Mandatory HIV Testing and Prostitution: The World's Oldest Profession and the World's Newest Deadly Disease

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by

JAMES GRANT SNELL*

Introduction

Acquired Immunodeficiency Syndrome (AIDS) is one of the
greatest health challenges of our time. AIDS is a communicable dis-
ease for which there is currently no cure.1 However, the means of
transmission of the disease are fairly well established,2 so that efforts
can be focused on minimizing the spread of the disease.3 A key to
reducing the spread of the disease is identifying infected persons, so
that they can receive education on how to avoid behavior that will
infect other persons.

A blood test has been developed to identify infected persons.4
The blood test detects the presence of antibodies to the Human Im-
munodeficiency Virus (HIV), which is the virus widely believed to
cause AIDS.5 The vast majority of persons who take such blood tests
do so voluntarily.6 However, for some members of American society,

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1. PREVENTING AIDS: THEORIES AND METHODS OF BEHAVIORAL INTERVENTIONS 1
2. See id. at 1 (explaining that sexual behavior and the sharing of drug injection
equipment are the principal modes of transmission).
3. See id. at 1-3 (discussing abstinence, condom use, cleansing of injection equip-
ment, and drug abuse treatment as means of minimizing the spread of AIDS).
4. Schwartz et al., Human Immunodeficiency Virus Test Evaluation, Performance and
   Use, 259 JAMA 2574, 2578 (1988). The test begins with the enzyme-linked immunoassay
   (EIA). Id. at 2574. If a positive result is achieved the assay is usually repeated. Id. at
   2578. If the second result is positive the sample is confirmed by another test, usually the
   Western Blot. Id.
5. Ralph J. DiClemente & John L. Peterson, Changing HIV/AIDS Risk Behavior:
The Role of Behavioral Interventions, in PREVENTING AIDS, supra note 1, at 1.
6. THE SOCIAL IMPACT OF AIDS IN THE UNITED STATES 27-29 (Albert R. Jonsen &
   Jeff Stryker eds., 1993).

[1565]
mandatory HIV testing has become a reality. Mandatory testing involves an age-old conflict: the protection of individual liberty versus the furtherance of societal and governmental interests. Some commentators invoke the "slippery slope" argument when addressing the issue of mandatory HIV testing, warning that allowing testing of limited segments of society will lead to widespread testing of much of the population. Other commentators argue that the threat of the spread of the disease warrants testing of certain members of society. Both arguments are compelling. While it is clear that substantial public health measures are required to control the spread of AIDS, it is also clear that controlling the disease through forced testing is a very invasive procedure.

Strategies for controlling the AIDS epidemic can only be developed after careful consideration of the means to be used. The legal profession is often relied on to police the means used to address major

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8. See generally Karin Zink, Love v. Superior Court: Mandatory AIDS Testing and Prostitution, 22 GOLDEN GATE U. L. REV. 795, 819 (1992) ("In light of the Love court's analysis [concluding that California's mandatory HIV testing of person's convicted of soliciting an act of prostitution does not violate the 4th Amendment] it is difficult to imagine a situation, short of blanket testing, which would not withstand the court's scrutiny.").


10. In 1992, 46,648 new cases of AIDS were reported in the United States. 41 MORTALITY & MORBIDITY WEEKLY REP. 979 tbl. 1 (Jan. 8, 1993). In early 1992, at least 12.9 million people worldwide had been infected with HIV, including 7.1 million men, 4.7 million women, and 1.1 million children. 5 AIDS REPORT 1 (No. 5) (July 1992) (citing statistics released in JONATHAN MANN, AIDS IN THE WORLD 1992 (1993)). As of September 30, 1992, a cumulative total of 242,146 cases of AIDS in the United States had been reported to the Centers for Disease Control (CDC). 5 CALIFORNIA HIV/AIDS UPDATE 56 (Oct. 1992) (citing CDC statistics). Of the 242,146 AIDS cases, 160,372 AIDS-related deaths have been reported. Id.

11. See Paul H. MacDonald, AIDS, Rape, and the Fourth Amendment: Schemes for Mandatory AIDS Testing of Sex Offenders, 43 VAND. L. REV. 1607, 1632 (1990)("The defendant's privacy interest in not being tested for HIV involuntarily is substantial, primarily because of the inherent difficulty in keeping test results confidential and also because of the frequent discrimination against individuals known or thought to be HIV-positive."); Bernadette Pratt Sadler, When Rape Victims' Rights Meet Privacy Rights: Mandatory HIV Testing, Striking the Fourth Amendment Balance, 67 WASH. L. REV. 195, 207-08 (1992) (arguing that HIV testing is an invasion of privacy in a persons bodily integrity and an invasion of a person's confidentiality interest in medical information); Zink, supra note 8, at 815 (arguing that the stigma attached to the AIDS virus heightens the privacy intrusions).
social problems. However, legal history contains many examples of how, in times of crisis, the vigilance of the legal world has failed. Case decisions made during times of crisis haunt law school casebooks.\textsuperscript{12} The late Justice Thurgood Marshall wrote:

> History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. The World War II relocation-camp cases ... and the Red scare and McCarthy-era internal subversion cases, ... are only the most extreme reminders that when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.\textsuperscript{13}

At odds with Marshall's call "for vigilance against unconstitutional excess"\textsuperscript{14} is the real need to enact measures to prevent the spread of AIDS. Researchers William B. Johnston and Kevin R. Hopkins warn:

> Merely to wait for things to get better is to condemn hundreds of thousands, even millions of people to premature death. This generation of policymakers may well be held accountable for these deaths, because to some degree they are preventable ... Steps can be taken now to save many of these lives as well as billions of dollars in health care and other costs. Failing to take these steps will leave a legacy of bitterness and division, along with the inevitable questions: Who failed to act; who failed to lead?\textsuperscript{15}

Studies indicate that prostitutes are in a high risk group for the transmission of AIDS.\textsuperscript{16} These studies suggest that particular attention should be paid to this segment of society. One commentator notes:

\begin{itemize}
  \item \textsuperscript{12} See, e.g., Dennis v. United States, 341 U.S. 494 (1951) (McCarthy hearings); Korematsu v. United States, 323 U.S. 214 (1944) (Japanese internment in camps during World War II); Hirabayashi v. United States, 320 U.S. 81 (1943) (curfew on Japanese during World War II); Schenck v. United States, 249 U.S. 47 (1919) (communist prosecuted for disseminating written material).
  \item \textsuperscript{14} Id.
  \item \textsuperscript{15} William B. Johnston & Kevin R. Hopkins, The Catastrophe Ahead: AIDS and the Case for a New Policy 17 (1990). It is noteworthy that Johnston and Hopkins do not advocate mandatory testing. Rather, these researchers advocate the implementation of a two-step plan. First, they counsel, the extent of the infection must be determined through a routine, national, voluntary testing program. \textit{Id.} Second, "[l]arge-scale efforts must be initiated to encourage individuals to act on the basis of their knowledge of their HIV status." \textit{Id.} These efforts, according to Johnston and Hopkins, must strongly discourage HIV carriers from having sex or sharing needles with others. \textit{Id.}
  \item \textsuperscript{16} W.W. Darrow, Assessing Targeted AIDS Prevention in Male and Female Prostitutes and their Clients, in Assessing AIDS Prevention 215-31 (F. Paccaud et al. eds., 1992); Martin Plant, Sex Work, Alcohol, Drugs, and AIDS, in AIDS, Drugs, and Prostitution 7-12 (Martin Plant ed., 1990).
\end{itemize}
As the AIDS pandemic has spread its sinister reach through society it has become clear that the two major modes of transmission are: first, through penetrative sexual contact, anal, vaginal, and possibly oral and, second, through the sharing of infected injecting equipment by intravenous drug users.\textsuperscript{17} Prostitutes as a class are generally at risk in both of these respects. Due to the fact that prostitutes have a high number of sexual partners, the dangerous possibility exists that they will be infected with the disease and may pass it on.\textsuperscript{18} Because of this "prostitutes may . . . represent a significant bridge [for the transfer of AIDS] into the heterosexual community."\textsuperscript{19}

Researchers have also noted high levels of drug and alcohol use by prostitutes to enhance sociability and/or deaden the realities of the profession.\textsuperscript{20} A substantial portion of the prostitutes who use high levels of drugs do so intravenously. There is "ample evidence indicating that intravenous drug use is commonplace among some groups of sex workers."\textsuperscript{21} A 1986 study of women with recent histories of prostitution revealed that 19.9\% (138/693) of prostitutes who use intravenous drugs were HIV positive and 4.8\% (34/703) of prostitutes who do not use intravenous drugs were HIV positive.\textsuperscript{22} A study of 360 San Francisco male prostitutes found that 53.3\% had used intravenous drugs and 16.7\% of those sampled, who had been tested for HIV and had received the results, were HIV positive.\textsuperscript{23}

These statistics indicate that prostitutes as a class are at a high risk of infection relative to other populations. Because of their association with high risk activities and the potential dangers of spreading AIDS into other segments of society, the interest in enacting measures

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\item \textsuperscript{17} AIDS, Drugs, and Prostitution, supra note 16, at xv (emphasis added).
\item \textsuperscript{18} AIDS, Drugs, and Prostitution, supra note 16, at 7 (explaining that multiple sex partners and intravenous drug use place prostitutes and their clients at risk of HIV infection).
\item \textsuperscript{19} See Johnston & Hopkins, supra note 15, at 90 ("While there is no evidence yet that such widespread viral transmission is occurring [from prostitution] . . . . This bridge could become more dangerous in the future if infectiousness increases over time."). The class of people at potential risk is considerable. About 15\% of unmarried men and 4\% of married men claim to visit prostitutes with some frequency and 25\% of unmarried men and 7\% of married men claim to have done so on occasion. \textit{Id.} at 74.
\item \textsuperscript{20} \textit{Id.} at 6-7. Some population-wide studies also show a "clear connection between the use of alcohol and illicit drugs during sexual activity and failure to comply with 'safer sex' guide-lines intended to minimize AIDS risks." \textit{Id.} at 3 (citing studies by R. Stall from 1986-89 and Robertson and Plant in 1988).
\item \textsuperscript{21} Martin Plant, Sex work, Alcohol, Drugs, and AIDS, in AIDS, Drugs, and Prostitution, supra note 16, at 7.
\item \textsuperscript{22} William Darrow, Prostitution, Intravenous Drug Use, and HIV-I in the United States, in AIDS, Drugs, and Prostitution, supra note 16, at 28 tbl. 2.2.
\item \textsuperscript{23} Dan Waldorf & Sheila Murphy, Intravenous Drug Use and Syringe-Sharing Practice of Call Men and Hustlers, in AIDS, Drugs, and Prostitution, supra note 16, at 115, 124.
\end{itemize}
to lower the spread of AIDS through prostitutes as a population is substantial.

Some state legislatures have set out to curtail the spread of AIDS through mandatory HIV testing of convicted prostitutes. Legislation mandating HIV testing of convicted prostitutes has twice been tested, and twice upheld, in state courts. However, some legislators feel that limiting HIV testing to convicted prostitutes is insufficient, and favor mandatory testing of individuals arrested for prostitution. Two states have actually enacted legislation extending mandatory HIV testing to individuals arrested for prostitution.

HIV testing in the case of arrest poses serious constitutional questions. The requirement of a conviction acts as a safety screen to reasonably insure that only members of the high-risk group are subjected to the intrusion of mandatory testing. The absence of such a requirement opens the door for abuse. On the other hand, a standard less than conviction may serve the public safety goals of mandatory testing by broadening the class of persons tested.


This Note only considers one side of the prostitution equation, the testing of prostitutes. The World Health Organization has commented that "HIV transmission requires the active participation of two persons." World Health Organization, Global Program on AIDS Progress Report (World Health Organization, Geneva), Oct. 1988, at 4. Although this statement lacks truth in some cases, such as forcible sex crimes, it is true regarding prostitution. The constitutionality of the testing of customers of prostitutes is beyond the scope of this Note. However, it is worth noting that many of the laws mandating testing of prostitutes also mandate testing of the prostitutes' patrons. See, e.g., Colo. Rev. Stat. Ann. § 18-7-205.5 (West Supp. 1993).


Is mandatory HIV testing of arrested and convicted prostitutes a constitutional way to curb the spread of AIDS or will we "invariably come to regret" the taking of such drastic measures? This Note considers the Fourth Amendment issues regarding the constitutionality of both mandatory HIV testing of convicted prostitutes and mandatory HIV testing of those arrested for prostitution. Part I of the Note traces the development of the Fourth Amendment "special needs" doctrine, under which mandatory HIV testing of prostitutes has been upheld. Part II outlines the arguments and analyses of the two cases that have upheld mandatory testing of convicted prostitutes. Part III applies a Fourth Amendment analysis to mandatory testing in cases of arrest for prostitution. Part IV considers hold and treat laws—municipal ordinances that permit the detaining and treating of prostitutes for venereal diseases—as justification for the testing of arrestees. Part IV concludes that while blanket testing of prostitution arrestees is unconstitutional, testing based on reasonable suspicion would survive constitutional analysis.

I. The Fourth Amendment and the Special Needs Doctrine

Opponents of mandatory HIV testing of convicted prostitutes argue that such testing violates the Fourth Amendment protection against unreasonable searches and seizures. Two courts have rejected this claim finding the testing valid under the special needs doctrine. This Part traces the development of that doctrine.

"The [Fourth] Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their discretion." Only searches and seizures that are unreasonable are prohibited. The determination of reasonableness "depends upon all of the circumstances surrounding the search or seizure and the nature of the search or

28. The Fourth Amendment provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
U.S. Const. amend. IV.

29. In addition to Fourth Amendment claims, courts have also considered equal protection and due process challenges to such laws. However, courts have found little merit in these arguments, focusing instead on a Fourth Amendment analysis. See Love v. Superior Court, 276 Cal. Rptr. at 666-67; People v. Adams, 597 N.E.2d 574, 584-86 (Ill. 1992). Therefore, this Note focuses only on the Fourth Amendment analysis.


seizure itself."32 Determining the standard of reasonableness that should govern any specific class of searches requires a balancing test between the need to search and the invasion that the search entails.33 With some limited exceptions, the United States Supreme Court has found that searches and seizures are unreasonable unless conducted pursuant to a warrant issued by a neutral magistrate upon a showing of probable cause.34

(a) Administrative Searches and Reasonableness

The Fourth Amendment protects against both unreasonable criminal searches35 and unreasonable administrative searches.36 A criminal search is a search conducted to acquire evidence to be used in a criminal proceeding.37 An administrative search is conducted to obtain information to be used to protect public health or to enforce state regulations.38

In Camara v. Municipal Court,39 a housing occupant refused to allow officials to conduct a warrantless administrative search of his residence. The United States Supreme Court found the occupant’s refusal justified because the statute allowing the search lacked the necessary Fourth Amendment safeguards and was therefore unreasonable.40 The Court framed the question regarding warrantless searches as follows:

In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.41

The Court found that the warrantless search attempt in Camara violated the Fourth Amendment. However, the Court did not impose the probable cause safeguards present in criminal searches as a requirement for obtaining an administrative warrant.42 Noting that the scope of probable cause required is related to the governmental interest justifying the intrusion, the Court found that probable cause in

34. See Skinner, 489 U.S. at 619.
37. See MacDonald, supra note 11, at 1618.
38. Id.
40. Id. at 534.
41. Id. at 533.
42. Id. at 538-39.
administrative searches does not require individualized suspicion. The Court required only that “reasonable legislative or administrative standards” for the inspection exist. For example, while the governmental interest in recovering stolen goods or contraband in a criminal case does not justify a “sweeping search of an entire city,” the governmental public health and safety interest in enforcing universal minimum private property standards will justify “routine periodic inspections of all structures.”

(b) Warrantless Searches: A Framework for Cases of Special Need

In New York v. Burger, the United States Supreme Court considered “whether the warrantless search of an automobile junkyard, conducted pursuant to a statute authorizing such a search, falls within the exception to the warrant requirement for administrative inspections of pervasively regulated industries.”

The Court began its Fourth Amendment analysis by noting that an owner of a business has a reasonable expectation of privacy in commercial property. However, the expectation is lessened in cases in which the business is part of a “closely regulated” industry. The Court explained that, in this context, “as in other cases of ‘special need’ . . . where the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened” the warrant and probable-cause requirements have lessened application and a warrantless inspection may even be reasonable.

Under Burger, the Court established that generally three criteria must be met for a warrantless inspection of a pervasively regulated business to be reasonable. First, there must exist a “substantial” government interest that informs the regulatory scheme pursuant to which the inspection is made . . . . Second, the warrantless inspection must be ‘necessary to further [the] regulatory scheme.’” Third, the certainty and regularity of the application of the inspection program must provide a constitutionally adequate substitute for a search warrant. To provide a constitutionally adequate substitute for a search warrant “the regulatory statute must perform the two basic functions

43. Id. at 538.
44. Id. at 535-60.
46. Id. at 693.
47. Id. at 699.
48. Id. at 700.
49. Id. at 702 (citations omitted).
50. Id.
51. Id. (citing Donovan v. Dewey, 452 U.S. 594, 600 (1981)).
52. Id. at 703
of a warrant, it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. In addition, in defining how a statute limits the discretion of the inspectors, we have observed that it must be "carefully limited in time, place, and scope." 53

Applying this analysis, the Court found warrantless administrative searches of automobile junkyards constitutional. In subsequent cases involving administrative searches, courts have applied the standards established in Burger.

(c) The Special Needs Doctrine Applied to Bodily Intrusions

Subsequent to Burger, the United States Supreme Court held that a special government need can justify a Fourth Amendment bodily intrusion conducted absent a warrant or any individualized suspicion. In Skinner v. Railway Labor Executives' Association, 54 railway labor organizations challenged Federal Railroad Administration (FRA) regulations that mandated blood and urine tests of employees involved in certain train accidents and authorized railroads to administer breath and urine tests to employees who violated specific safety rules.

The Court, finding the regulations to be administrative, 55 applied the factors discussed in Burger. First, the Court found the government interest in railroad safety compelling and that railroad safety would be furthered by regulating the conduct of railroad employees. 56

Second, the Court found that warrantless inspections were necessary to further the regulatory scheme. The Court noted an increased interest in disregarding the warrant requirement when such a requirement would frustrate the governmental purpose behind the search. 57 Because drugs and alcohol "are eliminated from the bloodstream at a constant rate" the warrant requirement would delay the test, and consequently reduce the possibility of detecting such substances. As a

53. Id. (citation omitted).
55. "The FRA has prescribed toxicological tests, not to assist in the prosecution of employees, but rather 'to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.'" Id. at 620-21. The Court refused to define the boundary between administrative and criminal searches. "We leave for another day the question whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature of the FRA's program." Id. at 621 n.5.
56. Id. at 628.
57. Id. at 623.
result, the warrant requirement would hinder the possibility of effectiveness of the regulations.58

Third, the Court found that the regulations provided an adequate substitute for a warrant. Warrants serve two essential purposes: (1) they assure the citizen that the intrusion is as narrow as possible and is authorized by law,59 and (2) they provide the detached scrutiny of a neutral magistrate.60 The Court found these purposes served by the regulations because the statute was narrowly defined, employees knew of the testing program, and minimal discretion was vested in the administrators of the program.61

Thus, the Court found that the regulations withstood the Fourth Amendment test of reasonableness in the absence of a warrant or reasonable suspicion, and that they served a compelling government interest that outweighed the employees privacy concerns.62

In National Treasury Employees Union v. Von Raab,63 the companion case to Skinner, the Court considered the constitutionality of a United States Customs Service drug testing program that required warrantless and suspicionless drug testing of employees applying for positions involving interdiction of illegal drugs or requiring carrying of firearms.64 Applying the Burger reasoning, the Court found that the compelling government interest of preventing the placement of employees who use drugs in positions "where they might endanger the integrity of our nation's borders or the life of the citizenry" constituted a special governmental need.65 The Court held that the requirement of a warrant would "divert valuable agency resources from the Service's primary mission" while providing little or no additional protection to the employee's privacy interests.66 Moreover, the program served as an adequate substitute for a search warrant because it was defined narrowly and specifically, the employees covered were doubtlessly aware of the testing program, and the officer conducting the tests had little discretion.67 Thus, the court found the program constitutionally sound.

The Skinner and Von Raab cases set the stage for the courts to consider the Fourth Amendment implications of mandatory HIV testing. Those cases will now be considered.

58. Id.
59. Id. at 622.
60. Id.
61. Id.
62. Id. at 633.
64. Id. at 659-63.
65. Id. at 666, 679.
66. Id. at 666-67.
67. Id. at 667.
II. The Courts and Mandatory HIV Testing of Prostitutes.

The United States Supreme Court has not yet heard a case involving a Fourth Amendment challenge to mandatory HIV testing. However, lower courts have upheld mandatory HIV testing in an array of cases involving different segments of the society.68 Regarding the mandatory testing of convicted prostitutes specifically, only the California Court of Appeal69 and the Supreme Court of Illinois70 have addressed Fourth Amendment or other constitutional challenges.

(a) Love v. Superior Court

In 1991 the First District Court of Appeal in San Francisco, California, examined the issue of mandatory HIV testing of convicted prostitutes.71 In Love petitioners had been convicted in the San Francisco Municipal Court of soliciting acts of prostitution. Upon conviction they were subject to a statute72 requiring HIV testing and AIDS counseling. Petitioners filed a petition for a writ of mandate in Superior Court challenging the constitutionality of the statutory testing requirement.73 Upon denial of the petition by the Superior Court, the women petitioned for a writ from the court of appeal on the grounds that the statute violated: (1) their right to be free from unreasonable searches, (2) due process,74 and (3) equal protection.75 The court of

68. See supra note 7.
71. Love, 276 Cal. Rptr. at 660.
72. CAL. PENAL CODE § 1202.6(a) (West Supp. 1992). "[U]pon the first conviction of any person for a violation of subdivision (b) of Section 647, the court shall, before sentencing or as a condition of probation, . . . order the defendant to submit to testing for AIDS . . . ." Id. In its entirety, the Penal Code requires that any person convicted of violating § 647(b) must undergo AIDS education and an AIDS test. The report of the test must be furnished to the court and the California Department of Health Services, and the results must be furnished to the defendant at sentencing. If the test is positive, the court must advise the defendant that a subsequent conviction of prostitution will be treated as a felony. The report must be maintained as confidential "except that the department shall furnish copies of any such report to a district attorney upon request." Id.
73. Love, 276 Cal. Rptr. at 661-62.
74. Petitioners contended that the statute violated due process because there was no reasonable relation between its means and its ends. Id. at 666. Specifically, an individual could be convicted of prostitution without the commission of a sex act or the transmission of bodily fluid. Id. The court found that the legislative determination or judgment concerning AIDS and the high-risk group of convicted prostitutes was not unreasonable. The court agreed with the respondent that the relevant question should not be whether fluids were exchanged during the particular act but "whether and to what extent the group affected by the statute . . . are members of a group at high risk for AIDS, and whether and to what extent such persons threaten to transmit the AIDS virus to the general population." Id. at 666 (citing brief of the People).
appeal primarily addressed the Fourth Amendment claim that the testing constituted an unreasonable search and seizure.

The court first acknowledged that the HIV test's requirement of physical penetration[76] for removal of bodily fluid and the subsequent testing of the sample both constitute searches under the Fourth Amendment.[77] The court then recognized the control of a communicable disease as a valid exercise of the state's police power and acknowledged that the legislature is given great latitude in determining the appropriate means for preventing the spread of disease.[78]

Courts accept as conclusive a determination by the legislative body that a particular regulation is necessary for the protection or preservation of health, so long as the determination is reasonable, not an abuse of discretion, and the regulation does not infringe rights secured by the Constitution.[79]

The court then turned to the question of whether the search was criminal or administrative. As discussed in Part I(a), supra, a search is considered a criminal search if its purpose is to acquire evidence to be used in a criminal proceeding, whereas a search is considered administrative if its purpose is to obtain information to be used to protect

The court, however, recognized the danger to constitutional rights of blanket testing requirements of entire classes of persons. Id. at 666-67 (citing Johnetta J. v. Municipal Court, 267 Cal. Rptr. 666, 684 (Ct. App. 1990)). The court noted that the testing applies only when a person is convicted of violating the statutory section and "has thus exhibited behavior from which it can be inferred that he or she has been, and may in the future be, sexually involved with multiple partners." Id. at 667.

75. Id. at 662. Petitioners argued that equal protection was denied because the section of the statute that applied to violent sex offenders limits the use of the blood test information while the section applying to persons convicted of lesser crimes does not. The court, in analyzing the search and seizure argument, held the limitation on the use of information was intended to apply with equal force to each statutory subsection and thus this contention was rejected.

76. It is interesting to note that the legal doctrine surrounding mandatory HIV testing may soon be revolutionized by a saliva-based test. Epitope Inc., an Oregon-based biotechnology company, is currently refining a saliva-based test that "has thus far proven to be both sensitive and specific." Epitope Inc. Receives Grant for Rapid Saliva-Based AIDS Test, PR NEWSWIRE 1005SE004, NW File 649, Oct. 5, 1989. Obtaining a saliva sample is less intrusive than the drawing of blood.

77. Love, 276 Cal. Rptr. at 662 (citing Johnetta J. v. Municipal Court, 267 Cal. Rptr. 666, 675-76 (Ct. App. 1990)); see also Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989). "In light of our society's concern for the security of one's person . . . it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable" and "[t]he ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interest." Id. at 617.

78. Love, 276 Cal. Rptr. at 662 (citing In re Johnson, 180 P. 644 (Cal. Ct. App. 1919) (allowing quarantine for venereal disease); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (allowing mandatory vaccination for smallpox)).

public health or to enforce state regulations. The California mandatory testing regulation has no impact on the immediate criminal conviction. However, if the test result is positive for HIV, the regulation provides for sentence enhancement for any subsequent convictions.80 Despite the enhancement clause, the court found the mandatory testing regulation to be an administrative search because the purpose of the enhancement clause was to deter acts known to spread the disease and because the statute as a whole included provisions for education unrelated to any criminal penalty.81 Because the search was administrative, the special needs doctrine could be applied.

The court noted that where the state uses its police power to mandate testing "for the protection and preservation of the health or safety of its citizenry," that testing, even though the testing is done without a warrant, probable cause, or individualized suspicion, may be upheld under the Fourth Amendment using the special needs doctrine.82 The court felt two questions had to be answered affirmatively to uphold the regulation: (1) did the regulation arise from a special need beyond those of ordinary law enforcement, and (2) if so, was the intrusion justified by the special need?83

After reviewing the statute, the court answered the first question affirmatively. The special need was "revealed by the provisions of the act, the legislative history of the act and findings of the Legislature regarding AIDS and AIDS testing."84 The court took notice of a state publication which instructed that "[t]he primary public health purposes of counseling and testing are to help uninfected individuals initiate and sustain behavioral changes that reduce their risk of becoming infected and to assist infected individuals in avoiding infecting others."85 The publication also stated that "[m]ale and female prostitutes should be counseled and tested and made aware of the risks of HIV infection to themselves and others . . . . Local or state jurisdictions should adopt procedures to assure that these instructions are followed."86 Thus the court was convinced that the provisions of the statute furthered its broad purpose—the prevention of the spread of AIDS—and constituted "an obvious and compelling 'special need.'"87

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80. Id. at 667.
81. Id. at 664.
82. Id. at 662.
83. Id. at 663 (quoting Johnetta J., Municipal Court, 267 Cal. Rptr. 666, 677 (Ct. App. 1990)).
84. Id.
85. Id. at 664 (quoting a 1986 U.S. Public Health Service publication entitled "Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS" published in 36 MORBIDITY & MORTALITY WEEKLY REP. 509 (Aug. 14, 1987)).
86. Id. (citing 36 MORBIDITY & MORTALITY WEEKLY REP. 509, 513 (Aug. 14, 1987)).
87. Id.
The court then balanced this special need against the intrusion to determine whether the intrusion was justified. Citing previous authority, the court first found that the physical intrusion, the drawing of blood, is accepted as minimal.88 Then, the court construed the confidentiality provisions of the statute narrowly, finding that the medical information revealed from the chemical testing of the blood is subject to disclosure restrictions that protect confidentiality.89 Therefore, both types of intrusions—the physical withdrawal of blood and the testing of the blood—were minimal. Without much more discussion,90 the court concluded that the government's special need to attempt to prevent the spread of AIDS outweighed the minimal and confidential intrusions of those persons convicted of prostitution.

A reading of Love does not leave one satisfied that the constitutional question of mandatory HIV testing has been adequately addressed. The court's balancing of state need and individual intrusion lacks depth. For example, the court fails to address whether a convicted prostitute has a lowered expectation of privacy. Moreover, the court's narrow interpretation of the confidentiality provision seems an inadequate remedy given the potential personal trauma to a testee in revelation of a positive test result.

Nevertheless, while the wisdom of legislating mandatory HIV testing may be questioned,91 such testing appears to be constitutionally sound. Where the gaps in the Love court's analysis leave one unsatisfied, the reasoning of the Supreme Court of Illinois on the same issue fills in those gaps.

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89. Id. at 665-66. After reviewing the wording and the legislative history of the statute, the court rejected "the proposal that the statute allows the district attorney to use test results for purposes unrelated to the statute which requires disclosure to that official" and accepted the interpretation of the Attorney General that allows disclosure to a district attorney only for the reasons articulated in California Penal Code § 1202.1(c). Id. at 666. The court solidified the narrow construction of the confidentiality clause by recognizing that the Attorney General, as the chief law officer of the state, has direct supervisory authority over every district attorney in the state under the California Constitution, Article V, Section 13 of the California Constitution. Id.

90. Some commentators have criticized the Love court for providing inadequate reasoning and analysis in its decision. See Zink, supra note 8, at 812-18.

91. As noted by the Love court, the necessity of a legislative decision is conclusive on the court. Love, 276 Cal. Rptr. at 662. This Note follows the same rule and does not address the wisdom of effectiveness of mandatory HIV testing. This Note addresses only the constitutionality of such decisions. However, it is worth noting that a number of commentators disfavor mandatory HIV testing. See generally Johnston & Hopkins, supra note 15, at 17 (favoring voluntary testing and education campaigns); Sadler, supra note 11 (same).
(b) People v. Adams

A more detailed analysis of the issue is set forth in People v. Adams, an Illinois Supreme Court decision. In Adams the complainants were two women who had been separately convicted in Cook County for prostitution. Following their convictions, and pursuant to statute, the women were ordered to undergo testing to determine whether they were carriers of the HIV.

The women challenged the constitutionality of the statute, and the trial judge found in their favor on two different grounds. The court determined that the testing procedure was an illegal search and seizure and that it denied the defendants their right to equal protection. The Illinois Supreme Court then reviewed the decision under an Illinois rule of court that gives jurisdiction to the state supreme court for appeals from a ruling that a statute is unconstitutional. Two issues were presented on appeal: (1) whether the testing constituted an illegal search and seizure, and (2) whether the statute denied the defendants equal protection of the laws. The opinion of the Illinois Supreme Court principally addresses the Fourth Amendment unreasonable search and seizure claim.

92. 597 N.E.2d 574 (Ill. 1992).
93. Id. at 576.
94. ILL. REV. STAT. ch. 38, para. 1005-5-3(g) (1989). The statute provided:
Whenever a defendant is convicted of an offense under [the prostitution statutes] . . . the defendant shall undergo medical testing to determine whether the defendant has any sexually transmissible disease, including a test for infection with human immunodeficiency virus (HIV) or any other identified causative agent of acquired immunodeficiency syndrome (AIDS). Any such medical test shall be performed only by appropriately licensed medical practitioners and may include an analysis of any bodily fluids as well as an examination of the defendant's person. Except as otherwise provided by law, the results of such test shall be kept strictly confidential by all medical personnel involved in the testing and must be personally delivered in a sealed envelope to the judge of the court in which the conviction was entered for the judge's inspection in camera. Acting in accordance with the best interests of the victim and the public, the judge shall have the discretion to determine to whom, if anyone, the results of the testing may be revealed.
Id. This statute has been recodified as ILL. REV. STAT. ch. 730, § 5/5-5-3(g) (1989 & Supp. 1993).
95. Adams, 597 N.E.2d at 577.
96. Id.
97. Id.
98. The Illinois Supreme Court in Adams found that the statute did not violate the equal protection laws of the federal or Illinois Constitutions. Id. at 584-86 (citing U.S. CONST. amend. XIV; ILL. CONST. art. I, § 2). First, the court found that the statute drew no distinction between male and female offenders and that there was no evidence of an intent by the legislature to disadvantage female offenders. Id. at 585. Thus, the statute did not violate the Illinois Constitution's prohibition of sex-based discrimination. ILL. CONST. art. I, § 18. The court further found that the statute did not violate the federal equal protection
As in Love, the court found that both the drawing of the blood sample and the subsequent test on the sample implicated Fourth Amendment interests.\(^9\) To determine the reasonableness of the search, the court balanced the importance of the state interest under the statute against the nature and scope of the intrusion on an individual's Fourth Amendment rights.\(^10\) In its balancing analysis, the court found the Burger factors satisfied.

The search was classified by the court as administrative because, rather than serving the ordinary needs of law enforcement, it serves the public health and safety goal of controlling the spread of AIDS by identifying persons infected with the virus. The "manifest purpose" of the statute "is to help control the spread of AIDS by identifying persons infected with the causative virus."\(^11\) The state interest was given great weight: "There are few, if any, interests more essential to a stable society than the health and safety of its members."\(^12\) The court thus found the first prong of the Burger test fulfilled: the statute served a compelling state interest that constituted a special governmental need.\(^13\)

The court then balanced this compelling state interest against the intrusion on personal freedom. The court first discussed the warrant issue, finding that the warrant requirement exists to guarantee that search and seizures are not arbitrary and to ensure the judgment of a neutral third party.\(^14\) The court held, however, that a warrant was not required because the statute triggered only after conviction and thus does not allow for discretion in enforcement.\(^15\) "Under this clause because, since sexual activity is one of the main means by which HIV is transmitted from one person to another, the inclusion of prostitution among the criminal offenses for which testing would be required was appropriate. \(^{16}\) at 586.

It is interesting to note that as of August 14, 1991 in Los Angeles, California, the only two cases filed against prostitutes for plying their trade after testing positive for the AIDS virus were filed against male prostitutes. Valerie Kuklenski, Male Prostitute Charged With AIDS Felony, UPI, Aug. 14, 1991.

100. Id. at 580.
101. Id. at 581. The court discussed the provisions of the statute finding that: (1) at-risk groups would be targeted, (2) the results would be confidential, subject to the discretion of the trial judge, (3) the victims of the defendants conduct could be notified, (4) the defendants themselves could receive treatment, and (5) the infected individual could alter his or her conduct so that other members of the public would not become exposed to the virus. \(^{17}\) at 580.
102. Id. at 580-81 (citing Jacobsen v. Massachusetts, 197 U.S. 11, 27 (1905)("Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.").)
103. Id. at 581, 584.
104. Id. at 581.
105. Id.
[statute] there would be nothing for the presiding judge . . . to weigh if issuance of a warrant were to be required."106 Thus, the third prong of the Burger test, the regulation as an adequate substitute for a warrant, was found to be satisfied.

The second prong of the Burger test—whether the warrantless inspection is necessary to further the regulatory scheme—was then addressed. Ordinarily, even in the absence of a warrant, probable cause or some degree of individualized suspicion is required.107 However, in limited circumstances when the intrusion is minimal and an important government interest would be jeopardized by requiring individualized suspicion, searches lacking suspicion are reasonable.108 The court found extraction of blood to be a relatively minor procedure involving "virtually no risk, trauma, or pain" that "has become routine in our everyday life."109 Furthermore, individualized suspicion would be impracticable because there are often no outward manifestations of the disease aside from an individual's membership in a high-risk group.110 Because an individualized suspicion requirement would jeopardize the state's goal of identifying HIV carriers among certain high risk groups, the court found that a warrantless inspection was necessary to further the regulatory scheme.111

The court did recognize that information obtained as the result of a positive HIV test could have a devastating impact on individuals, affecting their psychological well-being and subjecting them to social disapproval.112 However, the court found that these consequences did not make the test more objectionable for Fourth Amendment purposes, stressing that the judicial inquiry should focus on the actual physical intrusion caused by the search.113

Additionally, it was noted that offenders necessarily have reduced expectations of privacy because the testing requirement is activated by a person's conviction for one of the offenses listed in the

106. Id. at 581-82.
107. Id. at 582 (citing Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 624 (1989)).
108. Id. (citing National Treasury Employees Union v. Von Raab, 489 U.S. 656, 668 (1989)("Our precedents have settled that, in certain limited circumstances, the Government's need to discover . . . latent or hidden conditions . . . is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion.").)
109. Id. (quoting Schmerber v. California, 384 U.S. 757, 771 (1966); Breithaupt v. Abram, 352 U.S. 432, 436 (1957)).
110. Id. at 583.
111. Id.
112. Id. at 583-84.
113. Id.
statute. "[T]he statute operates only at that point in the proceedings when a defendant no longer enjoys a presumption of innocence but instead stands at the threshold of incarceration, probation, or other significant curtailment of personal freedom." Finally, the court noted that the issue was not whether the state has the best or most effective means of combating the disease, but whether the means chosen by the state could withstand constitutional scrutiny.

The Adams decision provides a much more complete argument than Love. The court properly classified the testing as administrative and addressed both the government's heightened interest and the convicted testee's reduced expectation of privacy. Moreover, all of the Burger criteria are thoroughly addressed. The Adams case provides convincing reasoning for the constitutionality of testing of convicted prostitutes. But if testing convicted prostitutes is constitutional what is the next possible legislative step?

Many commentators believe that the special needs analysis opens the door for testing in a much broader array of situations. One scholar wrote, "[In] light of the Love court's analysis it is difficult to imagine a situation, short of blanket testing, which would not withstand the court's scrutiny." Some legislatures have already enacted


115. Id.

116. Id. at 584.

117. Zink, supra note 8, at 819. In fact, some mandatory testing cases do extend further than Love and Adams by applying mandatory testing to groups that are not at such a high risk, and in situations in which the risk of infection is very low. For example, a recent California appellate decision, Johnetta v. Municipal Court, 267 Cal. Rptr. 666 (Ct. App. 1990), upheld a statute providing for HIV testing of persons charged in a criminal complaint when probable cause existed to believe that a transfer of bodily fluid occurred between the person charged and a public safety officer. In Johnetta, the defendant had bitten a public safety officer. The court found the statute constitutional under the "special needs" doctrine despite the fact that no individualized suspicion that the defendant was infected existed and that, even if afflicted, saliva transfer as a means of contracting AIDS was, at best, a "theoretical possibility." The court explained:

The record below establishes that HIV can be found, albeit in small amounts, in saliva. The experts essentially agree there is a theoretical possibility of saliva transfer, and the trial court so found. Although this possibility is extremely low, the majority of the experts agreed that the possibility cannot be categorically ruled out . . . and that the available evidence is insufficient to determine conclusively that HIV cannot be transferred through a bite.

Id. at 680-81. The court identified the special need as the state's interest in protecting the health and safety of its employees faced with the possibility of becoming infected with HIV in the line of duty. Id. at 679-80.

Despite Zink's predictions and cases like Johnetta, the manner in which the disease is spread indicates that blanket testing will probably never be a reality. The only documented means of transmission are through exchanges of blood or sexual contact. John-
regulations to broaden testing in some situations. One situation—the testing of arrested prostitutes—is now considered.

III. Does Testing of Arrested Prostitutes Withstand Constitutional Analysis?

In many states, legislation proposing mandatory HIV testing for those arrested for prostitution has either been enacted or is pending. Even before any such legislation was enacted, mandatory HIV testing of arrestees was not unheard of. A 1992 United Press International release reported that police in Bensalem, Pennsylvania were ordered to halt the practice of HIV testing of individuals arrested for prostitution. The following Part will analyze the constitutionality of extending mandatory HIV testing to those individuals arrested for prostitution before a conviction is secured.

Mandating testing of those arrested for prostitution causes a considerable shift in the balance of interests associated with the Fourth Amendment as applied in Love and Adams. Application of the BURSTON & HOPKINS, supra note 15, at 27.

The majority of people, who do not engage in promiscuous sex or intravenous drug abuse, are, at the present time, at little risk of catching the disease. JOHNSTON & HOPKINS, supra note 15, at 27. Furthermore, relative to other diseases AIDS is difficult to catch. Although estimates vary, the chances of transmitting the virus during a single sexual contact with an infected person appear to be less than two in ten thousand. In studies of accidental puncture wounds with infected needles in hospital settings, only four cases of infection have occurred in more than twelve hundred incidents.

Id.

Moreover, even in Johnetta, where testing was allowed when there was only a theoretical possibility of transfer, the court recognized that there are limits to the mandatory HIV testing:

Skinner . . . has [not] relegated blood testing in all cases to the “bargain basement” of the Fourth Amendment where minimal intrusions may be made by the government without probable cause. Certainly a statute mandating blood testing for AIDS of the entire population, or as a precondition for certain rights or privileges unrelated to AIDS infection and not connected to furthering a serious governmental need, would raise serious—and perhaps insurmountable—constitutional objections.

Id., 267 Cal. Rptr. at 680.

118. See supra notes 26-27.

119. Police in the Bucks County community of Bensalem have been ordered to halt the practice of testing alleged prostitutes for the AIDS virus. District Attorney Alan Rubinstein said Tuesday police can administer the test only if they can prove a 'significant risk' that someone will be exposed to the AIDS virus. Police Told to Halt AIDS Tests, UPI, Oct. 14, 1992. Rubinstein said that under state law, HIV tests can only be given if an officer has been exposed to a bodily fluid. "Even then, the suspect must consent to the test and the result can only be released by the courts." Id. One woman was charged with reckless endangerment after testing positive. Id.
ger criteria reveals that mandatory testing of all arrested prostitutes is unconstitutional.

Since the testing of arrestees serves the same state interests as the testing of convictees, the first prong of Burger—the furthering of a compelling state interest—is not altered. The interest in preventing the spread of AIDS remains a compelling public health interest that advances a special need. Moreover, the goal of controlling the spread of AIDS would be furthered by testing arrested prostitutes.

The second prong of Burger would be satisfied because warrantless inspections will nearly always be necessary to further a regulatory scheme regarding HIV testing. Because there is generally no outward manifestation of the disease, there is generally no information on which to base individualized suspicion or probable cause that one has AIDS, regardless of whether the testee is a convicted prostitute or an arrestee.

Mandatory HIV testing of arrestees, however, fails the third prong of Burger—whether the regulation is an adequate substitute for a warrant. The purpose of a warrant issued by a magistrate (and the purpose of a conviction) is to have the intrusion approved by a neutral party and to limit the discretion of the police. An arrest statute is not an adequate substitute for a detached magistrate. While the conviction requirement allows the opportunity for a neutral fact finder to determine guilt, an arrest standard does not provide an opportunity for a neutral evaluation.

Rather, a warrantless, suspicionless test based on an arrest transfers the discretion to the authorities who actually make arrests. Placing both the authority to arrest and test in one body allows for the possibility of abuse through selective arrests. If the conviction by a neutral fact-finding body is not required, authorities could arrest individuals simply to test them, using the arrest merely as a pretext. "'When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.'" Due to the amount of discretion that would reside in police officers in the case of testing of arrestees, and the potential for police indiscretion, such testing is unconstitutional.

Testing of arrestees further fails the third prong of Burger because such testing is not a narrow intrusion—rather than testing a member of a specific high risk group, testing an arrestee targets a mere suspect. Both Adams and Love emphasized that the Illinois and California testing laws are activated only after conviction, when a de-

fendant is no longer presumed innocent. An arrestee, unlike one who has been convicted, has not been found by the judicial system to fall within any high risk group. The only thing separating the arrestee and the individual on the street is an unproven and perhaps unsubstantiated claim that the person is guilty of a crime. Thus, an arrestee has a greater expectation of privacy and is entitled to a greater degree of Fourth Amendment protection than a convictee. For these reasons, mandatory testing of arrested prostitutes fails the third prong of Burger and is unconstitutional.

IV. "Hold and Treat" Laws: A Constitutional Compromise?

If blanket mandatory HIV testing of arrestees is unconstitutional, the question arises: Does a middle ground exist between the requirements of conviction and arrest? Currently, no proposed state statute that allows for HIV testing upon arrest requires any intermediate showing that the arrestee is in fact a prostitute. Such an intermediate showing might provide a compromise. An example may be drawn from "hold and treat" laws. These laws, usually municipal ordinances, allow officials to detain and treat those individuals "reasonably suspected" of having a venereal disease by virtue of the fact that they can be shown—by various standards of proof—to be prostitutes.

121. Love v. Superior Court, 276 Cal. Rptr. 660, 667 (Ct. App. 1990) ("Testing under section 1202.6... applies only when a person has been convicted... and has thus exhibited behavior from which it can be inferred that he or she has been, and may in the future be, sexually involved with multiple partners."); People v. Adams, 597 N.E.2d 574, 583 (Ill. 1992) ("[T]he testing requirement is triggered only upon a person's conviction for one of the offenses specified in the statute. Thus, the statute operates only at that point in the proceedings when a defendant no longer enjoys a presumption of innocence but instead stands at the threshold of incarceration, probation, or other significant curtailment of personal freedom.").

122. See Bell v. Wolfish, 441 U.S. 520 (1979) (assuming that pre trial detainees have a diminished expectation of privacy, and holding that visual body-cavity inspections do not violate the Fourth Amendment).

123. See Reynolds v. McNichols, 488 F.2d 1378 (10th Cir. 1973) (holding "hold and treat" laws valid constitutional exercise of police power); see also Welch v. Shepherd, 196 P.2d 235 (Kan. 1948) (allowing city health officer, by virtue of the police power, to use force that is "reasonably necessary" to determine whether a person has a venereal disease when the officer has reasonable grounds to believe the person is infected with a venereal disease); Ex parte Fowler, 184 P.2d 814 (Okla. Crim. App. 1947) (upholding statute under police power authorizing local health officials to "examine those arrested by lawful warrant for... prostitution" to determine if they have a venereal disease, but requiring health authorities to show facts justifying restraint where a person questions their detention); People v. Strautz, 54 N.E.2d 441 (Ill. 1944) (holding that a state's police power justifies detaining persons reasonably suspected of being afflicted with a communicable venereal disease and requiring the state to present sufficient evidence to the justice of the peace to justify ordering such examination); Varholy v. Sweat, 15 So. 2d 267 (Fla. 1943) (upholding the detainment for treatment of venereal disease of a woman who, after being arrested for being drunk and disorderly, voluntarily submitted to an examination); City of Little Rock
(A) Reynolds v. McNichols

The 1973 case of Reynolds v. McNichols \(^{124}\) is the only reported federal case on the subject. In Reynolds a woman had been cited for solicitation on five different occasions.\(^{125}\) Under a Denver municipal "hold and treat" ordinance, those arrested and charged with prostitution had a choice between (1) limited detention for the purposes of examination for venereal disease and treatment for any disease, or (2) submission to an immediate injection of penicillin without examination.\(^{126}\) On the first three occasions, the defendant submitted to examination and treatment for venereal disease.\(^{127}\) On the fourth occasion, the woman, in the presence of her attorney, refused to submit to the examination and apparently was not tested.\(^{128}\) On the fifth occasion, she opted to take penicillin orally in lieu of an examination.\(^{129}\) Based on this sequence of events, she brought a civil rights complaint against the City and County of Denver, its mayor, and certain city officials and police officers.\(^{130}\) The complaint alleged that her rights under the Fourth and Fourteenth Amendments were violated, and she sought monetary and injunctive relief.

Under the ordinance, a person was reasonably suspected of having a venereal disease by virtue of the fact that the person had been arrested and charged with solicitation and prostitution.\(^{133}\) The court noted that the goal of the ordinance was to bring under control the source of communicable venereal disease.\(^{134}\) The court also cited several state court cases upholding similar statutes and cases holding that the quarantining of persons to control infectious diseases is constitutional.\(^{135}\) In light of these authorities, and without much analysis, the court held that these laws were valid exercises of police power and therefore constitutional.\(^{136}\)

Does the reasoning of Reynolds provide a middle ground upon which mandatory HIV testing might be allowed, absent a conviction? Upon a close analysis, the answer is a resounding no because the rea-
soning of Reynolds is flawed. In its analysis, the court stated that the fact that the plaintiff was a prostitute—based on numerous facts in the record in addition to the plaintiff's admission—was of "crucial significance." Yet, the court upheld the ordinance that on its face allows testing of one who is "reasonably suspected of having a venereal disease by virtue of the fact that she has been arrested and charged with solicitation and prostitution . . . ." The court fails to acknowledge that the ordinance would allow examination when the only evidence of a person's status as a prostitute is the arrest. As discussed in Part III, supra, a search based merely on the fact of arrest is unconstitutional under the Fourth Amendment because a warrant substitute does not exist. Thus, the Reynolds court should have invalidated the ordinance on its face.

(B) California Hold and Treat Laws

While Reynolds does not provide a middle ground, California's "hold and treat law" does. California "hold and treat" decisions require a higher standard of reasonable suspicion than does the Denver ordinance involved in Reynolds. These decisions require reliable, independent evidence that the person is a prostitute before the person may be detained for examination.

137. Id. at 1382.
138. Id. at 1383. But see id. at 1386 (Lewis, C.J., concurring) (noting that the court does not have to "spell out the limitations, if any, that the word 'suspicion' may have as a legal standard" and noting that "[s]ufficient cause existed in this case for the authorities to consider appellant to be a probable health hazard to the community").

If the health authorities rely upon the claim that the person quarantined is a prostitute and hence likely to be afflicted with disease, then the burden is on the quarantine officers to establish the proof of claim that the accused is of the class and character mentioned. If such person has been legally convicted of being of such class and character, the record of conviction may be relied upon to establish the important fact. In the absence of such conviction, the burden will be with the health authorities to establish the fact by sufficient evidence; for it is the existence of that condition in the person suspected that furnishes the ground for the belief, as an inference only, that the disease exists. It will not do to allow the inference of probable cause to be drawn from a mere suspicion. Id. at 816. The California "hold and treat" laws allow for evidence such as living in a house of ill repute or proof of an encounter to allow examination prior to a conviction. See, e.g., Ex parte Martin, 188 P.2d 287, 290 (Cal. Ct. App. 1948)(basing reasonable cause on evidence that "the premises in question was commonly regarded as a house of prostitution; that it contained the usual paraphernalia generally found in such establishments; . . . cases of venereal disease had been reported . . . there; . . . several arrests had been made at the premises on charges of prostitution . . . and . . . that the petitioners themselves admitted having been engaged either in prostitution or in operating a house of prostitution"); Ex parte Clemente, 215 P. 698, 698 (Cal. App. Ct. 1923)(basing reasonable cause on evidence that "the house conducted by petitioners was a house of ill fame, that she was an inmate thereof, and personally participated in the unlawful acts carried on therein"); Ex parte
One case in particular, *Ex parte Arata*, foreshadows the issue of HIV testing and illustrates the dangers of allowing detention and testing after merely an arrest. In *Arata* the petitioner alleged that she was arrested without a warrant and after spending two days in jail was charged with committing an act of prostitution. Petitioner pled not guilty at her arraignment, and a trial date was set. She furnished the required fifty dollars bail but the jailer refused to discharge her because the Los Angeles Health Department had instructed that she not be released until she submitted to an examination to determine whether she was infected with a communicable disease.

Petitioner filed a writ of habeas corpus alleging that the chief of police was detaining and confining her “without process of law or lawful authority.” She further alleged that she was not infected with any disease, that the city had no reason to believe so, and that she was not a prostitute nor guilty of the crimes accused.

Respondent admitted that petitioner was being detained in the city jail. Narrative facts were presented regarding petitioner’s arrest and her alleged solicitation. The chief of police then explained the health department policy under which petitioner was to be quarantined in the city jail until “examined by officers of the health department... to determine her freedom from contagious or infectious quarantinable venereal disease.” Respondent alleged that petitioner was held in jail due to her refusal to submit to an examination.

The court found that no sufficient cause had been shown by respondent to detain petitioner. After payment of bail, “the right of the chief of police to further detain the petitioner [could only] be justified on grounds having no reference at all to the fact that an accusa-
tion had been made . . . charging petitioner with a crime.”

While the court acknowledged the right of the health department to quarantine those "whom they have reasonable cause to believe are afflicted with infectious or contagious diseases," it held that personal restraint can only occur where "reasonable grounds exist to support the belief that the person is afflicted as claimed." Whether there exist "reasonable grounds" depends on the facts of the individual case.

The court agreed with the rationale that it is "reasonably probable that a person found to be of the class mentioned" (i.e., prostitutes) is infected with a venereal disease. However, the court found arrest insufficient to show that a person belongs to such a class.

If the health authorities rely upon the claim that the person quarantined is a prostitute and hence likely to be afflicted with disease, then the burden is on those officers to establish the proof of the claim that the accused is of the class and character mentioned.

The court held that a conviction for prostitution automatically meets the burden to detain a person until an examination has been made. Absent conviction, however, the health authorities must provide sufficient evidence to show that a person is a member of the high risk class. The court held that since the respondent failed to provide such evidence, the detention was unauthorized.

Would a reasonable suspicion requirement based on a model similar to "hold and treat" laws justify mandatory HIV testing of arrested prostitutes? Possibly, but some problems do exist.

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151. Id.
152. Id. (emphasis added). The court noted that when the person detained questions the power of the health authorities to impose such restraint, the burden shifts to the authorities to justify the detention by bringing forth facts establishing reasonable grounds. Id. “It might be proved, for instance, that the suspected person had been exposed to contagious or infectious influences; that some person had contracted such disease from him or her, as the case might be.” Id.
153. Id.
154. Id. ("The presumption which this statement allows to be made as against the individual in the first instance has its foundation in the fact that women of ill fame, by the very nature of their occupation, indulge in repeated and promiscuous acts of sexual intercourse.").
155. Id.
156. Id.
157. Id. Other cases have held, for example, that proof that one lives in a "house of ill fame" is sufficient evidence to show a person is a prostitute and therefore likely to have a venereal disease. Ex parte Martin, 188 P.2d 287, 289-90 (Cal. Ct. App. 1948); see also Ex parte Dayton, 199 P. 548, 549 (Cal. Ct. App. 1921) ("Evidence consisting of oral testimony of the witnesses and an affidavit were presented at the hearing, and from that evidence we have reached the conclusion that the house at which the petitioner was residing was a house of ill fame, and that she was one of the inmates thereof.").
158. Ex parte Arata, 198 P. at 816-17.
First, the narrowness of the regulation must be evaluated. Allowing testing of those only accused, even with a reasonable suspicion, blurs the line between testing of the general population and testing those proven to be in a high risk group.

Additionally the level of intrusion between the “hold and treat laws” and mandatory testing differs. Thus, the balancing of reasonableness may result in different outcomes. “Hold and treat” laws provide a choice between detention or ingestion of penicillin. Mandatory HIV testing laws involve no choice. Moreover, mandatory HIV tests involve the withdrawal and subsequent testing of the individual’s blood as opposed to the injection or ingestion of penicillin into the bloodstream. This may skew the Fourth Amendment balance. Because a heightened individual privacy interest is involved with the withdrawal and testing of blood, injections or prescriptions of penicillin under “hold and treat” laws may be justified while blood testing might constitute an unreasonable search. The balance may also be altered because it is unclear whether persons who can be reasonably suspected of being prostitutes have a lower expectation of privacy that would justify testing in light of the governmental interest.

Finally, while California case law establishes the need for reasonable suspicion apart from arrest, it does not appear that an actual hearing is necessary. In California, cases subsequent to Ex parte Arata established that:

the necessary proof [required to show that one is a prostitute] is analogous to that required on a preliminary examination before a magistrate prior to commitment on a criminal charge, the extent of the inquiry being merely as to the existence of reasonable cause pending opportunity for further investigation or examination.¹⁵⁹

However, while analogous to the proof required in a preliminary examination, a preliminary examination itself is not necessary. Rather, the evidence showing reasonable cause need only exist “under the facts as brought within the knowledge of the health authorities . . . .”¹⁶⁰ Under California “hold and treat” laws, only when a person questions the power of the health authorities to restrain them does the burden shift to the authorities to present evidence leading to a reasonable cause. This presents Fourth Amendment problems because, in cases in which a person does not question the power of health authorities to test them, a hearing need not be held and thus a warrant substitute does not exist.

While these problems are notable, they do not appear to be fatal to mandatory HIV testing regulations. The Fourth Amendment difficulties with testing arrested prostitutes could be cured with the re-

¹⁵⁹. Ex Parte Martin, 188 P.2d at 290.
¹⁶⁰. Ex parte Arata, 198 P. at 816.
requirement of a hearing to show reasonable suspicion that an individual is a member of a high risk group. The hearing would serve much the same function as a trial resulting in a conviction.

The requirement of a hearing would narrow the scope of the regulation to cases in which sufficient evidence can be shown that an individual is a member of the high risk group. Additionally, a hearing would even the balance between the government interest and the individual intrusion. A person shown by sufficient evidence to be in the high risk group has a lessened expectation of privacy, more closely resembling that of a convicted prostitute. A hearing would also serve as a warrant substitute that removes discretion from the police and places it with a neutral fact finder.

Thus, by combining the reasoning of California "hold and treat" law with the requirement of a hearing, a legislature could enact a regulation for mandatory HIV testing of arrested prostitutes that would be sufficiently narrow to survive Fourth Amendment scrutiny.

**Conclusion**

Mandatory HIV testing of individuals convicted of prostitution is constitutional and, combined with education and voluntary testing procedures, is one means of curtailing AIDS. Conviction, the culmination of a criminal trial, provides a conclusive determination that an individual is in a high risk group.

Some state legislatures have proposed and adopted legislation requiring mandatory HIV testing of those arrested for prostitution. Regulations allowing testing on arrest are unconstitutional under the Fourth Amendment because they fail to satisfy the warrant requirement, fail to check the discretion of the police, and unreasonably intrude on individuals who have not been shown to be a member of a high risk group. The court in *Arata* stated:

One of the most important rights guaranteed under our Constitution, that of the liberty of the citizen, is involved and cannot be lightly passed over, nor can encroachments upon that right be tolerated even under the argument that, in the main, the general result sought is a beneficent one.

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161. It is interesting to note that an effective way of curtailing the spread of the HIV, although perhaps a less socially popular alternative, may be the legalization of prostitution. In Nevada, the only state in the nation in which prostitution is legal and regulated, an 18-month program of mandatory testing did not reveal a single working prostitute who tested positive for HIV. See No Infection in Nevada Brothels, N.Y. Times, Nov. 3, 1987, at C3. Nevada also imposes criminal sanctions on prostitutes who engage in prostitution after testing positive for the HIV. *Id.* Prostitutes who ply their trade after testing positive face sentences of up to 20 years in prison. Nev. Rev. Stat. Ann. § 201.358 (Michie Supp. 1989).

162. *Ex parte Arata*, 198 P. at 816.
States desiring mandatory HIV testing prior to conviction must craft legislation that requires a hearing to show reasonable suspicion that the person arrested is a prostitute, and thus a member of a high risk group. Without such a requirement, the legislation will fail to satisfy established Fourth Amendment standards.