THE FOURTH AMENDMENT'S CHALLENGE TO MANDATORY AIDS TESTING OF CONVICTED SEXUAL OFFENDERS — HAS THE AIDS VIRUS ATTACKED OUR CONSTITUTIONAL RIGHT TO PRIVACY?

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I. INTRODUCTION

> *Posterity will judge us not only in how effectively we as a society respond to crisis posed by the AIDS virus, but also by the extent to which we respect the liberty and dignity of our citizens as we face the challenge posed by AIDS.*[1]

The Acquired Immune Deficiency Syndrome ("AIDS")[2] is "one of the most lethal diseases known to modern medicine."[3] The World Health Organization (WHO) has estimated that fourteen million people are currently infected with the Human Immunodeficiency Virus (HIV).[4] As of this writing, 600,000 individuals are presently suffering from this deadly disease.[5] By the year 2000, persons infected with the HIV virus could total forty million.[6] Of these forty million, it is estimated that at least ten million

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[1]*In re* Juveniles A, B, C, D, E, 847 P.2d 455, 463 (Wash. 1993) (Utter, J., concurring in part and dissenting in part).

[2]AIDS is an abbreviation for "Acquired Immune Deficiency Syndrome." BLACK'S MEDICAL DICTIONARY 20 (36th ed. 1990). For a medical description of AIDS, see *infra* notes 21-37 and accompanying text.

[3]Catrien Ross, *AIDS The Quest for a Cure*, INTERSECT JAPAN AND THE WORLD, Aug. 1993, at 10 [hereinafter *Quest for a Cure*].

[4]*Id.* HIV is an abbreviation for "Human Immunodeficiency Virus." HARRISON'S PRINCIPLES OF INTERNAL MEDICINE, 1402 (12th ed. 1991). AIDS is caused by the HIV virus. *See Quest for a Cure*, *supra* note 3, at 10. For a medical summary of the HIV virus, see *infra* notes 21-59 and accompanying text. Throughout this comment, the terms "AIDS virus," "HIV virus," "AIDS," and "HIV" will be used interchangeably.

[5]*Quest for a Cure*, *supra* note 3, at 10.

[6]*Id.*

will be children.[7] Presently, there is no cure, and the stark reality is that "[w]ithin two years of [a] positive diagnosis of AIDS, the majority of [persons die]."[8]

Understandably, people are frightened and are becoming more so as the death toll rises.[9] As a result, public outcry has triggered numerous legislative responses directed at controlling further spread of the disease.[10] Unfortunately, many of these proposed measures are not laudable.[11]

One law in particular, WASH. REV. CODE ANN. § 70.24.340, may prove

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[7] *Id.*

[8] *Id.*

[9] *See generally* Bernadette Pratt Sadler, Comment, *When Rape Victims' Rights Meet Privacy Rights: Mandatory HIV Testing, Striking the Fourth Amendment Balance*, 67 WASH. L. REV. 195, 195 (1992) [hereinafter *Striking the Balance*] ("As the number of people infected with HIV has grown, so has the panic and hysteria surrounding the disease.") (footnotes omitted); Joanna L. Weissman & Mildred Childers, Comment, *Constitutional Questions: Mandatory Testing for AIDS Under Washington's AIDS Legislation*, 24 GONZ. L. REV. 433, 433 (1988-89) [hereinafter *Constitutional Questions*] ("Concern over the spread of AIDS has prompted many states to adopt legislation which they believe will help limit the spread of this epidemic disease.") (footnote omitted); Royce R. Bedward, Note, *AIDS Testing of Rape Suspects: Have the Rights of the Accused Met Their Match?*, 2 U. ILL. L. REV. 347, 347 (1990) [hereinafter *Rights of the Accused*] (stating that the AIDS epidemic "has created tremendous fear, fueled by the widespread belief that AIDS poses the most serious public health threat in the history of [the United States]") (footnote omitted); Kelly A. Bennett, Legislative Note, *Mandatory AIDS Testing: The Slow Death of Fourth Amendment Protection?*, 20 PAC. L.J. 1413, 1413 (1989) [hereinafter *Slow Death*] ("The rapid spread of the disease in recent years together with the prevalence of the disease among controversial members of society has generated widespread fear of AIDS.").

[10] *See, e.g.*, CAL. PENAL CODE § 1524.1 (West Supp. 1990); TEX. CODE CRIM. PROC. ANN. art. 21.31 (Vernon 1989). For a discussion regarding legislative proposals in connection with the AIDS virus, see generally Lo Gostin, *Public Health Strategies for Confronting AIDS, Legislative and Regulatory Policy in the United States*, 261 JAMA 1621 (1989).

[11] *See Striking the Balance*, *supra* note 9, at 195 (characterizing a majority of legislative proposals which mandate HIV testing and quarantine programs as "unwarranted and absurd") (citation omitted); *Slow Death*, *supra* note 9, at 1413 n.4 (noting examples of various controversial solutions "such as mandatory testing of the entire population, quarantine of AIDS victims, and identification of AIDS carriers by a visible sign or marking") (citing C. EVERETT KOOP, M.D., SC.D., SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME, at 33, 34 (U.S. Department of Health and Human Services, 1986)).

to be as damaging as the disease itself. Pursuant to this statute, a convicted sexual offender is required to undergo compulsory HIV testing[12] even though there is no probable cause that the offender engaged in behavior capable of transmitting the HIV virus.[13] In a recent decision, the Washington Supreme Court determined RCWA 70.24.340 to be constitutional as applied to convicted juvenile sexual offenders.[14] If this decision is appealed and subsequently affirmed by the Supreme Court of the United States,[15] such a holding will severely diminish, if not fully destroy, a convicted[16] sexual offender's Fourth Amendment right to be free from unreasonable searches and seizures.

This comment will address the controversy surrounding mandatory AIDS testing of convicted sexual offenders.[17] Specifically, this essay will examine

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[12]RCWA 70.24.320(4) defines "HIV [blood] testing" as "a test indicative of infection with the human immunodeficiency virus as specified by the board of health by rule." *Id.* For a discussion regarding current medical testing procedures for the AIDS virus, see *infra* notes 60-70 and accompanying text.

[13]*Constitutional Questions*, *supra* note 9, at 449. Contrary to public opinion, the HIV virus is not an easily transmitted or highly contagious disease. *Striking the Balance*, *supra* note 9, at 197. In fact, the modes of transmission require very personal and intimate contact with a person infected with the HIV virus. *Id.* Specifically, the HIV modes of transmission include heterosexual intercourse, contact with blood or blood products through blood transfusions or sharing of contaminated needles, breast feeding, and perinatal exposure. *Id.* (footnotes omitted). For an in-depth discussion concerning the transmission and spread of the AIDS virus, see *infra* notes 39-59 and accompanying text.

[14]*See In re* Juveniles A, B, C, D, E, 847 P.2d 455, 462 (Wash. 1993) (holding that compulsory HIV testing of convicted sexual offenders "comports with the Fourth Amendment").

[15]A Fourth Amendment challenge to mandatory AIDS testing has yet to be heard by the Supreme Court of the United States.

[16]Under RCWA 70.24.340, an individual must be convicted of a sexual offense before he or she may be ordered by a court to undergo an AIDS test. RCWA 70.20.340 (West 1992).

[17]The issue of mandatory AIDS testing has surfaced in a variety of areas. *See, e.g.*, Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1, 909 F.2d 820 (5th Cir. 1990) (holding that a nurse's Fourth Amendment rights were not violated when nurse was terminated for refusing to offer his HIV test results to hospital officials); Dunn v. White, 880 F.2d 1188 (10th Cir. 1989) (finding that a prison's interest in treating prisoners infected with the HIV virus as well as preventing further spread of the disease outweighed the prisoner's lessened expectation of privacy), *cert. denied*, 493 U.S. 1059 (1990); Glover v. Eastern Neb. Community Office of Retardation, 867 F.2d 461 (8th Cir. 1989) (declaring that a health

whether the State of Washington has the right to compel a convicted sexual offender to undergo mandatory AIDS testing where there is no probable cause that the offender engaged in behavior capable of transmitting the HIV virus. Part II will provide the necessary medical background against which Fourth Amendment constitutional issues will be analyzed. Part III will briefly outline the State of Washington's statutory HIV testing scheme of convicted sexual offenders. Part IV will trace the evolution of the Fourth Amendment, with a focus on the development and application of the Supreme Court's "special needs" doctrine[18] in the context of administrative searches. Part V will then analyze the constitutional implications associated with the "special needs" doctrine as applied to mandatory AIDS testing of all convicted sexual offenders absent probable cause that a transmission of bodily fluids has occurred. Finally, Part VI will conclude that although the government has a valid interest[19] in safeguarding the public against the

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service agency policy which required HIV testing of employees was invalid because the risk of transmission of AIDS in the workplace was deemed trivial and virtually non-existent), *cert. denied,* 493 U.S. 932 (1989); Anonymous Fireman v. The City of Willoughby, 779 F. Supp. 402 (1991) (finding that the city's mandatory HIV testing policy for paramedics and firefighters as part of the city's yearly physical examination to serve did not violate the Fourth Amendment); Virgin Islands v. Roberts, 756 F. Supp. 898 (D.V.I. 1991) (holding that the government's interest in providing a rape victim with the HIV status of her assailant outweighed the privacy invasion of the defendant); Harris v. Thigpen, 727 F. Supp. 1564 (M.D. Ala. 1990) (allowing the HIV testing of prisoners because the testing was reasonably related to the penological interest); Love v. Super. Ct. of San Francisco, 276 Cal. Rptr. 660 (1990) (permitting the compulsory HIV testing of a person convicted of soliciting prostitution because the state's interest in preventing the spread of AIDS outweighed the minimal invasion of blood testing); Johnetta J. v. San Francisco Mun. Ct., 267 Cal. Rptr. 666 (1990) (allowing compulsory AIDS testing because the state's interest in trying to protect a public safety employee was greater than the privacy interest of the person who bit the peace officer); and State v. Farmer, 805 P.2d 200 (Wash.) (reversing the trial court's order requiring a convicted sexual offender to undergo an AIDS test prior to sentencing because the test results were useless in corroborating testimony that the convicted sexual offender had AIDS before soliciting juvenile prostitutes), *corrected,* 812 P.2d 858 (1991).

[18]The "special needs" doctrine, "special needs" exception, and the "special needs" balancing test refer to the same principle and are used interchangeably throughout this comment.

[19]Emily Campbell, Comment, *Mandatory AIDS Testing and Privacy: A Psycholegal Perspective*, 66 N.D. L. REV. 467, 469-72 (1990) [hereinafter *Psycholegal Perspective*]. Ms. Campbell identifies five general state interests in requiring mandatory HIV testing. *Id.* at 469-71. A summary of these interests include: (1) the state's interest in alerting responsible health agencies in an effort to calculate and accurately reflect those actually infected with the HIV virus as well as those who could be expected to contract the virus,

effects of AIDS, these interests do not warrant mandatory AIDS testing for *all* convicted sexual offenders. Rather, this comment will argue that pursuant to Fourth Amendment strictures, mandatory AIDS testing for convicted sexual offenders must be limited to instances where the offender engaged in behavior capable of transmitting the HIV virus. This comment will thus propose that the Supreme Court of the United States declare unconstitutional those statutes which do not require the Fourth Amendment constitutional safeguard of probable cause that a passing of bodily fluids occurred.

II. MEDICAL BACKGROUND

Medical knowledge can only be utilized appropriately in the promulgation of legislation if legislative and judicial forums are alert to the significance of AIDS as a bearer of social meanings.[20]

A. THE ACQUIRED IMMUNE DEFICIENCY SYNDROME

As the acronym connotes, AIDS[21] is a syndrome.[22] Accordingly, AIDS does not refer to a single, identifiable disease, but rather refers to a

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id. at 470; (2) ensuring that proper counselling is available for HIV-infected persons, *id.*; (3) monitoring the occurrence and spread of the disease, *id.* at 471; (4) ensuring that available medical treatment is administered to infected individuals, *id.*; and (5) accurately assessing the amount of resources necessary to control the disease. *Id. See also Striking the Balance*, *supra* note 9, at 209-10 (stating that the government has an interest in addressing the health considerations of rape victims by providing the victim with the HIV status of his or her assailant). See *infra* note 220 and accompanying text for further elaboration on governmental interests in requiring mandatory AIDS testing.

[20]Janet L. Dolgin, *AIDS: Social Meanings and Legal Ramifications*, 14 HOFSTRA L. REV. 193, 209 (1985) [hereinafter *Social Meanings*].

[21]Previously used acronyms for the disease include: HTLV-III or Human T cell leukemia virus, LAV, type 3, or lymphadenopathy associated virus. AIDS LAW TODAY A NEW GUIDE FOR THE PUBLIC, 21 (Scott Burris et al. eds., 1992) [hereinafter AIDS LAW].

[22]*See* Paul H. MacDonald, Note, *AIDS, Rape, and the Fourth Amendment: Schemes for Mandatory AIDS Testing of Sex Offenders*, 43 VAND. L. REV. 1607, 1610 (1990) [hereinafter *Testing Schemes*].

progressive sequence of diseases.[23] These diseases are the ultimate cause of death for people with AIDS.[24] AIDS is caused by the Human Immunodeficiency Virus, or HIV.[25] HIV is a retrovirus[26] that attacks the body's immune system by attaching itself to a specific class of white blood cells, known as lymphocytes.[27] Once infected, these lymphocytes are destroyed and the immune system's ability to combat disease and infection becomes progressively weakened.[28] This progression generally occurs in three stages.[29]

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[23]*Striking the Balance*, *supra* note 9, at 196. For a recent survey of medical reports describing the spectrum of diseases in HIV-infected individuals in the United States, see Karen M. Farizo et al., *Spectrum of Disease in Persons with Human Immunodeficiency Virus Infection in the United States*, 267 JAMA 1798 (1992).

[24]Lisa Simotas, Note, *In Search of a Balance: AIDS, Rape and the Special Needs Doctrine*, 66 N.Y.U. L. REV. 1881, 1886 (1991) [hereinafter *Rape and the Special Needs Doctrine*]. *See also* AIDS INFORMATION PLUS, 15 (Carol D. Foster et al. eds., 1992) [hereinafter AIDS INFORMATION].

[25]AIDS LAW, *supra* note 21, at 21.

[26]"A retrovirus incorporates its genetic material into the host cell's DNA structure and causes the cell to replicate the virus instead of performing normal cellular functions." *Testing Schemes*, *supra* note 22, at 1609-10 n.16.

[27]Steven Eisenstadt, *An Analysis of the Rationality of Mandatory Testing for the HIV Antibody: Balancing the Governmental Public Health Interests with the Individual's Privacy Interest*, 52 U. PITT. L. REV. 327, 329 (1991) [hereinafter *Rationality of Testing*] (characterizing lymphocytes as "essential to the function of the body's immune system").

[28]*Id.* (noting that once the lymphocytes are infected by the HIV virus, "the immune system is less effective in combatting viruses, fungi, protozoans and bacteria which invade the body or in preventing the body's development of unusual cancers").

[29]AIDS LAW, *supra* note 21, at 30. As stated in the text above, the three stages include: asymptomatic carriage, symptomatic disease or AIDS-Related Complex (ARC), and full-blown AIDS. *Id.* These stages routinely evolve in a predictable pattern, but may vary in length of time for each infected individual. *Id.* One commentator described the course of AIDS progression as follows:

> Once infection occurs, an irreversible course of progressive illness has been set in motion, and the goal of medical intervention is to slow viral activity and delay the next step in immune deterioration. HIV disease is not now reversible, and periods of stability are seen as temporary halts rather than permanent arrests.

Id.

The first stage is known as "asymptomatic carriage."[30] Asymptomatic carriage poses the greatest risk to the public health.[31] During this stage, an infected individual, although capable of transmitting the disease to others, does not manifest any overt or identifiable symptoms, and "generally feel[s] and appear[s] perfectly healthy."[32] The length of this stage averages four and one half years, but may last as long as ten years for some individuals.[33]

The second stage, known as "HIV positive, symptomatic," is characterized by symptoms such as fatigue, weight-loss, fever, and swollen glands.[34] This stage precedes the final stage known as "full-blown AIDS," (or merely AIDS).[35] During full-blown AIDS, a person may experience second-stage symptoms "combined with the development of opportunistic infections [such as Kaposi's sarcoma (a form of cancer) or *pneumocystis carinii* pneumonia], secondary cancers and/or a variety of neurologic disorders."[36] As previously stated, it is these cancers and opportunistic infections, and not the HIV virus, which ultimately causes death for people with AIDS.[37]

B. Modes of Transmission and Spread of the HIV Virus

Medical data indicate that HIV infection can only occur when an infected individual's semen, vaginal secretions, or blood [hereinafter bodily fluids]

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[30]*Id.* Individuals at this stage of infection are also commonly referred to as "seropositive" or "HIV-positive." *Id. See Rape and the Special Needs Doctrine*, *supra* note 24, at 1885 n.26.

[31]*Rape and the Special Needs Doctrine*, *supra* note 24, at 1886 n.27 (indicating that "fewer than 10% of HIV infected individuals are aware that they carry the virus").

[32]*Id.* at 1885-86 n.27.

[33]*Id.* at 1885-86.

[34]AIDS Law, *supra* note 21, at 34. "HIV positive, symptomatic" is also commonly referred to as "AIDS Related Complex," or ARC. *Id.*

[35]*Striking the Balance*, *supra* note 9, at 196-97.

[36]*Id.*

[37]*Rationality of Testing*, *supra* note 27, at 329.

come into close or intimate contact with the mucous membranes[38] or blood of an uninfected individual.[39] Casual contact cannot spread the HIV virus.[40] As such, HIV is not transmitted by food, water, air, or by sharing household objects.[41] To date, no case of HIV transmission has been reported that involves contact with saliva, tears, or sweat.[42] The established modes of HIV transmission include: blood-to-blood contact,[43] sexual contact,[44] and mother-to-infant transmission.[45]

Blood-to-blood contact poses the greatest risk of transmission.[46] Blood-to-blood contact may occur, and thus transmission may result, from the use of contaminated needles, or from the receipt of contaminated blood through a blood transfusion.[47] Significantly, however, intact skin does not allow the HIV virus to penetrate the body and, therefore, is not a viable route for transmission.[48]

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[38]Mucous membranes are found in the eyes, mouth, vagina, anus, and urethra. AIDS LAW, *supra* note 21, at 23.

[39]*Id.* *See also* AIDS INFORMATION, *supra* note 24, at 16 (clarifying that HIV is not spread by routine or daily contact such as "sneezing or coughing, by sharing bathrooms or swimming pools, hugging, or shaking of hands").

[40]AIDS LAW, *supra* note 21, at 23. *See also* AIDS AND THE COURTS 28 (Clark C. Abt & Kathleen M. Hardy eds., 1990) [hereinafter AIDS AND THE COURTS]. For further discussion regarding casual contact and the nontransmission of the HIV virus, see *infra* notes 57-59 and accompanying text.

[41]AIDS LAW, *supra* note 21, at 24.

[42]*Id.* at 23 (stating that "there is only one mechanism of transmission — intimate contact with infected bodily fluids . . . .").

[43]*Id.* at 28-29.

[44]*Id.* at 24-25.

[45]*Id.* at 27-28.

[46]*Id.* at 23. As compared to vaginal secretions or semen, an infected individual's blood contains the highest concentration of the infectious virus. *Id.* Additionally, blood has the richest supply of CD4 protein cells (cells that make the body susceptible to infection). *Id.*

[47]*Id.* at 28.

[48]*Id.* at 24 (stating that "[e]ven direct contact between infected blood and intact skin is not a risky exposure").

The largest number of documented HIV infections worldwide constitutes transmission by sexual contact.[49] It has been established that sexual activity involving genital contact presents a substantial risk of HIV transmission.[50] There are no reported cases that document kissing as a cause of transmission.[51] Although small traces of the HIV virus have been found in human saliva, medical experts do not consider saliva to be a medically-significant source of infection.[52]

As the number of women infected with HIV increases, either through heterosexual activity or shared needles, "the problem of mother-to-infant transmission escalates proportionately."[53] Mother-to-infant transmission includes three possible routes of infection. The first route involves "direct HIV transfer into the fetal circulation and tissues in utero."[54] Second, an infant may become infected with HIV through "exposure to maternal blood and secretions during the trauma of a spontaneous vaginal delivery."[55] The third route of infection, although not as prevalent as the above, includes breastfeeding.[56]

Although critical that the public recognize and understand behaviors that pose a high risk of transmission, the public must also be cognizant of those activities which do not pose a threat of infection.[57] In this regard, numerous studies have documented over 700 individuals who have had close,

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[49]*Id.*

[50]*Rationality of Testing, supra* note 27, at 330. *See also* AIDS LAW, *supra* note 21, at 25. Studies have revealed that receptive partners of anal intercourse by gay males have the greatest risk of infection, and receptive women partners of heterosexual vaginal intercourse are also at high risk of infection. *Id.* Moreover, vaginal intercourse during menstruation is believed to pose a higher risk to a woman's partner than intercourse involving regular vaginal secretions. *Id.*

[51]AIDS LAW, *supra* note 21, at 25.

[52]*Id.*

[53]*Id.* at 27.

[54]*Id.* at 27-28.

[55]*Id.* at 28.

[56]*Id.*

[57]*Id.* at 29.

although nonsexual, contact with a person infected with AIDS.[58] These studies have revealed that no single instance of HIV transmission was detected or reported "that could not be explained by a more traditional route of exposure."[59]

C. TESTING FOR THE HIV VIRUS[60]

Testing is available to determine whether individuals are infected with the HIV virus. Currently, there are two commonly-used methods of testing: the enzyme-linked immunosorbent assay, or ELISA, and the Western Blot.[61] Neither of these tests directly detects the presence of the HIV virus itself.[62] Rather, the ELISA and Western Blot tests merely detect the presence of

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[58]*Id.*

[59]*Id.* at 29. A report on a study of casual contact that involved detailed information regarding the sharing of toothbrushes, razors, toilets, bath towels, unwashed drinking glasses, and utensils noted that:

> None of these activities resulted in a single case of viral transmission, although many of them involved sharing objects that were soiled with saliva, feces, and urine. Similarly, spitting, biting, and exposure to urine or feces are not routes of transmission, because in most such situations the skin remains intact, and the amount of virus present in these fluids is in any case insignificant. It is important to recognize that simply because the virus can be isolated from these bodily fluids in the laboratory does not mean that they play any significant role in the real-world transmission of the virus.

Id. (footnote omitted).

[60]David K. Moody has provided an excellent, concise description of HIV testing. *See* David K. Moody, Note, *AIDS and Rape: The Constitutional Dimensions of Mandatory Testing of Sex Offenders*, 76 CORNELL L. REV. 238 (1990) [hereinafter *Constitutional Dimensions*]. Much of this section has been modeled after his writing.

[61]AIDS LAW, *supra* note 21, at 32. The ELISA test can be completed within a matter of hours. *Id.* The ELISA test, however, can falsely identify blood samples as being HIV positive (known as "false positive") and, thus, is not considered as specific or accurate as the Western Blot. *Id.* Therefore, ELISA is generally performed first, and if the results are positive, the Western Blot is used to confirm the results. *Id.*

[62]*Id.* Several techniques are available that directly detect the presence of the HIV virus. *Id.* Due to the biology and nature of HIV infection, however, these alternative forms of testing are considered unreliable measures of exposure and are not utilized by the medical community. *Id.*

positive HIV antibodies.[63] HIV testing has proven to be inherently inexact.[64] Because the ELISA and Western Blot do not test for HIV itself, but for the presence of antibodies formed in reaction to the HIV virus, there generally is, after exposure, a delay of three to twelve weeks before either test will indicate a positive result.[65] Some individuals may test negative after twelve weeks.[66] By six months, however, presence of HIV antibodies will appear in almost every case.[67]

Originally, the ELISA and Western Blot tests were designed to test donated blood for the HIV virus.[68] As such, these tests were not designed to test whether an individual is infected with the HIV virus.[69] Therefore, current testing practices have been developed to "err on the side of false positives rather than false negatives."[70]

III. WASHINGTON'S STATUTORY HIV TESTING SCHEME AND CONVICTED SEXUAL OFFENDERS

We cannot ignore that rules of law also have a symbolic power that may vastly exceed their utility.[71]

In 1988, the State of Washington adopted what has been deemed "possibly the most comprehensive legislation in the United States dealing with AIDS

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[63]Antibodies are developed by the body's immune system to combat various infections and viruses. AIDS LAW, *supra* note 21, at 31-32. The process whereby the blood converts from negative to positive antibodies is known as "seroconversion." *Id.* at 32.

[64]*Constitutional Dimensions*, *supra* note 60, at 241.

[65]*Id.*

[66]*Id.*

[67]*Id.*

[68]*Id.*

[69]*Id.*

[70]*Id.*

[71]New Jersey v. T.L.O., 469 U.S. 325, 373 (1985) (Stevens, J., concurring in part and dissenting in part).

. . . ."[72] Under this legislative scheme, all persons convicted of a sexual offense in violation of RCWA Chapter 9A.44 will be required to submit to HIV testing.[73]

One of the offenses included within this chapter is the sexual offense, indecent liberties.[74] Conviction for indecent liberties occurs when a person "engage[s] in 'sexual contact' with another."[75] Sexual contact has been defined as "any touching of the sexual or other intimate parts of a person

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[72]*See Constitutional Questions*, *supra* note 9, at 433. The Washington statute provides for testing in a variety of other contexts. *Id.* Because this comment is limited to a constitutional analysis of the statute's constitutionality as it relates to the rights of convicted sexual offenders only, a discussion of the statute's other sections will not be included within this text. For an exhaustive analysis regarding the entire Washington statute, see *id.*

[73]*Id.* at 449 (citing 70.24.340(1)(a) (Supp. 1988)). WASH. REV. CODE ANN. § 70.24.340(1)(a) (West 1992) states in pertinent part:

> (1) Local health departments authorized under this chapter shall conduct or cause to be conducted pretest counseling, HIV testing, and posttest counseling of all persons:
> (a) Convicted of a sexual offense under chapter 9A.44 RCW . . . ,
> (2) Such testing shall be conducted as soon as possible after sentencing and shall be so ordered by the sentencing judge.

WASH. REV. CODE ANN. § 70.24.240(1)(1) (West 1992)).

[74]*Id.* at 449 (citing 9A.44.100 (1987 & Supp. 1988)). Regarding the offense, indecent liberties, 9A.44.100 provides in relevant part:

> (1) A person is guilty of indecent liberties when he knowingly causes another person who is not his spouse to have sexual contact with him or another:
> (a) By forcible compulsion; or
> (b) When the other person is less than fourteen years of age; or
> (c) When the other person is less than sixteen years of age and the perpetrator is more than forty-eight months older than the person and is in a position of authority over the person; or
> (d) When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless.
> (2) For purposes of this section:
> (a) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party.

WASH. REV. CODE ANN. § 9A.44.100 (1979).

[75]*Id.*

done for the purpose of gratifying sexual desire of either party."[76] The statute does not require the passing of bodily fluids capable of transmitting the AIDS virus.[77] Nonetheless, an offender convicted under this statute is compelled to undergo AIDS testing even though he or she may not have engaged in the type of behavior necessary for transmitting the HIV virus.[78]

IV. EVOLUTION OF THE FOURTH AMENDMENT AND THE "SPECIAL NEEDS" 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 direction.[79]

The Fourth Amendment to the United States Constitution[80] was created

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[76]*Id.* at 449 (citing WASH. REV. CODE ANN. § 9A.44.100(2)).

[77]For a detailed discussion on the modes of transmission of the AIDS virus, see *supra* notes 39-59 and accompanying text.

[78]Similar statutes requiring mandatory AIDS testing of persons convicted of a sexual offense have been passed throughout the United States. *See, e.g.*, W. VA. CODE I 16-3C-2(f)(2), 16-3C-3(a)(8) (1991) (requiring mandatory HIV testing for certain crimes; allowing disclosure of test results if court determines the need for the disclosure outweighs the individual privacy interests); TENN. CODE ANN. § 39-13-521 (1991) (requiring mandatory AIDS testing and results revealed to victim upon victim's request); GA. CODE ANN. § 17-10-15 (1990) (providing that a court may, at its discretion, require testing and provide results to assailant's victim).

[79]Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 613-14 (1989) (citing Camara v. Municipal Court, 387 U.S. 523, 528 (1967)).

[80]U.S. CONST. amend. IV. The full text of the Fourth Amendment reads as follows:

> 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.

Id.

The relationship between the first clause of the amendment (the "reasonableness" clause) and the second clause (the "warrant" clause) is the subject of continuing debate. *See* Andrea Lewis, Comment, *Drug Testing: Can Privacy Interests Be Protected Under the "Special Needs" Doctrine?*, 56 BROOK. L. REV. 1013, 1015-16 n.9 (1990) [hereinafter *Privacy Interests*]. This debate centers upon the constitutional issue of whether searches

to protect individuals against unreasonable searches and seizures conducted by the government.[81] Two criteria must be satisfied for a governmental action to be deemed a "search" under the Fourth Amendment.[82] First, a person must exhibit an actual or subjective expectation of privacy,[83] and second, that expectation must be one that society is willing to recognize as reasonable.[84]

The Supreme Court has found that compulsory blood testing constitutes a search within the meaning of the Fourth Amendment.[85] All searches, however, are not prohibited under the Fourth Amendment.[86] Only those searches that are deemed unreasonable will be violative of the Fourth

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conducted without a warrant are *per se* unreasonable or whether the warrant is simply one of several factors to be considered in determining a search's reasonableness. *Id.* For an in-depth concentration regarding the constitutional role of search warrants, see generally Craig M. Bradley, *Two Models of the Fourth Amendment,* 83 MICH. L. REV. 1468 (1985); Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173 (1988).

[81]The Fourth Amendment applies to state actions as well as actions by the federal government. Mapp v. Ohio, 367 U.S. 643, 655, *reh'g denied*, 368 U.S. 871 (1961).

[82]*See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). In *Katz*, the petitioner was convicted under an eight-count indictment which charged him with violating a federal statute prohibiting telephone transmission of wagering information across state lines. *Id.* at 348. During Katz's trial, the State admitted into evidence a recording of Katz's telephone conversation wherein he transmitted wagering information across state lines. *Id.* The conversation was overheard by FBI agents who had deliberately attached electronic recording and listening devices to the exterior of a public telephone booth from which Katz had placed his telephone call. *Id.*

[83]*Id.* at 361 (Harlan, J., concurring).

[84]*Id.*

[85]*See* Schmerber v. California, 384 U.S. 757, 767 (1966). In *Schmerber*, the petitioner was convicted of the criminal offense of driving while intoxicated in violation of CAL. VEH. CODE § 23102(a) which provides in relevant part, "[i]t is unlawful for any person who is under the influence of intoxicating liquor . . . to drive a vehicle upon any highway . . . ." *Id., reprinted in Schmerber*, 384 U.S. at 758 n.1. The petitioner was arrested while he was at a hospital being treated for injuries sustained as a result an automobile accident in which he was the driver. *Id.* A blood sample was withdrawn by a hospital physician at the instruction of a police officer. *Id.* Subsequent chemical analysis of the blood sample revealed alcohol in petitioner's blood during the time of the accident. *Id.* at 759. Petitioner challenged the introduction of this evidence at trial. *Id.*

[86]Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989).

Amendment and, thus, rendered unconstitutional.[87] To determine the reasonableness of a search, the Court will balance the government's need to conduct the search against the level of intrusiveness placed upon the individual.[88] Generally, the reasonableness of a search will depend upon the type of governmental search at issue.

Government searches have been divided into two distinct categories.[89] The first, criminal searches, involve those intrusions effectuated with an intent to obtain and procure evidence for use in a criminal proceeding.[90] In the criminal context, a search will generally be considered reasonable only if it is conducted pursuant to a judicially-issued warrant based upon probable cause.[91] The warrant and probable cause requirements,[92] however, may

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[87]*Id.* (citing United States v. Sharpe, 470 U.S. 675, 682 (1985)); *Schmerber*, 384 U.S. at 768). The reasonableness of a search will depend upon the surrounding circumstances and particular nature of the search involved. *Id.* (citing United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985)).

[88]*Skinner*, 489 U.S. at 619 (citations omitted).

[89]*Testing Schemes*, *supra* note 22, at 1618.

[90]Schmerber v. California, 384 U.S. 757, 759 (1966).

[91]*Skinner*, 489 U.S. at 619 (indicating that "Except in certain well-defined circumstances, a search or seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause.").

One writer has defined probable cause as "the degree of information necessary that would lead a reasonable person to believe that the thing to be searched for will be found in a particular location." *Privacy Interests*, *supra* note 80, at 1013 n.4 (relying on Brinegar v. United States, 338 U.S. 160, 175-76 (1949)). Ms. Lewis has observed that "*Brinegar* did not define the degree of probability required other than to say 'more than bare suspicion' and 'less than evidence which would justify . . . [the] conviction.'" *Id.* (citing *Brinegar*, 338 U.S. at 175).

[92]"The probable cause requirement is basic to the central concern of the Fourth Amendment that citizens be protected from arbitrary and oppressive interference and intrusions by [the government]." JOHN W. HALL, JR., SEARCH AND SEIZURE 141 (1982). Historically, the purpose of the Fourth Amendment was to guarantee that police intrusions were justified and not executed on "mere suspicion or whim." *Id.* Thus, the probable cause requirement was designed to eliminate intrusions at an officer's discretion on the street. *Id.*

Intimately connected to the probable cause requirement is the warrant requirement or the requirement that, subject to certain exceptions, a "neutral and detached" magistrate first review the appropriate facts and circumstances stipulated by the police officer to determine if probable cause exists to justify a search. *Id.*

be relaxed if the search is deemed minimally intrusive.[93] The second type of search is an administrative search.[94] Unlike criminal searches, administrative searches are regulatory in nature and the gravamen[95] of the governmental search is to obtain information in an effort to protect the health and safety of citizens.[96] Administrative searches are generally part of a governmental regulatory scheme and include activities such as: border stops, building inspections, and inspections of pervasively regulated businesses, such as gun shops, restaurants, and junkyards.[97] Thus, the reasonableness standard for administrative searches differs from the criminal search requirement of a warrant based upon probable cause. The probable cause requirement of an administrative search may be satisfied whenever a reasonable government interest is justified by the "legislative or administrative standards" governing the search.[98]

The following sections will trace the evolution of the Supreme Court's Fourth Amendment jurisprudence in the areas of criminal and administrative searches. The sections below will highlight the Supreme Court's dangerous trend toward dissolving the constitutionally-mandated warrant and probable cause requirements with the judicially-created "special needs" balancing test

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[93]*Constitutional Dimensions, supra* note 60, at 247 ("Since the government's need for [a] search does not vary within the context of law enforcement, departures from the warrant and probable cause requirements turn on the intrusiveness of the search."). *Id.* "Minimally intrusive searches require less than probable cause, *id.* (citing Terry v. Ohio, 392 U.S. 1, 27 (1968)), while some searches may be so intrusive as to be unreasonable even if conducted pursuant to a warrant issued on probable cause." *Id.* (citing Winston v. Lee, 470 U.S. 753, 766 (1985)).

[94]For further discussion regarding administrative searches, see *infra* notes 120-129 and accompanying text.

[95]*Rape and the Special Needs Doctrine, supra* note 24, at 1891 n.68 ("The threshold question of what constitutes an 'administrative purpose' is open to debate" as "[m]any administrative inspection schemes may result in the imposition of criminal penalties.") (citing New York v. Burger, 482 U.S. 691, 712-16 (1987)) (holding that a state may deal with similar problems through use of administrative schemes and criminal laws).

[96]*Testing Schemes, supra* note 22, at 1619-20.

[97]*Striking the Balance, supra* note 9, at 201 (footnote omitted).

[98]Camara v. Municipal Court, 387 U.S. 523, 538 (1967).

for administrative searches.[99]

A. CRIMINAL SEARCHES — FEDERAL STANDARDS REGULATING CRIMINAL SEARCHES INVOLVING BODILY INTRUSIONS

The issue of whether compulsory blood testing constitutes a search within the meaning of the Fourth Amendment was first addressed and affirmatively decided in *Schmerber v. California*.[100] The Court in *Schmerber* upheld the warrantless administration of a blood alcohol test pursuant to the arresting officer's belief that the petitioner was driving while intoxicated.[101] In reaching this conclusion, the Court reasoned that the petitioner's overt symptoms of intoxication[102] and the exigent circumstances surrounding the drunk driving accident,[103] provided the police officer with sufficient probable cause to justify a warrantless administration of the blood alcohol

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[99]The Supreme Court's "special needs" cases include: New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (finding a "substantial need" for teachers and administrators . . . to maintain order in the schools . . . ."); O'Connor v. Ortega, 480 U.S. 709, 725 (1987) (finding a special need in "the efficient and proper operation of the workplace . . . ."); Griffin v. Wisconsin, 483 U.S. 868, 878 (1987) (finding a need to protect "the deterrent effect of the supervisory arrangement" of probation); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 620 (1989) (finding a need to deter drug and alcohol use by railroad employees); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 679 (1989) (validating the need to prevent "the promotion of drug users to positions where they might endanger the integrity of [the] Nation's borders or the life of the citizenry . . . .").

[100]384 U.S. 757 (1966). Justice Brennan delivered the majority opinion. *Id.* at 758. Justice Harlan authored a separate concurrence. *Id.* at 772 (Harlan, J., concurring). Justice Stewart joined in Justice Harlan's concurrence. *Id.* Chief Justice Warren penned a separate dissent. *Id.* (Warren, C.J., dissenting). Justice Black, joined by Justice Douglas, wrote a separate dissent. *Id.* at 773 (Black, J., dissenting). Justice Douglas wrote a separate dissent. *Id.* at 778 (Douglas, J., dissenting). Justice Fortas also authored a separate dissent. *Id.* at 779 (Fortas, J., dissenting).

[101]*Id.* at 772.

[102]*Id.* at 768-69 (noting that "[t]he police officer who arrived at the scene shortly after the accident smelled liquor on petitioner's breath, and testified that petitioner's eyes were 'bloodshot, watery, [and] sort of a glassy appearance.'").

[103]*Id.* at 770-71. Writing for the Court, Justice Brennan observed that the desired evidence as to the amount of alcohol in petitioner's blood would have been severely diminished by the usual delays associated with obtaining a warrant. *Id.*

test.[104]

The Court in *Schmerber* balanced the government's need in conducting the warrantless search against the individual's privacy interest at issue.[105] Analyzing the severity of the privacy intrusion, the Supreme Court considered the extent to which the blood test threatened the health and safety of the petitioner.[106] Next, the Court balanced the severity of the intrusion upon the personal dignitary interests and bodily integrity of the individual.[107] Employing this test, Justice Brennan found that under the circumstances, the blood testing procedure and method of administration were reasonable.[108] The Justice reasoned that because there was little or no threat to the petitioner's health or safety, and because the petitioner's privacy intrusions were minimal,[109] the search was reasonable and, thus, comported with the Fourth Amendment.[110]

The Supreme Court later applied the *Schmerber* balancing test in *Winston*

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[104]The Court in *Schmerber* did not abandon the traditional warrant and probable cause requirements, but recognized that under certain exigent circumstances where "the delay necessary to obtain a warrant . . . [t]hreaten[s] 'the destruction of evidence,'" the probable cause standard may be enhanced. *Id.* at 770 (quoting Preston v. United States, 376 U.S. 364, 367 (1964)).

[105]*Id.* at 770-72.

[106]*Id.* at 771.

[107]*Id.* (reasoning that the "[e]xtraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol"). Justice Brennan, recognizing that "[s]uch tests are common-place . . . ," stated that blood tests are "a ritual for those going into the military as well as those applying for marriage licenses." *Id.* at 771 n.13 (citation omitted). The Justice further noted that "many colleges require such tests before permitting entrance and literally millions of individuals have voluntarily gone through the same, though a longer, routine in becoming blood donors." *Id.*

[108]*Id.* at 771.

[109]*Id.* In furthering this proposition, the Court stated that blood tests are a common procedure that involves a minimal extraction of blood and poses "virtually no risk, trauma, or pain" for most individuals. *Id.* Moreover, because the petitioner's blood was extracted by a hospital physician in accordance with "accepted medical practices," the manner in which the procedure was conducted was also considered reasonable. *Id.* at 771-72.

[110]*Id.* at 772. The Court stressed, however, the narrow application of its holding as well as the importance of preserving the bodily integrity of an individual and cautioned against "more substantial intrusions, or intrusions under other conditions." *Id.*

v. Lee.[111] *Winston* involved the compelled surgical removal of a bullet which was lodged in Lee's chest.[112] The bullet was to be used as evidence to determine Lee's guilt or innocence in an armed robbery.[113] Contrary to the Supreme Court's holding in *Schmerber*, the Court in *Winston* held that the compelled surgery was "unreasonable" and, as such, violated the respondent's Fourth Amendment right against unreasonable searches and seizures by the government.[114]

Adopting the case-by-case balancing approach articulated in *Schmerber*,[115] the Court in *Winston* found that the surgery was substantially more intrusive and dangerous[116] than the routine blood extraction procedure present in *Schmerber*.[117] Moreover, Justice Brennan determined that the Commonwealth's interest in retrieving the bullet was not compelling because the evidentiary value of the bullet was not certain, nor was retrieval of the bullet crucial to the outcome of the criminal proceeding.[118] The majority

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[111]470 U.S. 753 (1985). Justice Brennan, joined by Justices White, Marshall, Powell, Stevens, and O'Connor, delivered the opinion of the Court. *Id.* at 755. Justices Blackmun and Rehnquist concurred in the judgment. *Id.* at 767 (Blackmun, J., concurring in the judgment). Chief Justice Burger authored a separate concurrence. *Id.* (Burger, C.J., concurring).

[112]*Id.* at 755-58. Specifically, the Commonwealth of Virginia sought to compel the respondent, Rudolph Lee, who was suspected of attempted armed robbery, to undergo surgery which required general anesthesia. *Id.*

[113]*Id.* at 755.

[114]*Id.* at 767.

[115]*Id.* at 761-66.

[116]Although the surgery's threat to Lee's health and safety were sharply disputed between the parties, Justice Brennan indicated that the possibility of injury to Lee's "muscle . . . nerves, blood vessels and other tissues . . ." represented a severe privacy intrusion. *Id.* at 763-65.

[117]*Id.* at 765-66. The Court in *Winston* characterized Lee's bodily intrusion as 'extensive.' *Id.* at 764. The Court reasoned that because the surgery involved the forced use of narcotics and barbituates, and placed the individual "'into a state of unconsciousness,' to search beneath his skin for evidence of a crime . . . [the search involve[d]] a virtually total divestment of ordinary control over surgical probing beneath his skin." *Id.* at 764-65.

[118]*Id.* at 765-66. The Commonwealth of Virginia possessed substantial evidence to convict Lee without using the bullet as evidence. *Id.*

thus reasoned that Lee's protected privacy and security interests outweighed the government's need to search for evidence.[119] The Court, therefore, concluded that the government was prohibited from compelling Lee to undergo the search.

B. ADMINISTRATIVE SEARCHES

1. Federal Standards Regulating Administrative Searches Involving Property Intrusions

a. Employing a Balancing Test for Determining the Reasonableness of an Administrative Search

The Supreme Court of the United States first extended the scope of Fourth Amendment protection beyond the realm of criminal searches and arrests in the seminal case of *Camara v. Municipal Court.*[120] The *Camara* decision, which involved a housing code statute,[121] established the framework governing Fourth Amendment standards for administrative searches of personal property.[122] Recognizing the unique character of administrative

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[119]*Id.* at 767.

[120]387 U.S. 523 (1967). Justice White delivered the majority opinion. *Id.* at 525. Justice Clark, joined by Justices Harlan and Stewart, penned a separate dissent. *Id.* at 546 (Clark, J., dissenting).

[121]Section 86(3) of the San Francisco Housing Code provides in pertinent part that "apartment house operators shall pay an annual license fee in part to defray the cost of periodic inspections of their buildings . . . ." *Id.* at 526 n.1. On three separate occasions, Camara refused to allow city housing inspectors to conduct an inspection of his residence without a warrant. *Id.* at 539. Consequently, Camara was charged with violating the San Francisco Housing Code. *Id.* at 525. Justice White, writing for the Court, found that the city housing inspector did not possess probable cause to believe that any housing code violations or evidence of criminal activity would be found. *Id.* at 539. The Supreme Court in *Camara,* thus, reversed the appellant's conviction for refusing to allow city housing inspectors to conduct a search of his personal residence without a warrant. *Id.* at 540.

[122]*Cf.* See v. City of Seattle, 387 U.S. 541 (1967) (holding that general Fourth Amendment standards of reasonableness apply to businesses as well as residential property).

searches,[123] the Court modified the traditional criminal search requirement of a warrant based on probable cause.[124] Under this modified framework, the "probable cause" requirement for an administrative search may be satisfied and a valid warrant issued if the government can justify the search by a reasonable governmental interest.[125] Writing for the Court, Justice White explained that if the administrative search is of personal property, the probable cause requirement will be satisfied if the government can justify its intrusion with a valid public interest.[126] The Justice employed a balancing test to determine whether the governmental interest was reasonable.[127] Pursuant to this balancing test, the governmental interest in conducting the search is weighed against the competing individual privacy interest at issue.[128] If the governmental interest outweighs an individual's privacy intrusion, an administrative warrant may be issued and the search will be

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[123]*Camara*, 387 U.S. at 535. For an explanation of the purpose of an administrative search, see *supra* note 95 and accompanying text.

[124]*Id.* For a definition of probable cause, see *supra* note 91 and accompanying text.

[125]*Id.* at 538. The Court noted that a reasonable government interest may be evidenced by administrative or legislative standards. *Id.* Justice White reasoned:

> Such standards which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.

Id.

[126]*Id.* at 539.

[127]*Id.*

[128]*Id.* at 539. Although the Court conceded that there is no "ready test" to determine the reasonableness of a search, Justice White, writing for the Court, enumerated several factors which will support the "reasonableness of area code-enforcement inspections." *Id.* at 537. First, the Justice noted that the inspection program must have been previously accepted by both the judiciary and the public. *Id.* Second, Justice White stipulated that there must exist a demonstrated public need to prevent and abate all dangerous conditions such as, for example, faulty wiring which may not be readily observable without entry into the building. *Id.* Third, the Justice stated that the inspections must not be personal in nature and must not be aimed at discovering evidence of a crime. *Id.*

upheld, even if individualized suspicion is absent.[129]

b. Development of The "Special Needs" Doctrine

The use of the *Camara* balancing test has been significantly broadened by the Supreme Court's judicially-created "special needs" doctrine. This doctrine "creates an alternative to the usual warrant and probable cause requirements when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement[s] impracticable.'"[130] Once the Court determines that a special need exists, the Court then applies the *Camara* balancing test to determine whether the search is reasonable.[131]

The Court first recognized this "special needs" exception in *New Jersey v. T.L.O.*[132] Writing for the Court, Justice White[133] upheld the

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[129]*Id.* at 539. In justifying this modification of the traditional application of the probable cause requirement, the Court stated that:

> Such an approach neither endangers time-honored doctrines applicable to criminal investigations nor makes a nullity of the probable cause requirement in this area. It merely gives full recognition to the competing public and private interests here at stake and, in so doing, best fulfills the historic purpose behind the constitutional right to be free from government invasions of privacy.

Id.

Criticizing the Court's proposition, Andrea Lewis persuasively stated that "[B]y taking away an independent role for probable cause, [and] making probable cause a function of reasonableness, the Court has diluted the probable cause requirement and weakened the protection that the fourth amendment was meant to provide." *See Privacy Interests*, *supra* note 80, at 1017 (footnote omitted).

[130]*Privacy Interests*, *supra* note 80, at 1031-32 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985))).

[131]*Id.* at 1032. See *supra* notes 120-129 for an examination of the *Camara* balancing test.

[132]469 U.S. 325 (1985).

[133]*Id.* Justice White, joined by Chief Justice Burger, and Justices Powell, Rehnquist, and O'Connor, delivered the majority opinion. *Id.* at 327. In Part II of the decision, Justices Brennan, Marshall, and Stevens joined. *Id.* at 333. Justice Powell, joined by Justice O'Connor, filed a separate opinion. *Id.* at 348 (Powell, J., concurring). Justice Blackmun wrote an opinion concurring in the judgment. *Id.* at 351 (Blackmun, J., concurring in the judgment). Justice Brennan, joined by Justice Marshall, filed an opinion concurring in part and dissenting in part. *Id.* at 353 (Brennan, J., concurring in part and

warrantless search of a student's pocketbook for cigarettes by a public school administrator.[134] The seized evidence[135] was forwarded to the police and the student was thereafter legally implicated in the sale of marijuana.[136] The majority pronounced that a search lacking a warrant based on probable cause may be constitutionally permissible if two criteria are satisfied.[137]

First, Justice White explained that the search must be justified at its inception by a "reasonable suspicion of wrongdoing," and second, the search must reasonably relate in scope to "the need to justify the search."[138] Applying these prongs, the Justice struck a balance between the school's special need in maintaining order in the classroom against the student's legitimate expectation of privacy in personal property brought to the school.[139] Central to the Court's holding was the view that a warrant "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."[140]

Justice White subsequently applied the "special needs" framework established in *T.L.O.* to further justify warrantless searches to the

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dissenting in part). Justice Stevens, also joined by Justice Marshall, filed an opinion concurring in part and dissenting in part. *Id.* at 370 (Stevens, J., concurring in part and dissenting in part). Justice Brennan joined in Part I of the decision. *Id.*

[134]*Id.* at 347-48. In *T.L.O.*, the respondent, a student, was suspected of smoking cigarettes in the school lavatory, in violation of school policy. *Id.*

[135]*Id.* at 328. The respondent-student, along with another student, were taken to the principal's office. *Id.* In response to questioning by the school's assistant principal, one of the students admitted to smoking in the lavatory. *Id.* The respondent, a fourteen-year old freshman, denied that she was smoking in the school lavatory. *Id.* The assistant principal, nevertheless, demanded to see the student's purse. *Id.* Upon opening the purse, the assistant principal seized a pack of cigarettes and noticed cigarette rolling papers, which he believed were generally associated with marijuana use. *Id.* Because the principal suspected there may have been evidence of drugs in the purse, he searched the purse and seized evidence which implicated the student in the sale of marijuana. *Id.* The State thereafter brought delinquency charges against the student. *Id.*

[136]*Id.*

[137]*Id.* at 341.

[138]*Id.* (citing Terry v. Ohio, 392 U.S. 1, 20 (1968)).

[139]*Id.* at 340-42.

[140]*Id.* at 340.

constitutionally-protected interests, "houses" and "papers."[141] Regarding "houses," the Court in *Griffin v. Wisconsin*[142] upheld the warrantless search of a probationer's home. The Court reasoned that the state's interest in providing security to the community and reducing recidivism presented a "special need."[143] The majority concluded that the state's interest in closely monitoring its probation system sufficiently outweighed the privacy interest of the probationers.[144]

Regarding "papers," a plurality, per Justice O'Connor, in *O'Connor v. Ortega*[145] announced a standard regarding the reasonableness of a government employer's search of the workplace.[146] Justice O'Connor found that the government's interest in promoting and maintaining efficiency in the workplace presented a "special need."[147] In *O'Connor*, the plurality

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[141]*See supra* note 80 for full text of the Fourth Amendment. The "special needs" framework was applied to the right of persons to be secure in their "effects" in *T.L.O.* *See supra* note 132.

[142]483 U.S. 868 (1987). Justice Scalia, joined by Chief Justice Rehnquist, and Justices White, Powell, and O'Connor, delivered the majority opinion. *Id.* at 870. Justice Blackmun, joined by Justice Marshall, filed a dissenting opinion. *Id.* (Blackmun, J., dissenting). Justice Brennan joined in Parts I-B and I-C, and Justice Stevens joined in Part I-C. *Id.* at 881. Justice Stevens, joined by Justice Marshall, filed a dissenting opinion. *Id.* at 890 (Stevens, J., dissenting).

[143]*Id.* at 875.

[144]*Id.* at 876.

[145]480 U.S. 709 (1987) (plurality opinion). Chief Justice Rehnquist, and Justices White and Powell joined in Justice O'Connor's opinion. *Id.* at 711 (plurality opinion). Justice Scalia authored an opinion concurring in the judgment. *Id.* at 729 (Scalia, J., concurring in the judgment). Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, filed a dissenting opinion. *Id.* at 732 (Blackmun, J., dissenting).

[146]*Id.* at 719-26 (plurality opinion).

[147]*Id.* at 725-26 (plurality opinion). Justice O'Connor posited that:

> Government agencies provide myriad services to the public, and the work of these agencies would suffer if employers were required to have probable cause before they entered an employee's desk for the purpose of finding a file or a piece of office correspondence. Indeed, it is difficult to give the concept of probable cause, rooted as it is in the criminal investigatory context, much meaning when the purpose of a search to retrieve a file for work-related reasons. Similarly, the concept of probable cause has little meaning for a routine inventory conducted by public employers for the purpose of securing state property. [citation omitted]. To

maintained that the government's interest in the "efficient and proper operation of the workplace"[148] may outweigh, in certain circumstances,[149] a government employee's expectation of privacy in his or her desk and papers.[150]

Justice Blackmun filed a dissenting opinion, in which Justices Brennan, Marshall, and Stevens joined.[151] Justice Blackmun agreed with the plurality's determination that under certain circumstances, government employees may have a lessened expectation of privacy.[152] The Justice, however, vigorously opposed the plurality's decision to abrogate the warrant and probable cause requirements.[153] The dissent attacked the plurality's "special needs" analysis as unsupported.[154]

Subsequently, in *New York v. Burger*,[155] the Supreme Court further broadened the scope of permissible administrative searches by allowing warrantless inspections of commercial property where there is a heightened

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> ensure efficient and proper operation of the agency, therefore, public employers must be given wide latitude to enter employee offices for work-related, noninvestigatory reasons.

Id. at 723 (plurality opinion).

[148]*Id.*

[149]*Id.* at 726-29 (plurality opinion). Because the lower courts in *O'Connor* granted summary judgment, the Court declared that the reasonableness of this particular search could not be determined. *Id.* Accordingly, the Court remanded the case for further proceedings. *Id.* at 732 (plurality opinion).

[150]*Id.* at 719-26 (plurality opinion).

[151]*Id.* at 732 (Blackmun, J., dissenting).

[152]*Id.* at 737 (Blackmun, J., dissenting) (recognizing that under certain circumstances, "the 'operational realities' of the workplace may remove some expectation of privacy on the part of the employee").

[153]*Id.* at 742 (Blackmun, J., dissenting).

[154]*Id.* at 742 (asserting that no "special need" existed in *O'Connor* to "justify dispensing with the warrant and probable-cause requirements").

[155]482 U.S. 691 (1987). Justice Blackmun, joined by Chief Justice Rehnquist, and Justices White, Powell, Stevens, and Scalia, delivered the opinion of the Court. *Id.* at 693. Justice Brennan, joined by Justice Marshall, wrote a separate dissent. *Id.* at 718 (Brennan, J., dissenting). In all but Part III, Justice O'Connor joined. *Id.*

governmental interest and a correspondingly weakened privacy interest of the property owner.[156] *Burger* involved the search of an automobile junkyard by police officers without a warrant or probable cause.[157] The search was conducted pursuant to a vehicle and traffic law statute[158] which authorized the type of search involved.[159] The Court in *Burger* identified three criteria which must be satisfied in order for a warrantless inspection of commercial property to be reasonable.[160] First, Justice Blackmun opined that the government must have a "substantial" interest in the regulatory scheme under which the inspection is conducted.[161] Second, the Justice posited that the warrantless inspections must be necessary in order to advance the regulatory scheme.[162] Finally, the Court announced that the regulatory scheme must

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[156]*Id.* at 700. Writing for the Court, Justice Blackmun, found that a commercial property owner's expectation of privacy is less than an individual's expectation of privacy in his private or personal property. (citing Donovan v. Dewey, 452 U.S. 594, 598-99 (1981)). *Id.* The Justice further noted that "this expectation is particularly attenuated in commercial property employed in 'closely regulated' industries." *Id.* A business or industry is "closely regulated" if there exists "a long tradition of close government supervision" of that business. *See* Marshall v. Barlow's Inc., 436 U.S. 307 (1978). Additionally, where the industry is a newly emerging one, "pervasiveness and regularity" of the regulation must exist. *Donovan*, 452 U.S. at 594.

[157]*Burger*, 482 U.S. at 693-95.

[158]The search was conducted pursuant to N.Y. VEH. & TRAF. LAW § 415-a5 (McKinney 1986), *reprinted in Burger*, 482 U.S. at 694.

[159]*Burger*, 482 U.S. at 693. The New York statute authorized the police officers to view the defendant's business license and records. *Id.*

[160]*Id.* at 702-03. The three requirements afford the owner of commercial property significant protection, despite the fact that the owner of commercial property in closely regulated industries has a diminished expectation of privacy. *Id.*

[161]*Id.* at 702 (citing Donovan v. Dewey, 452 U.S. 594, 602 (1981)) (finding a "substantial federal interest in improving the health and safety conditions in the Nation's underground and surface mines"); United States v. Biswell, 406 U.S. 311, 315 (1972) (holding that "regulation of firearms is of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders"); Colonnade Corp. v. United States, 397 U.S. 72, 75 (1970) (recognizing federal interest "in protecting the [liquor] revenue against various types of fraud"). *Id.*

[162]New York v. Burger, 482 U.S. 691, 702 (1987) (citing Donovan v. Dewey, 452 U.S. 594, 600 (1981)) (recognizing that "forcing mine inspectors to obtain a warrant before every inspection might alert mine owners or operators to the impending inspection, thereby frustrating the purposes of the Mine Safety and Health Act — deter safety and

serve as a "constitutionally adequate substitute for a warrant."[163] The Court determined that for the regulatory scheme to serve as an adequate substitute for a warrant, the scheme must be sufficiently comprehensive in advising the owner that the search is being conducted in accordance with the law, and the statute must also properly limit an inspector's discretion in terms of the place, time, and scope of the search.[164]

The Court then found that New York's regulatory inspection scheme satisfied this three-prong test.[165] First, the Court reasoned that the State of New York demonstrated a "substantial interest" in regulating the automobile junkyard industry because of increased vehicle theft in the State.[166] Second, Justice Blackmun posited that the State regulation of the automotive junkyard-dismantling industry was necessary to advance the regulatory scheme.[167] Finally, the Justice determined that the statute served as a constitutionally adequate substitute for a warrant in that it informed the business operator that routine inspections would be conducted.[168] Justice Blackmun also determined that the statute appropriately established the scope of the inspection by notifying the owner how to comply with the regulation and who was authorized to inspect the premises.[169]

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health violations."). *See also* Donovan v. Dewey, 452 U.S. 594, 603 (1981).

[163]*Buger*, 482 U.S. at 703 (declaring that the regulatory scheme must "perform the two basic functions 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").

[164]*Id.*

[165]*Id.* at 708-12.

[166]*Id.* at 708-09.

[167]*Id.* at 709-10. The Court noted that "[i]t is well-established that the theft problem can be addressed effectively by controlling the receiver of, or market in, stolen property." *Id.* at 709. (citations omitted).

[168]*Id.* at 711-12.

[169]*Id.* at 711.

2. Federal Standards Regulating Administrative Searches Involving Bodily Intrusions — The "Special Needs" Doctrine is Expanded to Include Searches Involving Bodily Intrusions

The "special needs" balancing test was further expanded to include searches of the body and bodily fluids in the controversial landmark cases *Skinner v. Railway Labor Executives' Ass'n*,[170] and *National Treasury Employees Union v. Von Raab*.[171] In both cases, the Court upheld bodily searches absent a warrant and individualized suspicion.[172]

In *Skinner*, Justice Kennedy, writing for the Court, upheld the Federal Railroad Administration's (FRA) regulatory scheme mandating the warrantless administration of blood, breath, and urine tests of railroad

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[170]489 U.S. 602 (1989). Justice Kennedy, joined by Chief Justice Rehnquist, and Justices White, Blackmun, O'Connor, and Scalia, delivered the majority opinion, and in all but portions of Part III, Justice Stevens joined. *Id.* at 606. Justice Stevens authored a separate concurrence in part and concurred in the judgment. *Id.* at 634 (Stevens, J., concurring in part and concurring in the judgment). Justice Marshall, joined by Justice Brennan, penned a separate dissent. *Id.* at 635 (Marshall, J., dissenting).

[171]489 U.S. 656 (1989) Justice Kennedy, joined by Chief Justice Rehnquist, and Justices White, Blackmun, O'Connor, and Scalia, delivered the majority opinion. *Id.* at 659. Justice Marshall, joined by Justice Brennan, authored a dissenting opinion. *Id.* at 679 (Marshall, J., dissenting). Justice Scalia, joined by Justice Stevens, also filed a dissenting opinion. *Id.* at 680 (Scalia, J., dissenting).

Von Raab was decided the same day as *Skinner* and involved the application of the "special needs" doctrine to searches involving the body and bodily fluids by urinalysis. *Id.* at 659. The Court in *Von Raab* evaluated the United States Customs Service's compulsory drug testing program which required urinalysis of "[s]ervice employees seeking transfer or promotion to positions having a direct involvement in drug interdiction or requiring the incumbent to carry firearms or handle 'classified' material." *Id.* at 656.

Utilizing its "special needs" balancing test, the Court held that the Custom Service's mandatory drug testing program was reasonable and, thus, not violative of the Fourth Amendment. *Id.* at 679. According to the Court, the government had a compelling interest "in preventing the promotion of drug users to positions where they might endanger the integrity of [the] Nation's borders or the life of the citizenry." *Id.* The Court concluded that this compelling governmental interest sufficiently outweighed the privacy interest of the Custom Service's employees. *Id.*

[172]*See Skinner*, 489 U.S. at 627-34; *Von Raab*, 489 U.S. at 679.

employees under certain specified circumstances.[173] These circumstances included major train accidents,[174] impact accidents,[175] or incidents that involved death to an on-duty railroad employee.[176] The purpose of the FRA regulations was to safeguard the public against accidents arising from drug and alcohol use by railroad employees.[177]

In *Skinner*, the respondents, Railway Labor Executives Association and certain members of its labor organizations, sought to enjoin the FRA regulations in federal district court[178] upon the grounds that the mandatory testing scheme violated the railroad employees' Fourth Amendment rights to

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[173]Under the Federal Railroad Safety Act of 1970, the Secretary of Transportation is authorized to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety." *Skinner*, 489 U.S. at 606 (quoting 84 STAT. 971, 45 U.S.C. § 431(a)). Finding that drug and alcohol abuse by railroad employees posed a serious threat to public safety, the FRA, in 1985, promulgated regulations addressing this problem. *Id.* at 606. Two subparts to the regulations specifically pertain to testing of railroad employees. *Id.* at 609. The first, Subpart C, of the regulations is mandatory. Subpart C is entitled: "Post-Accident Toxicological Testing," and provides in pertinent part that: "[r]ailroads 'shall take all practicable steps to assure that all covered employees of the railroad directly involved . . . provide blood and urine samples for toxicological testing by FRA,' § 219.203(a), upon the occurrence of certain specified events." *Id.* Toxilogical testing may be ordered following major train accidents which include, *inter alia,* a fatality or the release of hazardous material. *Id.* (citing § 219.201(a)(1)). In addition, the railroad has a duty to compel testing following an "impact accident" as defined in § 219.201(a)(2). *Id.* The railroad is further required to test after "[a]ny train [incident] that involves a fatality to any on-duty railroad employee." *Id.* (citing § 219.201(a)(3)).

The second subpart, Subpart D, is permissive. Subpart D is entitled: "Authorization to Test for Cause," and authorizes the railroads to compel covered railroad employees to undergo breath or urine tests after, among other things: "[a] reportable accident or incident, where a supervisor has a 'reasonable suspicion' that an employee's acts or omissions contributed to the occurrence or severity of the accident or incident . . . ." *Id.* at 611 (citing § 219.301(b)(2)).

[174]*Id.* at 609.

[175]*Id.*

[176]*Id.*

[177]*Id.* at 606-12.

[178]*Id.* at 612. The respondents brought suit in the United States District Court for the Northern District of California. *Id.*

be free from unreasonable searches and seizures.[179] The Court rejected the respondents' Fourth Amendment challenge and found that the FRA testing program was reasonable and comported with the "special needs" doctrine.[180]

Drawing upon previous decisions, the Supreme Court in *Skinner* announced that the testing scheme constituted a search under the Fourth Amendment.[181] Writing for the majority, Justice Kennedy first found that a "special need"[182] existed because of the increased risk of accidents on the railways due to the drug and alcohol impairment of railroad employees.[183] Next, the Justice analyzed the reasonableness of the FRA regulations under the "special needs" balancing test.[184] The Justice elaborated that the requirement of reasonableness is satisfied if three criteria are met.[185] First, the privacy intrusion in the person being searched must be weakened or minimal.[186] Second, a heightened and substantial governmental interest must exist.[187] Finally, the requirement of individualized suspicion must jeopardize the governmental interest at issue.[188]

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[179]*Id.* The respondents also sought to enjoin the FRA regulations on various statutory grounds. *Id.*

[180] *Id.* at 634.

[181]*Id.* at 616 ("We have long recognized that 'compelled intrusio[n] into the body for blood to be analyzed for alcohol content' must be deemed a Fourth Amendment search."). Justice Kennedy further articulated that the breath-testing procedures, and the urine collection process and subsequent chemical analysis constitute searches under the Fourth Amendment. *Id.* at 616-17. This comment will focus on the blood testing procedure because HIV testing schemes specifically involve the extraction of blood. For a description of HIV testing procedures, see *supra* notes 60-70 and accompanying text.

[182]For a description of the Supreme Court's "special needs" doctrine, see *supra* notes 130-131 and accompanying text.

[183]*Id.* at 620.

[184]*Id.* at 624-33. See *supra* notes 130-169 and accompanying text for an in-depth explanation of the "special needs" balancing test.

[185]*Id.* at 619.

[186]*See Constitutional Dimensions*, *supra* note 61, at 251-52 (footnote omitted).

[187]*Id.*

[188]*Id.*

Noting that when a "special need" exists,[189] a balancing test may be used to replace the traditional warrant and probable cause requirements,[190] the Court declared that in the present case, a special need rendered the requirements of a warrant and individualized suspicion impracticable.[191] Specifically, the Court found that the governmental objectives of ensuring public and employee safety on the railways would be unduly impeded, and the governmental interest placed in jeopardy, through the delays associated with obtaining a warrant because drugs and alcohol are continually eliminated from the bloodstream.[192]

Further, Justice Kennedy stated that individualized suspicion is not a constitutional requirement under all circumstances.[193] Accordingly, the Justice opined that the requirement of individualized suspicion may be dispensed with if a heightened governmental interest would be frustrated by imposing such a requirement.[194] Also, the Justice posited that there must exist a weakened or minimal privacy interest in the person being searched.[195]

In *Skinner*, the Supreme Court found that the three criteria necessary to satisfy the "special needs" doctrine were met. First, the Court found that blood tests are minimally intrusive searches.[196] Additionally, the Court reasoned that railroad employees had a diminished expectation of privacy

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[189]*See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989). In *Skinner* the Court reiterated that: "[e]xcept in certain well-defined circumstances, a search or seizure . . . is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause." *Id.* (citations omitted). The Court in *Skinner* noted, however, that: "[the Court] has recognized exceptions to this rule when 'special needs,' beyond the normal need for law enforcement, make the warrant and probable-cause requirements impracticable." *Id.* at 619-20 (citations omitted).

[190]*Id.* at 619.

[191]*Id.* at 624.

[192]*Id.* at 623.

[193]*Id.* at 624 (indicating that "[i]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.").

[194]*Id.*

[195]*Id.*

[196]*Id.* at 625.

because the railroad industry was widely and closely regulated.[197] Second, the Court found that a heightened governmental interest existed because the risk of injury to the public was substantial.[198] Third, the Court in *Skinner* concluded that the FRA testing scheme was constitutional despite the fact that blood, breath, and urine tests would be conducted without a warrant and would not be based on probable cause or individualized suspicion.[199]

In a vigorous dissent, Justice Marshall, joined by Justice Brennan, accused the majority of departing from well-established Fourth Amendment doctrine.[200] The Justice strongly criticized the majority for taking the "longest step yet toward reading the probable-cause requirement out of the Fourth Amendment."[201] Justice Marshall found fault with the majority's "special needs" framework and classified its broadened application in *Skinner* as "unprincipled and dangerous."[202] The Justice endorsed the traditional Fourth Amendment framework which required the governmental intrusion to be justified by a showing of probable cause.[203] Although the dissent

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[197]*Id.* at 627 ("The expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees."). *Id.*

[198]*Id.* at 628.

[199]*Id.* at 634.

[200]*See id.* at 635-55 (Marshall, J., dissenting). Justice Marshall asserted that the majority, through its decision, ignored "the text and doctrinal history of the Fourth Amendment . . . [,]" and declared that highly intrusive searches [of the body] require a showing of probable cause. *Id.* at 636 (Marshall, J., dissenting).

[201]*Id.* at 636 (Marshall, J., dissenting).

[202]*Id.* at 641 (Marshall, J., dissenting).

[203]*Id.* at 641-42 (Marshall, J., dissenting). Justice Marshall characterized the Court's traditional stance as the proper analytical framework. *Id.* The Justice reiterated that prior to the "special needs" exception:

> [The inquiry was] whether a search has taken place . . .; whether the search was based on a valid warrant or undertaken pursuant to a recognized exception to the warrant requirement . . . whether the search was based on probable cause or validly based on lesser suspicion because it was minimally intrusive . . . and, finally, whether the search was conducted in a reasonable manner.

Id. at 642 (Marshall, J., dissenting).

recognized that the government possessed a compelling interest in safeguarding the public on the railways by reducing the number of accidents due to drug or alcohol use, Justice Marshall urged that these governmental interests should not be advanced at the expense of Fourth Amendment constitutional safeguards.[204] Expressing this belief, Justice Marshall stated that: "constitutional rights have their consequences, and one is that efforts to maximize the public welfare, no matter how well intentioned, must always be pursued within constitutional boundaries."[205]

V. THE "SPECIAL NEEDS" DOCTRINE AND MANDATORY AIDS TESTING OF CONVICTED SEXUAL OFFENDERS

Constitutional requirements like probable cause are not fair-weather friends, present when advantageous, conveniently absent when "special needs" make them seem not.[206]

A. WASHINGTON'S MANDATORY AIDS TESTING OF CONVICTED SEXUAL OFFENDERS PRESENTS A "SPECIAL NEED"

To date, a Fourth Amendment challenge to mandatory HIV testing has not been heard by the Supreme Court of the United States.[207] If and when the Supreme Court convenes on this issue, the Court will most likely evaluate the constitutionality of this type of search under its "special needs" framework.[208]

To justify application of the "special needs" doctrine to mandatory HIV testing, the Court must first determine whether the compulsory blood testing

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[204]*Id.* at 641-43 (Marshall, J., dissenting).

[205]*Id.* at 650 (Marshall, J., dissenting).

[206]*Id.* at 637 (Marshall, J., dissenting).

[207]Several lower courts, however, have decided on the issue of mandatory AIDS testing. See *supra* note 17 for a listing of these decisions.

[208]For elaboration regarding the likelihood of the Supreme Court applying the "special needs" doctrine to mandatory AIDS testing, see *infra* notes 208-217 and accompanying text. Several lower courts have determined that the "special needs" doctrine is appropriate when analyzing mandatory AIDS testing. *See, e.g.*, Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1, 909 F.2d 820, 832 (5th Cir. 1990); Dunn v. White, 880 F.2d 1188, 1193 (10th Cir. 1989), *cert. denied*, 493 U.S. 1059 (1990); Anonymous Fireman v. The City of Willoughby, 779 F. Supp. 402, 417 (N.D. Ohio 1991); Johnetta J. v. Municipal Court, 218 Cal. App. 3d 1255, 1272, 267 Cal. Rptr. 666 (1990).

scheme "arises from a 'special need' beyond the needs of ordinary law enforcement."[209] Washington's mandatory HIV testing scheme of convicted sexual offenders qualifies as a special need that is beyond the needs of ordinary law enforcement for several reasons.

First, Washington's nonconsensual HIV testing program constitutes an administrative search. The forced AIDS test is conducted pursuant to a regulatory scheme that is designed to reduce the incidence of the spread of AIDS.[210] Specifically, the goal of the testing scheme is to protect the public, the victim, and the offender against the damaging effects of the AIDS virus.[211] The regulatory purpose is not to obtain evidence for use in a criminal proceeding because the testing scheme applies to sexual offenders who have been convicted. Moreover, the testing must be conducted after sentencing and, thus, does not place the sexual offender at risk for a longer sentence or a new conviction.[212]

Additionally, one commentator has astutely identified a distinct, albeit more subtle, reason to expect that the Supreme Court will find that mandatory HIV testing schemes fall within the "special needs" framework.[213] Recognizing that the Supreme Court has displayed a significant degree of deference to legislative determinations when applying its "special needs" jurisprudence, Lisa Simotas has noted that, in many instances, the Court has not required much data to support the scope of the government's asserted 'problem.'[214]

For example, in *O'Connor v. Ortega*, the Court found that a government employer possessed a special need in maintaining an orderly and efficient workplace.[215] In so finding, the Court cited no examples regarding the 'tangible and irreparable' harms the government could potentially suffer if workplace efficiency was compromised.[216] Ms. Simotas further noted that

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[209]*In re* Juveniles, A, B, C, D, E, 847 P.2d 455, 459 (Wash. 1993).

[210]*See Constitutional Questions*, *supra* note 9, at 444.

[211]*Id.*

[212]*In re Juveniles*, 847 P.2d at 459.

[213]*See Rape and the Special Needs Doctrine*, *supra* note 24, at 1899-1900.

[214]*Id.*

[215]*Id.* at 1899-1900.

[216]*Id.*

"the Court seems willing to accept the state's assertion of a significant need where the social problem at issue is well-known, such as public school discipline or the drug scourge."[217] Clearly, the AIDS epidemic and mandatory AIDS testing fall within these parameters.[218]

B. THE "SPECIAL NEEDS" BALANCING TEST AS APPLIED TO WASHINGTON'S MANDATORY HIV TESTING SCHEME

Once it is determined that a "special need" exists, the Supreme Court must determine "whether the intrusion of compulsory blood testing for AIDS, without probable cause or individualized suspicion that the AIDS virus will be found, is justified by that need."[219] In assessing whether the warrant and probable cause requirements are practicable, the Court must balance the government's interest in testing without a warrant or probable cause, against the individual's privacy interests.[220] Only if the government's interest outweighs the individual privacy interest, will the search be considered reasonable and, thus, rendered constitutional. In this regard, the Court in *Skinner* established three criteria which must be satisfied

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[217]*Id.* (footnotes omitted).

[218]*Id.*

[219]*In re* Juveniles, A, B, C, D, E, 847 P.2d 455, 459 (Wash. 1993) (citing Johnetta J. v. San Francisco Mun. Ct., 267 Cal. Rptr. 666 (1990)). For an analysis of the "special needs" doctrine, see *supra* notes 130-204 and accompanying text.

Justice Utter, in his dissenting opinion in *In re Juveniles*, noted that the *Skinner* inquiry is not simply limited to whether the government has a valid need to test, but whether the government has a need to test without a warrant or probable cause. *Id.* at 464 (Utter, J., concurring in part and dissenting in part). Clarifying the "special needs" analysis articulated in *Skinner*, Justice Utter stated:

> The "special needs" analysis focuses not only on the need for the government to undertake a particular type of search, but also upon the need for the government to undertake such a search without the ordinary warrant and probable cause requirements . . . .
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> . . . .
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> Simply because a pressing need for testing exists does not mean that a pressing need for testing without a warrant or probable cause exists.

Id. at 464-65 (Utter, J., concurring in part and dissenting in part).

[220]Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989).

before a suspicionless search of a person's body may be performed. These three conditions include: (1) that the search be minimally intrusive; (2) that there exists a heightened or substantial governmental interest in conducting the search; and (3) that the requirement of probable cause will jeopardize the governmental interest at issue.[221]

The Washington statutory scheme violates the Fourth Amendment because no valid state interest exists which justifies abrogation of the probable cause requirement that the sexual offender engaged in behavior capable of transmitting the AIDS virus. Therefore, the Washington statutory scheme must be struck down as an unconstitutional violation of the Fourth Amendment. Although a strong governmental interest exists in safeguarding the public health, compulsory blood testing to determine a sexual offender's HIV status is not minimally intrusive. Moreover, the requirement of probable cause or individualized suspicion that the offender engaged in behavior capable of transmitting the HIV virus does not place the governmental interests in jeopardy.

1. The State's Interests

The State of Washington has asserted two primary governmental interests in testing convicted sexual offenders for the presence of the HIV virus. Namely, the State has asserted an interest in "combatting the spread of AIDS," and "protecting the rights of victims."[222] Justice Utter, in his dissenting opinion in *In re Juveniles*, proffered that "[e]ach of these interests may provide a justification for a testing program, even a nonconsensual [one], but they do not explain a testing program without probable cause."[223] Justice Utter stressed "that none of these interests speak to the *impracticability of probable cause*" as the requirement of probable cause in no way frustrates the government's asserted objectives.[224]

The State of Washington's interest in preventing the spread of AIDS is

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[221] For elaboration on the *Skinner* three-part test, see *supra* notes 185-187 and accompanying text.

[222] *See In re* Juveniles, 847 P.2d at 461.

[223] *Id.* at 465 (Utter, J., concurring in part and dissenting in part).

[224] *Id.*

indisputably a sound and valid interest.[225] Arguably, the government's interest in protecting its population can be deemed compelling, as "[t]he Supreme Court has consistently found that a state's interest in the health of its citizens [is] compelling."[226] Indeed, there is no question that the State faces an ever-increasing threat to the public health by the presence of the AIDS virus.[227] Moreover, it is well-established that a state may use its police power to control communicable diseases through legislative measures.[228] Although this argument lends support to the need for testing in general, the asserted interest does not demonstrate a need to test without probable cause or individualized suspicion.

Similarly, the State of Washington has an asserted interest in safeguarding the rights of its victims.[229] As one commentator aptly points out, "the motivation behind statutes that allow for testing of sexual offenders is the victim's understandable desire to know [his or] her assailant's HIV status."[230] Undeniably, there is a necessary, legitimate, and justifiable concern for the victim's psychological and physical well-being.[231] Generally, where there is a belief that a transmission of bodily fluids occurred, a negative test result may help alleviate some of the victim's

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[225]*See* Jacobsen v. Massachusetts, 197 U.S. 11, 27 (1905) (declaring that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.").

[226]*Constitutional Dimensions*, *supra* note 60, at 254-55 (footnote omitted).

[227]For medical background concerning the HIV virus, see *supra* notes 21-70 and accompanying text.

[228]*See* Love v. San Francisco, 276 Cal. Rptr. 660 (1990). The court in *Love* opined that a state's power to adopt measures to protect the public health "is universally conceded to be a valid exercise of the police power of the State as to which the legislature is necessarily vested with large discretion not only in determining what are contagious and infectious diseases, but also in adopting measures for preventing the spread thereof." *Id.* (quoting *In re* Johnson, 180 P. 644 (Cal. App. 1919)) (allowing quarantine for venereal disease) (citing *In re* Halko, 54 Cal. Rptr. 661 (1966) (allowing quarantine for tuberculosis)).

[229]*Constitutional Questions*, *supra* note 9, at 444 (noting that "the apparent rationale behind the legislation is to protect the public health by preventing the spread of the AIDS virus.").

[230]*See Striking the Balance*, *supra* note 9, at 209.

[231]*See generally* Johnetta J. v. Municipal Court, 267 Cal. Rptr. 666 (1990); People v. Thomas, 529 N.Y.S.2d 429 (Cy. Ct. 1988).

mental anguish and suffering over the fear of infection.[232] Also, a positive test result would provide the victim with the information needed to make informed decisions concerning available treatment[233] and help prevent further spread of the disease.[234]

These concerns are well-suited in cases where a known transmission of bodily fluids occurs or in cases where there is probable cause to believe that a passing of bodily fluids may have occurred.[235] Where there is no possibility or threat of infection, however, the asserted governmental interests in protecting the victim are severely weakened.[236] Therefore, Washington's interest in protecting its victims against the effects of AIDS is only implicated in instances where there is an actual or possible transmission of bodily fluids.

This view has been supported by the Eighth Circuit decision, *Glover v. Eastern Neb. Community Office of Retardation.*[237] In *Glover*, the Eighth Circuit held that mandatory AIDS testing is unconstitutional "where the risk of transmission [is] negligible or non-existent."[238] *Glover* involved an

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[232]*See Rape and the Special Needs Doctrine*, *supra* note 24, at 1913-14 (noting that "[e]ven if one accepts that the [offender's] test results are not objectively useful to the victim, a negative test result nonetheless may yield significant subjective peace of mind and relief, which can play a marked role in speeding the victim's psychological recovery.").

[233]*Id.* at 1910-11. Although there is currently no available cure for the AIDS virus, there are several treatment options available to HIV-infected persons. See AIDS LAW, *supra* note 21, at 38-40 for current available treatments.

[234]*Id.*

[235]For instance, in *People v. Thomas*, a state court upheld a forced AIDS test of a convicted rapist to determine whether he was HIV positive. *Thomas*, 529 N.Y.S.2d 429. In rendering its decision, the court reasoned that the victim had a right to know her assailant's HIV status because the assailant "forcibly and repeatedly engaged in acts of sexual intercourse and oral sodomy with the victim, and did thereby *expose said victim to his body and sexual fluids.*" *Id.* at 430 (emphasis added).

[236]*In re* Juveniles, A, B, C, D, E, 847 P.2d at 455, 466 (Wash. 1993) (Utter, J., concurring in part and dissenting in part) ("[W]hen there is no possibility of infection, the State's interest in protecting the victim of a sexual offender from AIDS is no greater than its interest in protecting the victim of a mugger or an automobile thief whose offense poses no possibility of HIV infection.").

[237]867 F.2d 461 (8th Cir.), *cert. denied*, 493 U.S. 932 (1989).

[238]*In re Juveniles*, 847 P.2d at 468 (citing Glover v. Eastern Neb. Community Office of Retardation, 867 F.2d 461 (8th Cir.), *cert. denied*, 493 U.S. 932 (1989)).

administrative agency policy which mandated AIDS testing for certain specified employees who cared for the mentally retarded.[239] The policy provided that because these employees had extensive contact with certain individuals who, at times, exhibited violent and aggressive behavior,[240] mandatory HIV testing was necessary for employee and client safety.[241]

Although the court in *Glover* noted a theoretical risk to both the agency employees and clients alike, the court relied on overwhelming medical evidence to support its finding that the risk of transmission was negligible under the circumstances.[242] Accordingly, the court found that the agency's interest in safeguarding the employees and clients, although worthy, did not outweigh the employees' reasonable expectation of privacy.[243]

Similarly, Washington's statutory testing scheme does not stipulate an adequate foundation upon which to test because there is no requirement of individualized suspicion or probable cause that bodily fluids have passed. Accordingly, the statute should be struck down as an impermissible infringement on the Fourth Amendment right of the convicted sexual offender.

2. The Sexual Offender's Privacy Interests

The Supreme Court has repeatedly held that routine blood extraction for alcohol or drug testing is a minimal bodily intrusion.[244] As justification for this determination, the Court has asserted that blood tests are a common occurrence and involve a procedure that poses "virtually no risk, trauma, or pain [for most individuals]."[245]

Although the bodily intrusion occasioned by the procedure is indeed

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[239]*See Glover*, 867 F.2d at 462-63.

[240]*Id.* at 463. Forms of violent and aggressive behavior included "biting and scratching." *Id.*

[241]*Id.*

[242]*Id.* at 463. Citing the district court holding, the Eighth Circuit found that "the risk of transmission of the [AIDS] virus . . . is minuscule at best and will have little, if any, effect in preventing the spread of [AIDS] or in protecting the clients." *Id.*

[243]*Id.* at 463-64.

[244]*See supra* notes 100-110 and accompanying text for an explanation of the Court's stance regarding extraction of blood and the Fourth Amendment.

[245]*See* Skinner v. Labor Executives' Ass'n, 489 U.S. 602, 625 (1989).

minimal, forced HIV testing clearly triggers graver concerns.[246] As one commentator has observed, "the fourth amendment implications of HIV tests go beyond the initial affront to dignity caused by the forced extraction of blood."[247] Where a nonconsenual AIDS test is concerned, the person subject to the search is forced to confront information from the test results that may be both life-altering and extremely devastating.[248] Unlike a routine blood alcohol or drug test, a positive test result for AIDS will tarnish virtually every aspect of that individual's life. In this regard, several courts have compared a positive HIV test result with that of a death sentence.[249] In capturing the reality of this comparison, Judge Broderick in *Virgin Islands v. Roberts* espoused that:

> AIDS has engendered such prejudice and apprehension that its diagnosis typically signifies a social death as concrete as the physical one which follows . . . .
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> . . . .
>
> [t]o conclude that persons with AIDS or HIV are stigmatized is an understatement; they are widely stereotyped as indelibly miasmic, untouchable, [as well as] physically and morally polluted.[250]

Sadly, the accuracy of this statement has been fully validated as HIV carriers have been banished from the workplace and schools.[251] Moreover, large

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[246]*See* Virgin Islands v. Roberts, 756 F. Supp. 898, 901 (1991).

[247]*Striking the Balance*, *supra* note 9, at 208.

[248]*Id.*

[249]*See* People v. Thomas, 529 N.Y.S.2d 429, 431 (Cy. Ct. 1988); *see also* Glover v. Eastern Neb. Community Office of Retardation, 686 F. Supp., 243, 248 (Neb. 1988).

[250]*Virgin Islands*, 756 F. Supp. at 902-03 (describing a reaction to a positive HIV test result as "devastation" that could lead to suicide).

[251]Forms of discrimination have also been prevalent in housing. *In re* Juveniles, A, B, C, D, E, 847 P.2d 455, 467 (Wash. 1993) (Utter, J., concurring in part and dissenting in part) (citing Howell v. Spokane & Inland Empire Blood Bank, 818 P.2d 1056 (1991); Bedford v. Sugarman, 772 P.2d 486 (1989) (footnote omitted)). Discrimination against persons with AIDS has also surfaced in the area of medical treatment. *See generally* Joelle S. Weiss, Comment, *Controlling HIV-Positive Women's Procreative Destiny: A Critical Equal Protection Analysis*, 2 CONST. L.J., 643 (1992).

segments of the American population favor the compelled quarantine of HIV-infected persons,[252] and suggestions have been made to tatoo HIV-positive persons for easy identification.[253]

Proponents of mandatory HIV testing have suggested that these potential harms are lessened where the results are not widely disseminated, thereby constituting a minimal Fourth Amendment privacy intrusion.[254] This reasoning is flawed, however, in that the extent of the disclosure will not in any way diminish the psychological trauma associated with a positive AIDS test.[255] Furthermore, there is no guarantee that the test results will remain confidential despite efforts to do so.[256] The problem with confidentiality raises graver concerns for an incarcerated defendant being subject to an AIDS test than those of the general public.[257] For example, inmates are aware of the risk of HIV infection in prisons, but may lack the necessary resources of obtaining information regarding HIV transmission.[258] Thus, many prisoners, in their own efforts, are often overzealous to contain spread of the disease.[259] From the prisoner's viewpoint, it is better if he is not tested.[260] Thus, based on the foregoing, the condition expressed in *Skinner* that the intrusion be minimal before a suspicionless search will be upheld is clearly not present in this situation.

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[252]*Social Meanings*, *supra* note 20, at 194-95 n.60.

[253]*Slow Death*, *supra* note 9, at 1413 n.4.

[254]*In re Juveniles*, 847 P.2d at 460.

[255]*Id.* at 467 (Utter, J., concurring in part and dissenting in part).

[256]*Id.* at 467-68. *See also Testing Schemes*, *supra* note 22, at 1633 (noting that many opportunities of disclosure exist even in cases where disclosure is restricted); Doe v. Borough of Barrington, 729 F. Supp. 376, 378-79 (D.N.J. 1990) (observing that public disclosure of plaintiff's positive HIV status by a police officer caused severe public hysteria and panic).

[257]*Testing Schemes*, *supra* note 22, at 1633.

[258]*Id.*

[259]*Id.* (footnote omitted).

[260]*Id.* ("Prisoner's rights advocates point out that when an inmate is tested, the results, positive or negative, are placed in his permanent record.") *Id.* Efforts to maintain this information confidential in a prison facility is virtually impossible. Thus, "any real or even rumored HIV infection could lead to discrimination, intimidation, or even violence among the prison population." *Id.* (footnotes omitted).

3. The Scales Must Tip in Favor of Privacy

Supporting Washington's suspicionless testing program, the Washington Supreme Court found that "the traditional standards which require individualized suspicion are impractical because HIV infected sexual offenders often have no outward manifestations of infection."[261] This justification, however, distorts the issue. The question of practicality does not turn on whether the sexual offender is HIV-positive, but whether there is probable cause to believe that the sexual offender engaged in behavior capable of transmitting the disease. Thus, the requirement of probable cause viewed from this standpoint in no way frustrates Washington's interests in safeguarding the public against the effects of the AIDS virus.

[261] *In re* Juveniles, A, B, C, D, E, 847 P.2d 455, 459 (Wash. 1993).

VI. CONCLUSION

History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure . . . [W]hen we allow fundamental freedom to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.[262]

Washington's mandatory HIV testing scheme of convicted sexual offenders is an unconstitutional violation of the Fourth Amendment. Absent probable cause to believe the sexual offender engaged in behavior capable of transmitting the HIV virus, the State's interests in testing are not compelling and, thus, do not sufficiently outweigh the substantial privacy interests of the sexual offender.

If and when the Supreme Court of the United States convenes on this issue, it must strike this type of statute down as unconstitutional. The AIDS virus has already destroyed too many human lives. The Supreme Court must not allow the threat of this disease to further destroy our individual rights.

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[262]Skinner v. National Labor Executives' Ass'n., 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).