichols, 488 F.2d 1378, 1383 (10th Cir. 1973) (detention for purpose of examination and treatment of venereal disease of a person reasonably suspected of having venereal disease because the person had been arrested and charged with solicitation and prostitution is a valid and constitutional exercise of police power), *Ex Parte* King, 128 Cal. App. 27, 16 P.2d 694, (1932) (law requires only probable cause to believe person has a communicable infectious disease to retain that person in quarantine and test for venereal disease). *See also Ex parte* Fowler, 184 P.2d 814, 817, 819 (Okla. Ct. App. 1947) (a known prostitute contended that she was detained and tested arbitrarily on the mere suspicion she had a communicable disease, but the court held that it was reasonable to hold her because she was a prostitute and prostitutes were known to have a high incidence of venereal disease).
192. *In re* Clemente, 61 Cal. App. 666, 667, 215 P. 698, 699.
193. 44 Cal. App. 239, 186 P. 170 (1919).

other offenses involving illicit sexual conduct.[194] In *Dillon*, the court held that testing a person charged with violating a rooming house ordinance[195] for venereal disease was not justified without reasonable cause to believe that the person was infected with a communicable disease.[196] The court stated that merely being arrested for violation of the ordinance was not sufficient cause for the test without some previous knowledge or information regarding the individual's likelihood of carrying the disease.[197]

B. Lack of Unifying Standard Concerning Bodily Intrusion

The judicial decisions discussed thus far involving criminal and administrative searches establish no clear precedent from which to determine whether the California legislation can withstand fourth amendment constitutional scrutiny.[198] For example, although *Camara*, *New York v. Burger*, *Glover*, and *O'Connor v. Ortega*, lay out a general balancing test, they offer no specific guidelines pinpointing what is a reasonable search or what is a sufficient regulatory scheme

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194. *Id.* at 241, 186 P. at 172.

195. The "rooming house" ordinance was a Los Angeles city ordinance making it illegal for a person to use a rooming house, hotel or other place in the city of Los Angeles for the purpose of having sexual relations with a person to whom he or she is not married. *Id.* at 239, 186 P. at 170.

196. *Id.* at 241, 186 P. at 172.

197. *Id. See also Ex parte* Shepard, 51 Cal. App. 49, 195 P. 1077 (1921) (more than a mere suspicion that a person is diseased is necessary to give a police officer the power to detain and test a person for venereal disease, even if the person arrested is charged with operating a house of prostitution).

198. *See* Schmerber v. California, 384 U.S. 757, 770-71 (1966) (warrantless blood alcohol test performed on defendant charged with drunk driving upheld because evidence would have dissipated before a search warrant could be obtained); Winston v. Lee, 470 U.S. 753, 767 (1985) (proposed surgery to remove a bullet from defendant to be used against him as criminal evidence would violate defendant's fourth amendment rights); Jones v. McKenzie, 833 F.2d 335, 341 (drug testing of public school employees that have direct contact with children is not unreasonable if the testing is conducted as part of a routine, reasonably required medical examination, and where there is a clear connection between the testing and the employer's safety concerns); Owner-Operators Indep. Driver's Ass'n of America v. Burnley, 705 F. Supp. 481, 485 (N.D. Cal. 1988) (Department of Transportation's random and post-accident drug testing of truck drivers enjoined for lack of justification for the testing); National Treasury Employees Union v. Von Raab, 57 U.S.L.W. 4338, 4344 (1989) (Customs Service drug testing program for employees seeking transfer within the department upheld because of the strong government interest in employing drug free customs agents compared with the limited intrusiveness of the search); National Air Traffic Controllers Ass'n v. Burnley, 700 F. Supp. 1043, 1047 (1988) (drug testing by urinalysis of air traffic controllers is not an unreasonable search under the fourth amendment because the government's interest in safe air travel far outweighs the minimal intrusion of the test).

to meet the warrant requirement.[199] Despite the lack of clear precedent from which to evaluate the current California legislation, *National Treasury Employees' Union* and *Railway Labor Executives' Association* may demonstrate a trend toward expanding the scope of administrative searches.[200] Although *Schmerber* and *Winston v. Lee* establish clear standards for conducting a search of the human body for evidence of crime, these standards do not directly apply to California's AIDS legislation because being infected with AIDS is not a crime.

Since there is no current case law other than *Glover* which concerns mandatory AIDS testing[201] and no clear precedent from which to evaluate the current legislation, California's mandatory AIDS testing laws will be analyzed by analogy to the property and bodily intrusion cases discussed in this note. Therefore, this note will categorize the legislation as either a criminal or administrative search. Then the legislation will be analogized to the statutes and case law discussed earlier to determine whether the legislation will withstand fourth amendment constitutional scrutiny.

III. Constitutionality of S.B. 2643, Proposition 96 and S.B. 1007

A. S.B. 2643

S.B. 2643 allows crime victims to request AIDS testing of the defendant charged with the crime.[202] A mandatory AIDS test administered by the government is a search that implicates the fourth amendment.[203] S.B. 2643 may be classified as an administrative search because testing is used to inform the victim and the defendant of the status of their health rather than to obtain criminal evidence to be used against the defendant.[204] Furthermore, S.B. 2643 specifically

199. *See* Camara v. Municipal Court, 387 U.S. 523 (1967), New York v. Burger, 107 S. Ct. 2636 (1987), O'Connor v. Ortega, 480 U.S. 709 (1987), Glover v. Eastern Nebraska Community Office of Retardation, 686 F. Supp. 243 (D. Neb. 1988).

200. Skinner v. Railway Labor Executives' Ass'n, 57 U.S.L.W. 4324 (1989), National Treasury Employees Union v. Von Raab, 57 U.S.L.W. 4338 (1989).

201. *Glover*, 686 F. Supp. 243 (D. Neb. 1988).

202. *See supra* notes 27-41 and accompanying text.

203. *Glover*, 686 F. Supp. at 250.

204. 1988 Cal. Stat. ch. 1088, sec. 1.5, at ____ (codifying S.B. 2643 and enacting Cal. Penal Code § 1524.1(a)).

provides that the result of the defendant's AIDS test may not be used as evidence of guilt or innocence in any criminal proceeding against him.[205] Accordingly, the constitutionality of testing under S.B. 2643 may be evaluated under the more liberal standards applicable to administrative searches.[206]

However, even an administrative search must be reasonable under the fourth amendment.[207] The reasonableness of an administrative search is determined by balancing the governmental and individual interests.[208] Because S.B. 2643 requires that a search warrant be issued before the search is conducted, the bill may be analogized to *Camara*, under which a search pursuant to S.B. 2643 could be considered reasonable if based on a warrant reflecting the strong governmental interest in helping crime victims learn quickly if they are at risk for infection.[209]

A strong governmental interest in protecting crime victims health must outweigh a defendant's privacy interest before a mandatory blood sample can be taken.[210] The government's interest is weakened because victims who want to find out whether the defendant infected them can simply have themselves tested, obviating the need to test the defendant.[211] No further health precautions need be taken to prevent further infection of the victim.[212] The government's interest in testing is further weakened because, with the exception of prostitutes, defendants in criminal actions are not notorious for carrying or spreading the AIDS virus and thus cannot be tested based on the assumption that their actions spread communicable disease.[213]

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205. *See id. See also* Robinson v. California, 370 U.S. 660, 666-67 (1962) (California statute making it illegal to be a narcotics addict found unconstitutional under the eight and fourteenth amendments because defendant had not committed any illegal acts while addicted).

206. *See supra* notes 123-197 and accompanying text (previous discussion of fourth amendment standards applicable to administrative searches).

207. O'Connor v. Ortega, 480 U.S. 709, 719-20, (1987).

208. *See supra* notes 123-97 and accompanying text (standards for determining the reasonableness of administrative searches).

209. 1988 Cal. Stat. ch. 1088, sec. 1.5, at ____ (codifying S.B. 2643 and enacting CAL. PENAL CODE § 1524.1(b)(1)) (requiring that the court issue a search warrant before testing); *See also Camara*, 387 U.S. at 532-33 (warrant needed for administrative inspection of a private home).

210. *See infra* notes 209-19 and accompanying text (application of the *Camara* rule to S.B. 2643).

211. *See generally, Speedier New Tests for the AIDS virus*, U.S. NEWS AND WORLD REPORT, Nov. 28, 1988 at 79 (new AIDS tests can detect the AIDS virus in a few days and sometimes hours, compared to the two to three week waiting period for old tests).

212. U.S. PUBLIC HEALTH SERVICE CENTERS FOR DISEASE CONTROL, *What About AIDS Testing?* in AMERICA RESPONDS TO AIDS at 2 (1988).

213. *See supra* notes 16-19, 188-97 and accompanying text (previous discussion of health department procedures for testing convicted prostitutes for venereal disease).

However, government interest in helping crime victims may substantially outweigh the defendant's privacy interest in his blood. AIDS antibodies may usually be detected in the blood anywhere from two weeks to three months after infection, but the period may be much longer.[214] If the defendant did infect the victim with AIDS, but the presence of antibodies cannot yet be detected in the victim's blood, the victim may infect someone else before learning he carries the AIDS virus.[215] Therefore, the most timely way to find out whether the defendant may have infected the victim is to test the defendant. This risk of infecting others gives added weight to the government's interest in testing defendants charged with crimes.[216]

A valid administrative search requires a legislative or administrative scheme sufficient to establish probable cause to support a search warrant.[217] S.B. 2643 allows testing where the possibility exists that a criminal defendant may have infected someone with the AIDS virus.[218] Allowing testing under these standards is similar to permitting searches under health department codes based on the housing conditions in a whole neighborhood, which under *Camara* were considered sufficient probable cause to support a warrant.[219]

B. *Proposition 96*

Proposition 96 allows victims of certain sex crimes, peace officers, and emergency personnel to request AIDS testing of individuals who

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214. *See* KOOP *supra* note 1, at 10.

215. *Id.* at 10.

216. *See* CAL. CONST. art. I, § 28 (Proposition 8). A defendant's right to privacy in his blood may be perceived as less important than those of the victim in light of Proposition 8. *Id.* California voters passed this initiative to amend the California Constitution in 1982 in order to protect and safeguard the rights of crime victims. *Id.* Although not explicit in the amendment, a court may interpret a victim's request to test the defendant for AIDS as an important protection for the victim and thus allow it under the Victim's Bill of Rights.

217. Camara v. Municipal Court, 387 U.S. 523, 534 (1966).

218. *Id.*

219. *Id.* at 535. S.B. 2643 has two additional problems. First, S.B. 2643 deals specifically with AIDS. 1988 Cal. Stat. ch. 1088, sec. 1.5, at ____ (enacting CAL. PENAL CODE § 1524.1). Under S.B. 2643, victims of crime cannot request that the defendant be tested for other communicable diseases transferrable through the exchange of bodily fluids. *Id.* Therefore, the victim is not able to learn if he may have been infected with venereal disease, hepatitis, mononucleosis or other highly infectious diseases which, though not fatal, may harm him and his family. Secondly, S.B. 2643 prevents the court from ordering the search warrant for testing until after the preliminary hearing is concluded. *Id.* (enacting CAL. PENAL CODE § 1524.1(b)(2)). Preliminary hearings must be held no later than 10 days after arraignment, but can be extremely lengthy in some instances. CAL. PENAL CODE § 859(b). Some preliminary hearings continue for up to six months. Telephone conversation with Sheriff Sherman Block, March 13, 1989 (notes on file at the *Pacific Law Journal*). Therefore, under S.B. 2643, the victim is prevented from learning whether the defendant is infected with AIDS for what may be a lengthy period of time. This could cause undue mental hardship on the victim and his family.

assault them.[220] Proposition 96 may best be classified as an administrative search because the purpose for testing is to inform crime victims, peace officers, and emergency personnel whether they have been possibly exposed to the AIDS virus.[221] Thus, the government's interest in testing is for informational, not criminal purposes. Also, Proposition 96 specifically prohibits the results of the defendant's AIDS test from being used against him as evidence of guilt or innocence in a criminal proceeding.[222] Since Proposition 96 does not require the court to issue a formal search warrant,[223] it can be analogized to *New York v. Burger* even though the warrantless search discussed in *New York v. Burger* did not concern a bodily intrusion.

The Court in *New York v. Burger* permitted a warrantless search of a business because the government had a substantial interest in regulating auto dismantling.[224] Under Proposition 96, the only grounds set forth for the AIDS test is probable cause to believe bodily fluids have passed between the defendant and the victim.[225] The initiative does not require the court to make a specific determination that the defendant committed the crime or that the defendant carries the AIDS virus.[226] Because Proposition 96 lacks such specific criteria, it may be difficult to find a legislative scheme sufficiently articulated to establish the necessary governmental interest.[227] However, Proposition 96 does alert persons who commit sex crimes or assault peace officers or emergency personnel that they may be tested for the AIDS virus by specifically providing that one may be tested only when convicted of such crimes.[228] Therefore, as in *New York v. Burger*, criminal activity consisting of these sex offenses or assaults on peace officers may be perceived as being closely regulated and thus lower a sex offender's expectation of privacy in his person.[229]

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220. 1988 Cal. Stat. prop. 96, sec. 1, at ____ (enacting CAL. HEALTH & SAFETY CODE §§ 199.96, 199.97).

221. *Id.* (enacting CAL. PENAL CODE § 199.95).

222. 1988 Cal. Stat. prop. 96, sec. 1, at ____ (enacting CAL. HEALTH & SAFETY CODE § 199.98(f)).

223. *Id.* (enacting CAL. PENAL CODE §§ 199.96, 199.97).

224. New York v. Burger, 107 S. Ct. 2636 (1987).

225. 1988 Cal. Stat. prop. 96, sec. 1, at ____ (enacting CAL. HEALTH & SAFETY CODE §§ 199.96, 199.97)).

226. *Id.*

227. *See* Camara v. Municipal Court, 387 U.S. 523, 534 (1967) (legislative and administrative regulations governing an administrative search must be comprehensive enough to substitute for probable cause).

228. 1988 Cal. Stat. prop. 96, sec. 1, at ____ (enacting CAL. HEALTH & SAFETY CODE §§ 199.96, 199.97).

229. New York v. Burger, 107 S. Ct. 2636, 2643 (1987) (the auto dismantling business is

In addition to deciding whether the legislative scheme in Proposition 96 is sufficient to forgo issuance of a search warrant, the reasonableness of the search itself must be determined by balancing the government interest in testing against the intrusion imposed upon the defendant by the test.[230] As discussed in the analysis of S.B. 2643, one of the factors weighing against the government interest is that the victim may always have himself tested for the AIDS virus.[231] However, AIDS antibodies may not be detected in the victim's blood for some time, leaving open the possibility that the victim may infect others before he knows he has AIDS.[232] This risk of infecting others may enhance the government's argument in support of mandatory testing. Furthermore, the government, as evidenced in Proposition 96 and S.B. 2643, has a strong interest in protecting crime victims, peace officers, and emergency personnel.[233] Because protecting these people is certainly both legitimate and substantial, Proposition 96 may be constitutional under *New York v. Burger*.

C. *Specific Problems Between Proposition 96 and S.B. 2643*

The overlap between S.B. 2643 and Proposition 96 may pose additional problems in determining the constitutionality of the legislation. Proposition 96 is an initiative passed by the people and supercedes any identical code sections of S.B. 2643.[234] Proposition 96 also may supersede any sections of S.B. 2643 which are identical in subject matter, but not in code section.[235] Since S.B. 2643, encompassing section 1524.1 of the California Penal Code, and Proposition 96, encompassing sections 199.95, 199.96, 199.97, and 199.98 of the California Health & Safety Code, will coexist, victims may request testing of defendants guilty of certain sex offenses based on two statutory sources. Under S.B. 2643, the court must find probable cause that the defendant committed the crime and that bodily fluids

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so highly regulated that owners do not have a legitimate expectation of privacy in their business operation).

230. *See supra* notes 123-180 and accompanying text (discussion of federal balancing test applicable to administrative searches).

231. *See supra* note 211 and accompanying text.

232. *See* KOOP *supra* note 1, at 10.

233. *See supra* notes 35-41, 52-53 and accompanying text (previous discussion of legislative intent of S.B. 2643 and Proposition 96).

234. Telephone conversation with Debra Smith, Committee Secretary, Senate Select Committee on AIDS, Dec. 9, 1988 (notes on file at the *Pacific Law Journal*).

235. *Id.*

were transferred between defendant and the victim.[236] Under Proposition 96, the court must find only that there was probable cause that bodily fluids were transferred between the defendant and the victim.[237] These two statutory sources may not be viewed as a legislative scheme specific enough to support administrative probable cause for a search with a warrant[238] or a warrantless search under *New York v. Burger*.[239]

D. S.B. 1007

S.B. 1007 requires the court to order AIDS testing of persons convicted of prostitution and certain sex offenses.[240] By testing under S.B. 1007, the government intends to inform prostitutes and sex offenders whether they are infected with the AIDS virus.[241] The government also intends to deter these criminals from committing further acts of prostitution or sex offenses.[242] Further, the government intends to educate prostitutes regarding the risk of contracting as well as transmitting the AIDS virus to others.[243] These purposes can be described as administrative, thus subjecting the search of a prostitute or sex offender's blood under S.B. 1007 to constitutional scrutiny under administrative search standards.[244] Under the balancing

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236. 1988 Cal. Stat. ch. 1088, sec. 1.5, at ____ (codifying S.B. 2643 and enacting CAL. PENAL CODE § 1524.1).

237. 1988 Cal. Stat. prop. 96, sec. 1, at ____ (enacting CAL. HEALTH & SAFETY CODE §§ 199.96, 199.97).

238. *See supra* notes 127-138 and accompanying text (discussion of *Camara* and administrative standards sufficient to substitute for probable cause).

239. *See supra* notes 139-150 and accompanying text (previous discussion of *Burger* criteria for warrantless search).

Another important goal of S.B. 2643 is to provide prerequest counseling for crime victims. 1988 Cal. Stat. ch. 1088, sec. 1.5, at ____ (enacting CAL. PENAL CODE § 1524.1(c)(1)). Since Proposition 96 does not provide for counseling, a crime victim may be able to request testing of a defendant without the benefit of professional advice. Therefore, legislative intent to educate and inform a crime victim as to the risks and dangers of AIDS may be frustrated. *See also* Johnson v. San Francisco Municipal Court, San Francisco Banner Daily Journal, Apr. 18, 1989, at 1, col. 2, 3, col. 1. In the first legal challenge to Proposition 96, the 1st District Court of Appeal has ordered the municipal court to conduct an evidentiary hearing to determine whether the AIDS virus can be transmitted through saliva. *Id.* Johnetta Johnson was ordered to submit to an AIDS test after she bit a San Francisco Deputy Sheriff who was removing her from a courtroom. *Id.* The appellate court denied a stay that would have prevented drawing of a blood sample from Ms. Johnson, but stated it was unable to address the constitutionality of Proposition 96 until further evidence is submitted. *Id.*

240. 1988 Cal. Stat. ch. 1597, secs. 2-3, at ____ (codifying S.B. 1007 and enacting CAL. PENAL CODE §§ 1202.6(a), 1201(a)).

241. *Id.* (enacting CAL. PENAL CODE §§ 1202.1(a), 1202.6(c).

242. *Id.* (enacting CAL. PENAL CODE § 1202.1(c), 1202.6(c)).

243. *Id.* (enacting CAL. PENAL CODE § 1202.6(d)).

244. *See supra* notes 123-197 and accompanying text (standards governing administrative searches).

test set forth in *Camara* and *O'Connor v. Ortega*, the government's interest in educating, deterring, and informing a prostitute or sex offender will be balanced against the intrusion imposed upon these persons by an AIDS test.[245]

An infected prostitute, because of her numerous sexual contacts, may transmit the AIDS virus to those who solicit her services.[246] An infected sex offender may also infect the victim of the sex crime. In turn, those who solicit the services of prostitutes or are the victim of a sex crime may unknowingly transmit the AIDS virus to family members or other sexual partners.[247] Therefore, the government has a strong interest in preventing the spread of AIDS by informing, educating, and deterring prostitutes and sex offenders as to the consequences of their actions. This strong interest should outweigh any privacy interest these criminals may have in the contents of their blood.

However, since the government intends to use the results of the prostitute or sex offender's AIDS test to punish these persons for future crimes they commit while infected with AIDS, S.B. 1007 also may be classified as a criminal rather than administrative search.[248]

Mandatory AIDS testing for use in criminal proceedings against the defendant may constitute an unreasonable intrusion under the fourth amendment. Under *Schmerber*, bodily intrusions by the government are subject to the same standards as the search of a private home,[249] including probable cause that the evidence to be seized is in the place to be searched.[250] Under *Schmerber*, a bodily intrusion is forbidden on the mere chance that the evidence will be found.[251] Under *Scott*, the court, in addition to issuing a search warrant, must perform a balancing test to determine whether the requested intrusion is appropriate.[252] Therefore, to meet these constitutional standards, compulsory AIDS testing under S.B. 1007 must be conducted pursuant to a search warrant supported by probable cause. Additionally, courts must perform the *Scott* balancing test to determine the appropriateness of the search.

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245. *See supra* notes 127-138, 151-158 and accompanying text (discussion of the administrative balancing test under *Camara* and O'Connor v. Ortega).

246. *See* KOOP, *supra* note 1, at 18.

247. See *supra* notes 214-16 and accompanying text (AIDS can be transmitted to other persons before the virus is detectable in the carrier's blood).

248. *Id.*

249. Schmerber v. California, 384 U.S. 757, 770 (1966).

250. U.S. CONST. amend. IV.

251. *Schmerber*, 384 U.S. at 770.

252. People v. Scott, 21 Cal. 3d 284, 293, 578 P.2d 123, 127, 145 Cal. Rptr. 876, 880 (1978).

S.B. 1007 does not require any individualized suspicion that the prostitute or sex offender has AIDS before a search warrant is issued ordering testing.[253] Furthermore, S.B. 1007 does not require probable cause to believe that the prostitute or sex offender will subsequently commit another offense.[254] Yet the test results from the first offense are used for criminal punishment if the prostitute or sex offender subsequently commits another offense.[255] S.B. 1007 therefore violates the rules set forth in *Schmerber* that bodily intrusions are not authorized on the mere chance that the criminal evidence may be discovered in the blood and also must be conducted pursuant to a valid criminal search warrant supported by probable cause.[256]

However, the United States Supreme Court in *New York v. Burger* held that the government may legitimately obtain criminal evidence while conducting an administrative search.[257] The court further stated that obtaining criminal evidence pursuant to an administrative search does not render that search illegal or the administrative scheme suspect.[258] Therefore, under the *New York v. Burger* standard, the government may search the prostitute or sex offender's blood for the AIDS virus pursuant to the administrative regulations set forth under S.B. 1007. The government may then use the positive results of the AIDS test as criminal evidence for the purpose of sentence enhancement without violating the fourth amendment rights of these persons.

E. Additional Considerations in Balancing Governmental and Individual Interests

Mandatory AIDS testing may be considered a minimal intrusion upon the privacy interests of persons being tested in light of invasions already imposed upon citizens.[259] The Supreme Court has recently

253. 1988 Cal. Stat. ch. 1597 secs. 2-3, at ____ (codifying S.B. 1007 and enacting CAL. PENAL CODE §§ 1202.1, 1202.6(d)).

254. *Id.* (enacting CAL. PENAL CODE §§ 647f, 12022.85).

255. This note will not discuss potential issues under Article I, section 28 of the California Constitution (Proposition 8) and Mapp v. Ohio, 367 U.S. 643 (1961) regarding the suppression of the prostitute or sex offender's AIDS test as the fruit of an unconstitutional search under the fourth amendment.

256. Schmerber v. California, 384 U.S. 757, 770 (1966). *See* Illinois v. Gates, 462 U.S. 213, 238 (1983) (probable cause is a practical, common-sense decision by a magistrate that, given all the circumstances, there is a fair probability that evidence of a crime will be found in a particular place).

257. New York v. Burger, 107 S. Ct. 2636, 2651 (1987).

258. *Id.*

259. *See supra* notes 16-19, 188-97 and accompanying text (previous discussion of health department policy for testing prostitutes for venereal disease).

declared constitutional drug testing of government employees for job suitability, investigatory purposes, and health and safety reasons.[260] The health department tests prostitutes for venereal disease.[261] Persons stopped for driving under the influence of alcohol or drugs are tested for blood alcohol levels in their breath, blood or urine.[262] Convicted sex offenders are subject to an extensive registration process which includes fingerprinting and the taking of blood and saliva samples upon release from prison or a mental hospital.[263] Men and women in the military have consistently undergone blood and urine tests for drugs, venereal disease and more recently AIDS.[264] All these government procedures involve significant bodily intrusions similar to the mandatory AIDS testing of defendants charged or convicted of crime. If drug testing for employment purposes, detection of venereal disease, blood alcohol levels, and military fitness is considered constitutional, it seems logical to extend that rationale to include testing of persons charged with crime to provide crime victims with essential health information. Furthermore, current California law makes it illegal to knowingly transmit venereal disease to another party.[265] Considering that AIDS, unlike venereal disease, is fatal, the state may legitimately punish prostitutes or sex offenders who knowingly put others at risk for infection.[266]

However, another factor to be considered in balancing governmental and individual interests is the administrative and fiscal[267] burdens placed on the courts by this legislation. Each AIDS test requires a court hearing.[268] The expense of conducting the additional court hearing,

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260. National Treasury Employees Union v. Von Raab, 57 U.S.L.W. 4338 (1989), Skinner v. Railway Labor Executives Ass'n, 57 U.S.L.W. 4324 (1989).

261. *See supra* notes 16-19, 188-97 and accompanying text.

262. CAL. VEH. CODE § 13353 (West 1987).

263. CAL PENAL CODE §§ 290(a), 290.2(a) (West 1988).

264. *See* Closen, *AIDS: Testing Democracy-Irrational Responses to the Public Health Crisis and the Need for Privacy in Serologic Testing*, 19 J. MARSHALL L. REV. 835, 909 (1986) (discussing AIDS testing in the military).

265. CAL. HEALTH & SAFETY CODE § 3198 (West 1979). *See also id.* § 3191 (West 1979) (every diseased person must, from time to time, submit to an approved examination to determine the condition of the disease).

266. *See* People v. Johnson, 181 Cal. App. 3d 1137, 225 Cal. Rptr. 251 (1986) (charge of great bodily injury may be based on the transmission of the herpes simplex II virus).

267. S.B. 2643 states that costs to local agencies required by the bill will be reimbursed according to the provisions of Part 7 of Division 4 of Title 2 of the Government Code if over $500,000, and from the State Mandates Claim Fund if under $500,000. 1988 Cal. Stat. ch. 1088, sec. 2, at ____. Proposition 96 makes no provision for financing by the state. 1988 Cal. Stat. prop. 96, sec. 2, at ____.

268. 1988 Cal. Stat. ch. 1088, sec. 1.5, at ____ (codifying S.B. 2643 and enacting CAL. PENAL CODE § 1524.1(b)(2)); 1988 Cal. Stat. prop. 96, sec. 1, at ____ (enacting CAL HEALTH & SAFETY CODE §§ 199.96, 199.97), Conversation with Ron Johnson, Supervising Deputy District Attorney, Sacramento County District Attorney's Office, Feb. 22, 1989 (notes on file at the *Pacific Law Journal*).

pretest counseling,[269] the clerical costs associated with these procedures, and the costs of administering the AIDS tests themselves[270] could be prohibitive. These factors may weigh against the government in the balancing test.[271]

IV. CONCLUSION

AIDS testing as required by California's 1988 legislation raises a constitutional challenge under the fourth amendment. S.B. 2643, Proposition 96, and S.B. 1007 impact the fourth amendment rights of those required to be tested for AIDS. However, the government may intrude upon an area protected by the fourth amendment when the intrusion is reasonable. This note has illustrated the differing standards of reasonableness for criminal and administrative searches and the difficulty in applying them to California's mandatory AIDS testing laws.

The constitutionality of the new AIDS testing laws is more difficult to determine because AIDS is unlike other communicable diseases. The way AIDS is transmitted, its prevalence among controversial population groups such as homosexuals and prostitutes, and the social stigma attached to those afflicted with the disease make it different from other communicable diseases. California previously enacted specific legislation preventing testing for the disease because of these differences.

California's new mandatory AIDS testing laws are a radical departure from this previous approach. The new laws reflect heightened government concern over the danger AIDS presents to our population. AIDS is a fatal disease with no known cure. Therefore, it is logical that the state should impose penalties upon persons who transmit the disease to others.

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269. 1988 Cal. Stat. ch. 1088. sec. 1.5, at ____ (enacting CAL. PENAL CODE § 1524.1(c)) (only S.B. 2643 requires pre-request counseling).

270. If testing is done in a state or county laboratory, the ELISA costs between $5.00 and $7.00. Telephone conversation with Anna Ramirez, Office of AIDS, State Department of Health Services, Nov. 17, 1988 (notes on file at the *Pacific Law Journal*). A confirmatory Western Blot or IFA test costs between $18.00 and $30.00. *Id.* For example, if 100 defendants are charged with battery per month, and 80 of the victims request and are granted AIDS testing of the defendant, at $5.00 per test, the cost for just the AIDS tests alone will be $400.00. If five of the defendants test positive initially, an additional ELISA test at $5.00 per test, and a confirmatory Western Blot test at approximately $25.00 per test must be administered to confirm the presence of the AIDS antibody, costing the state an additional $150.00.

271. CAL. HEALTH & SAFETY CODE § 199.22 (West Supp. 1989).

When analogized to the standards governing administrative searches, S.B. 2643, Proposition 96, and S.B. 1007 will probably survive constitutional scrutiny under applicable fourth amendment standards. The legislation provides specific guidelines about how testing will be ordered. The intrusion is minimal when compared to the benefits to be gained from informing a crime victim whether he is at risk for infection with AIDS, or a prostitute of the risks her actions present. The great danger AIDS presents to our society, the rapid spread of the disease in recent years, and the strong government interest in helping crime victims should outweigh any privacy interest persons subject to testing under S.B. 2643, Proposition 96, or S.B. 1007 may have in their blood.

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