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Mandatory HIV Testing of Rape Defendants: Constitutional Rights are Sacrificed in a Vain Attempt to Assist the Victim

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MANDATORY HIV TESTING OF RAPE DEFENDANTS: CONSTITUTIONAL RIGHTS ARE SACRIFICED IN A VAIN ATTEMPT TO ASSIST THE VICTIM

I. INTRODUCTION

Societal anxiety regarding AIDS (Acquired Immune Deficiency Syndrome) has increased proportionately with the heightened public

awareness of the disease and its consequences. But the AIDS epidemic has resulted in more than mere anxiety; it has produced outright fear and hysteria. It was perhaps inevitable, given the fear surrounding AIDS, that there would be a public clamor for the testing of certain groups of individuals[1] for the presence of the human immunodeficiency virus (hereinafter HIV), the causative agent of AIDS. For instance, rape victims and victim's rights advocates have called for the mandatory HIV testing of defendants accused of rape.[2]

This Note will briefly explore what is known about HIV transmission, testing, and the treatment prospects of those individuals exposed to the virus. Secondly, it will attempt to address the constitutional implications of requiring rape defendants to submit to HIV testing. In conclusion, it will examine the legislative responses of California, New York, and West Virginia, and the recent state and federal judicial responses to this relatively new issue.

II. HIV TRANSMISSION AND THE PROSPECTS FOR TREATMENT OF HIV-INFECTED INDIVIDUALS

The HIV is most commonly transmitted by one coming into contact with an infected individual's blood or semen.[3] Males engaging in homosexual relations are especially susceptible to infection.[4] As a result, homosexual males have been identified as a high-risk AIDS population, along with other groups such as intravenous drug users and hemophiliacs.[5] The general prevalence of HIV infection among these high risk groups has been estimated to be about one in twenty.[6]

Despite the fact that there is not a high rate of infection among the heterosexual population, the HIV is capable of being transmitted

1. Paul H. MacDonald, Note, *AIDS, Rape and the Fourth Amendment: Schemes for Mandatory AIDS Testing of Sex Offenders*, 43 VAND. L. REV. 1607, 1608 (1990).

2. *Id.*

3. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME 16 (1986) [*hereinafter* SURGEON GENERAL].

4. *Id.* at 15.

5. *Id.* at 19.

6. David K. Moody, Note, *AIDS and Rape: The Constitutional Dimensions of Mandatory Testing of Sex Offenders*, 76 CORNELL L. REV. 238, 241 n.23 (1990).

via heterosexual contact.[7] Although studies have suggested that repeated exposure to vaginal intercourse or any exposure to anal intercourse increases the chances of infection, the risk of contracting the virus from a single incident of vaginal intercourse has been estimated as being somewhere between 1 in 500 and 1 in 1000.[8] When this statistic is considered in conjunction with the prevalence of HIV infection among high-risk populations, the chances of a rape victim being infected with the virus from a single instance of vaginal intercourse with a member of a high-risk group would be no worse than 1 in 10,000. If the rapist were from a relatively low-risk category, in which the prevalence rate was 1 in 10,000, the risk of exposure to the victim would be about 1 in 5,000,000.

When an individual is infected by the HIV, the body reacts via seroconversion: it produces antibodies to combat the infection.[9] The two most common methods of testing in order to determine whether an individual is infected are the enzyme-linked immunosorbent assay (ELISA) and the Western Blot.[10] These tests detect the body's formation of antibodies to the virus; they do not detect the presence of the virus itself.[11] As a result, these tests are inherently inexact because there is a period of time between exposure and seroconversion where both tests will yield a negative result.[12] The lack of precision results in the possibility that an individual, although he tests negative because seroconversion has not occurred, could be infected and fully capable of transmitting the disease.

Although there are rare cases where an individual will not seroconvert for a year or longer following infection,[13] in nearly all cases antibodies to HIV can be detected within two months.[14] Some pa-

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7. SURGEON GENERAL, *supra* note 3, at 14.

8. Moody, *supra* note 6, at 241.

9. MacDonald, *supra* note 1, at 1612.

10. Klaus Mayer & Johanna Pindyck, *The Safety of Blood and Blood Products, in* AIDS: ETIOLOGY, DIAGNOSIS, TREATMENT, AND PREVENTION, 377 (Vincent T. DeVita, Jr. et al. eds., 2d ed. 1988) [*hereinafter* AIDS].

11. *Id.*

12. *See infra* notes 13-15 and accompanying text.

13. MacDonald, *supra* note 1, at 1612.

14. Robert Yarchoan & James M. Pluda, *Clinical Aspects of Infection with AIDS Retrovirus: Acute HIV Infection, Persistent Generalized Lymphadenopathy, and AIDS-Related Complex, in* AIDS, *supra* note 10, at 110.

tients seroconvert within two weeks after being exposed.[15] The problem of precision in testing is slightly exacerbated by a high incidence of false positives built into the system as a result of both ELISA and the Western Blot originally being designed to test for the presence of HIV in donated blood.[16] Neither test was designed to determine whether a specific individual is an HIV carrier.[17] However, when an ELISA test is supplemented with a confirming Western Blot, the joint false positive rate is less than one in 100,000.[18]

The prognosis of someone infected with the HIV is grim. Although almost no cases of AIDS occur in adults during the first two years after infection,[19] it is now believed that anywhere from 25% to 35% of HIV infected persons will develop full-blown AIDS within seven years of exposure.[20] It is further expected that the mortality rate of whose who become infected with the virus will approach 100% unless effective treatments are found.[21]

Although not cures, zidovudine (AZT) and dideoxyinosine (DDI) are the only drugs approved by the Food and Drug Administration for the purpose of controlling HIV production.[22] While the ultimate effectiveness of DDI is still uncertain, AZT has been found to induce immunologic and clinical improvements in patients with severe HIV infection.[23] But treatment with AZT has its drawbacks. Patients have complained of numerous side effects associated with AZT treatment such as nausea, muscle pain, insomnia, and severe headaches.[24] Ad-

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15. *Id.*

16. Mayer & Pindyck, *supra* note 10, at 377.

17. Moody, *supra* note 6, at 241.

18. James R. Allen, *Screening and Testing Asymptomatic Persons for HIV Infection*, *in* AIDS, *supra note 10*, at 424.

19. James J. Goedert & William A. Blattner, *The Epidemiology and Natural History of Human Immunodeficiency Virus*, *in* AIDS, *supra* note 10, at 48.

20. George M. Shaw et al., *Etiology of AIDS: Virology, Molecular Biology, and Evolution of Human Immunodeficiency Viruses*, *in* AIDS, *supra* note 10, at 11.

21. *Id.*

22. Malcolm Gladwell, *Second AIDS Drug Given Conditional Approval; FDA Allows Sale on Basis of Incomplete Tests; Final Evaluation Expected Next Spring*, THE WASH. POST, Oct. 10, 1991 at A-4. Robert Yarchoan & Samuel Broder, *Pharmacologic Treatment of HIV Infection*, *in* AIDS, *supra* note 10, at 277; *see also* Gina Kolata, *U.S. Halves Dosage for AIDS Drug*, N.Y. TIMES, Jan. 17, 1990, at B6.

23. Yarchoan & Broder, *supra* note 22, at 277.

24. Moody, *supra* note 6, at 242.

ditionally, AZT is toxic — it suppresses bone marrow production, leaving the AIDS patient almost defenseless against bacterial infections.[25] AZT treatment is also expensive: the annual cost to an AIDS patient has been estimated at over $3,000.[26]

Nevertheless AZT is now routinely prescribed to treat those HIV carriers who are asymptomatic, as well as those with advanced AIDS.[27] The reason for this widespread use of AZT is the August 1989 National Institute of Health (NIH) proclamation that AZT can delay the onset of AIDS in some asymptomatic individuals.[28] Five months later, the NIH advised cutting the recommended dosage in half, ameliorating the problems associated with the side effects and the expense of the drug.[29]

But prescribing AZT to treat those persons infected with the HIV provides only a temporary stay of execution for what is effectively a death sentence. Merely delaying the onset of AIDS symptoms is an unsatisfactory solution to the problems posed by a disease that insidiously robs human beings of their bodies' ability to fight off a host of deadly infections. Nothing short of a complete cure can or should be good enough to satisfy a society which has been so profoundly touched by this deadly epidemic.

III. The Constitutional Implications of Submitting Rape Defendants to Mandatory HIV Testing

Defendants resisting attempts by the rape victim to compel them to be tested for the HIV may base their opposition upon two grounds. One available defense is that the drawing of blood from their bodies for the purpose of informing the victim of their HIV status is violative of the Fourth Amendment's prohibition against unreasonable

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25. Yarchoan & Broder, *supra* note 22, at 282.

26. Moody, *supra* note 6, at 242-43.

27. *Id.* at 243.

28. *Id.* at 243 (citing AIDS Clinical Trial Study Group, National Institute of Allergy and Infectious Diseases, Protocol 019 (August 31, 1989)).

29. *Id.* (citing Gina Kolata, *U.S. Halves Dosage for AIDS Drug*, N.Y. Times, Jan. 17, 1990, at B6).

searches and seizures. Secondly, the defendant may assert that the involuntary testing and subsequent release of the results offends his general constitutional "right to privacy."

A. The Fourth Amendment "Search and Seizure" Issue

The Fourth Amendment affirms "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."[30] The United States Supreme Court has held that a compulsory blood test is a search within the meaning of the Fourth Amendment.[31] Simply because a particular governmental action is considered a search, however, does not mean that it is unconstitutional; the search must also be unreasonable.[32] The reasonableness of a particular search is ascertained by balancing the extent of a state's intrusion on an individual's privacy interests against the promotion of legitimate governmental interests.[33] This balancing test has been applied by the Court in three contexts. A search is said to either further law enforcement aims, implement administrative regulations, or fulfill some "special need."[34]

Law enforcement searches are conducted in the context of criminal investigations for the purpose of gathering evidence to be used in prosecutions.[35] Such searches must generally be conducted pursuant to the issuance of a warrant based upon probable cause.[36]

Administrative searches have arisen in the context of enforcing a regulatory health or safety code.[37] Such searches are usually held to the same standard as those relating to law enforcement, that is, a prior warrant based upon probable cause is required.[38] However, if governmental regulation of the entity being searched is pervasive, the added invasiveness occasioned by the search may be adjudged

30. U.S. CONST. amend. IV.

31. Schmerber v. California, 384 U.S. 757, 767 (1966).

32. U.S. CONST. amend. IV.

33. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989) (quoting Delaware v. Prouse, 440 U.S. 648, 654 (1979); United States v. Martinez-Fuerte, 428 U.S. 543 (1976)).

34. Moody, *supra* note 6, at 247.

35. *See, e.g.*, Illinois v. Gates, 462 U.S. 213 (1983); United States v. Watson, 423 U.S. 411 (1976).

36. U.S. CONST. amend. IV.

37. *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523 (1967).

38. *Id.* at 534.

so minimal as to justify its occurrence absent a warrant.[39] In the event of a warrantless search, the probable cause requirement is fulfilled by the presence of reasonable administrative guidelines regulating the conduct of searches in general and a showing that the guidelines have been followed in the particular case.[40]

A third type of search that neither aids law enforcement nor helps implement regulatory schemes has been recognized by the Supreme Court. These searches, termed "special needs" searches, can justify departures from the usual warrant and probable cause requirements associated with law enforcement and administrative searches.

The "special needs" doctrine was first recognized by the Supreme Court in *New Jersey v. T.L.O.*[41] The Court held that an assistant principal's warrantless search of a student's purse on the grounds that she was suspected of smoking cigarettes did not violate the student's constitutional rights when marijuana was found instead.[42] Upon balancing the state's interest in maintaining an environment in its schools conducive to learning against the student's legitimate privacy interest in the contents of her purse,[43] the Court held that the state's interest prevailed. The warrantless search was reasonable, despite being conducted on somewhat less than probable cause, because of the "special need" of school administrators to prevent "drug use and violent crime in the schools."[44]

The Supreme Court extended the "special needs" doctrine to include not only searches of effects, but also warrantless searches of persons in the companion cases of *Skinner v. Railway Labor Executives' Association*[45] and *National Treasury Employees Union v. Von Raab*.[46] At issue in *Skinner* was the Secretary of Transportation's promulgation of an alcohol and drug testing program for

39. *See* Donovan v. Dewey, 452 U.S. 594, 600 (1981).
40. Moody, *supra* note 6, at 248.
41. 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).
42. *Id.* at 333.
43. *Id.* at 340.
44. *See id.* at 339.
45. 489 U.S. 602 (1989).
46. 489 U.S. 656 (1989).

railroad employees in response to the high incidence of substance abuse and serious alcohol and drug related accidents involving railroad personnel.[47] All employees associated with a major train accident,[48] an impact accident,[49] or an incident involving a fatality to an on-duty railroad employee[50] were required to undergo drug testing. *Von Raab* involved a drug testing program similar to that in *Skinner*. The Treasury Department mandated drug testing as a precondition to employment or promotion for all customs officials who would be required to either carry a gun, be involved in drug interdiction, or be exposed to classified information.[51]

The Court upheld both testing programs as being reasonable Fourth Amendment searches under the "special needs" doctrine. In *Skinner*, the prevention of a potential threat to human life posed by drug use among railroad employees was a "special need."[52] The "special need" in *Von Raab* involved the compelling governmental interest in preventing drug users from attaining positions that could endanger the nation's border integrity or citizen's lives.[53] As a result of these decisions, railroad employees and customs officials could be tested for the presence of drugs despite the lack of individualized suspicion of drug use surrounding any particular employee or official. This concept was stated explicitly in *Skinner* as the Court declared that "a showing of individualized suspicion is not a constitutional floor."[54]

The significance of the Court's allowing drug testing of persons absent individualized suspicion is in its rejection of the notion that a showing of probable cause prior to a search is mandated by the Constitution.[55] Probable cause had always been a component of search and seizure analysis in its original law enforcement context and the requirement of some likelihood that "what was being

47. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 606-07 (1989).
48. *Id.* at 609.
49. *Id.*
50. *Id.*
51. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 660-61 (1989).
52. *See Skinner*, 489 U.S. at 620.
53. *Von Raab*, 489 U.S. at 679.
54. *Skinner*, 489 U.S. at 624.
55. Moody, *supra* note 6, at 250.

searched for would be found"[56] survived the Court's expansion of Fourth Amendment search doctrine into the administrative searches area.

Instead, the Court in *Skinner* set forth three conditions which must be fulfilled in order to consider a search reasonable within the meaning of the Fourth Amendment. First, the privacy interests implicated by the search must be minimal;[57] second, the government interest must be important;[58] lastly, the circumstances must be such that a requirement of individualized suspicion would place the government interest in jeopardy.[59]

In applying this criteria to the facts in *Skinner* and *Von Raab*, the Court held the tests on bodily fluids necessary to implement the testing programs were minimal intrusions into the employees' reasonable expectations of privacy.[60] The important government interest in *Skinner* was in having only drug-free employees piloting the nation's railroads, given the potentially disastrous consequences of the alternative.[61] In *Von Raab*, the government had a "compelling" interest in ensuring the physical fitness of its interdiction personnel on the front lines of the drug war.[62] Finally, the Court held in *Skinner* that, because of the hidden nature of drug impairment, requiring the government to suspect that a particular employee was impaired prior to being able to test her would jeopardize the government interest at stake.[63] Curiously, although a similar rationale would seem appropriate to the situation in *Von Raab*, the Court did not explicitly apply the third part of the test that they had just announced in *Skinner*.[64]

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56. *Id.* at 251.

57. *Skinner*, 489 U.S. at 624.

58. *Id.*

59. *Id.*

60. *Id.* at 628; *See Von Raab*, 489 U.S. at 671. The *Von Raab* court, rather than concentrating on the privacy interests implicated by perinatal invasion, emphasized the "diminished expectations" of privacy associated with certain forms of government employment, such as Mint employees who routinely find themselves subject to personal searches. Since these cases were decided at the same time, it is reasonable to believe that the court implicitly found the same minimal privacy intrusion applied to both tests on bodily fluids.

61. *Skinner*, 489 U.S. at 628.

62. *Von Raab*, 489 U.S. at 670.

63. *Skinner*, 489 U.S. at 633.

64. Moody, *supra* note 6, at 252.

Compulsory HIV testing of rape defendants might also be analyzed under the "special needs" doctrine if, like employee drug testing, it could be shown that HIV testing neither aided law enforcement nor furthered a regulatory scheme.[65]

State statutes allowing the testing of alleged rapists have barred prosecutors from using any information obtained from the testing as part of a charging decision[66] or as part of a criminal trial.[67] Since law enforcement searches are conducted for the purpose of gathering evidence to be used in criminal prosecutions,[68] statutes barring such uses of the searches they authorize are not related to law enforcement.[69]

Mandatory HIV testing programs cannot currently be classified as administrative searches either, as the Supreme Court has applied the administrative search analysis only to searches of buildings, not people.[70] Obviously, the drawing of blood necessary to conduct a test for the HIV is a search of the person.

Since HIV testing neither aids in the gathering of evidence for law enforcement purposes nor furthers an administrative scheme, it is likely that such testing would be subjected to Fourth Amendment search and seizure analysis under the "special needs" doctrine. HIV testing in that respect is similar to the *Skinner* and *Von Raab* drug testing cases which have already been decided by the Court.[71]

Given the Court's willingness to dispose of the probable cause requirement in upholding mandatory drug testing, it is not a far reach to suggest that suspicionless HIV tests could be construed as reasonable under the Fourth Amendment. In order for a rape defendant to successfully resist a request by the victim to undergo HIV testing, it will be necessary for him to show that the intrusion upon his privacy occasioned by the test is something more than "minimal"

65. *See supra* notes 34-37 and accompanying text.
66. *See, e.g.*, CAL. PENAL CODE § 1524.1(a) (Deering Supp. 1991).
67. *See, e.g., id.* § 1524.1(k).
68. *See supra* note 35 and accompanying text.
69. Moody, *supra* note 6, at 253.
70. *Id.*
71. *See supra* notes 45-64 and accompanying text.

or that the governmental interest in having him tested is something less than "important." Proving that either one of those conditions exist would theoretically be enough for the court to deny the victim's request;[72] it would assuredly be enough if the privacy intrusion was more than minimal *and* the government interest was less than important.

But what about the scenario where the privacy intrusion is more than minimal and the government interest is important? An intrusion which is no longer minimal should resolve the case in favor of the individual's privacy interest. However, it is highly questionable whether a court would defeat a sufficiently important government interest in the face of an intrusion into individual privacy that was only somewhat more than minimal. In a situation where a court feels constrained to rule in favor of the government, it might take pains to classify the privacy intrusion as "minimal", regardless of its actual intrusiveness. It is not implausible to suggest that a court engaging in this type of surreptitious analysis will decide a case in favor of the government where they may have to admit that the privacy intrusion is more than minimal; the court might simply add that other considerations of fairness and justice support their holding.

Therefore, the resolution of the question whether compulsory HIV testing of rape defendants is constitutional under the Fourth Amendment may well ultimately turn on the more traditional search and seizure analysis of whether the governmental interest in conducting the testing outweighs the individual interest in privacy.

B. The Constitutional "Right to Privacy" Issue

Although never explicitly mentioned in the Constitution, the Supreme Court has held that a constitutional right to privacy exists "in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action."[73] Once a right has been determined to be fundamental, the statute limiting that right can only be jus-

72. *See supra* note 57 and accompanying text.
73. Roe v. Wade, 410 U.S. 113, 153 (1973).

tified by a compelling state interest, and the statute must be narrowly tailored to effect only the compelling interest at stake.[74]

The Supreme Court, in *Whalen v. Roe*,[75] identified two privacy interests deserving protection under the Constitution: the individual interest in avoiding disclosure of personal matters[76] and the independence interest in making certain kinds of important decisions.[77] As to the latter, the Court has limited its definition of "important" decisions to those relating to marriage,[78] procreation,[79] contraception,[80] family relationships,[81] and child rearing and education.[82]

In matters of disclosure, the Court has "implicitly established a two-part test for determining whether the privacy interest in nondisclosure is implicated: first, the information disclosed must be of a peculiarly private nature; and second, the information must be disclosed beyond government officials."[83] A simple application of this test was illustrated in *New York v. Ferber*.[84] In that case, the Court had to decide whether children who had been depicted in pornographic films and pictures possessed a constitutionally protected privacy right in nondisclosure. The Court found that such a right existed, as the children's nudity was peculiarly private, and the depictions of their bodies were distributed for commercial use.[85]

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74. *Id.* at 155.

75. 429 U.S. 589 (1977).

76. California Bankers Ass'n v. Shultz, 416 U.S. 21, 79 (1974) (Douglas, J., concurring); *id.* at 78 (Powell, J., concurring); Stanley v. Georgia, 394 U.S. 557 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965); *id.* at 599 n.25 (citing Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

77. *Id.* at 600 n.26 (citing Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); Allgeyer v. Louisiana, 165 U.S. 578 (1897)).

78. Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977) (citing Loving v. Virginia, 388 U.S. 1, 12 (1967)).

79. *Id.* (citing Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942)).

80. *Id.* (citing Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972); *id.* at 460, 463-65 (White, J., concurring in result)).

81. *Id.* (citing Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

82. Roe v. Wade, 410 U.S. 113, 152-53 (1973); *id.* (citing Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

83. Moody, *supra* note 6, at 261.

84. 458 U.S. 747 (1982).

85. *Id.* at 759 n.10.

It is difficult to imagine anything more "peculiarly private" than the results of an individual's HIV test. Therefore, the first test for "fundamentalness" is satisfied. As for the scope of the disclosure, any testing scheme which purports to release the results of the defendant's HIV status to the victim necessarily requires that this information be accessible to persons other than government officials. Clearly then, the individual's privacy right in the nondisclosure of his HIV status appears to be a fundamental interest which is required to be justified by a compelling government interest. Further, even if the government's interest is indeed adjudged to be compelling, conditions governing any disclosure of the individual's HIV status must be carefully drawn to effect only the fulfillment of that interest.

Unfortunately, this view has yet to find any support within the federal court system. In *Local 1812, American Federation of Government Employees v. Department of State*,[86] the district court considered a Department of State policy implementing periodic mandatory HIV testing of its employees assigned to the Foreign Service. Upon consideration of the invasion of privacy argument put forth by the employees, the court declined to identify any substantial privacy interest other than the damaging psychological reactions of a "deep personal nature"[87] accompanying a positive test result. It was the court's opinion that these concerns alone were not sufficient to raise constitutional privacy issues.[88]

C. *Identifying the Competing Interests*

Regardless of whether the question of compulsory HIV testing of rape defendants is subjected to Fourth Amendment search and seizure analysis (where the government's interest in disclosure is balanced against the individual's privacy interest in nondisclosure) or Fourteenth Amendment "right to privacy" analysis (where the government's interest in disclosure must be shown to be compelling in order to intrude upon the individual's fundamental right to privacy in nondisclosure), it is necessary to identify the interests of both the

86. 662 F. Supp. 50 (D.D.C. 1987).
87. *Id.* at 53.
88. *Id.*

government and the individual for the purpose of evaluating their importance.

1. The Government's Interest in Testing and Disclosure

There are primarily two justifications posited in support of exposure-based[89] HIV testing, typified by the Supreme Court of California's holding in *Johnetta J. v. Municipal Court*.[90] The first assertion is that HIV testing helps to allay the fears of one who has potentially been exposed to the virus.[91] In addition to the supposed psychological benefit, disclosure of the HIV test results to the victim is said to provide the victim and her physicians with information allowing them to assess the proper course of medical treatment more accurately.[92]

Undoubtedly, anxiety over possibly being infected with the HIV is assuaged when an individual discovers that the person she fears has infected her has tested negative for the antibody,[93] despite the possibility of a "false" result. But it is important to remember that current means of HIV testing are ineffective in identifying infected persons who have yet to form the antibody. Professor Steven Eisenstat has stated that

> Exposure testing must not be promoted as a means of allaying the fears of the individual fearing infection; a negative test result would only encourage a false sense of security, and would thus increase the risk of further transmission . . . . Exposure testing also operates against the public health by creating a false sense of security. In this manner, it actually increases the risk of further contagion.[94]

89. Exposure-based testing implicates the desirability of testing a person for the presence of HIV antibodies when there is individualized reason to believe that the particular person has been exposed to the virus. It is to be distinguished from group-based testing, which involves testing a particular class of persons to discover whether any might be infected. In group-based testing, there is no particular reason to believe that any individual member of the group has been exposed to the virus.

90. 267 Cal. Rptr. 666 (Ct. App. 1990).

91. *Id.* at 672.

92. *Id.*

93. Steven Eisenstat, *An Analysis of the Rationality of Mandatory Testing for the HIV Antibody: Balancing the Governmental Public Health Interest with the Individual's Privacy Interest*, 52 U. PITT. L. REV. 327, 358 (1991).

94. *Id.* at 358-59.

In short, because of the less than complete reliability of HIV testing, and because of the "window" of time between exposure and the development of HIV antibodies, a person who allows the news that her assailant has tested HIV-negative to "allay her fears" does so unreasonably. Since the psychological benefit accruing to the person from learning the test results is largely illusory, states relying solely on that basis would likely fail in showing a governmental interest important or compelling enough to justify compulsory HIV testing.

Professor Eisenstat makes the above point in the context of deciding whether persons who have exposed medical and public safety personnel to their blood should be subjected to HIV testing. He concedes, however, that "the testing of individuals charged with or convicted of the crime of rape . . . may represent a rational public health policy."[95] He suggests that the unique circumstances of rape victims may provide sufficient justification for compulsory testing.

> Two factors distinguish the testing of rape defendants from other forms of exposure testing. First, a victim of rape is faced with possible infection due to truly unavoidable circumstances. Medical and public safety personnel . . . by virtue of their career choices, have to a certain extent agreed to assume those risks associated with their professions. Second, [the fear of HIV infection] when compounded with the trauma attending the rape itself, further distinguishes the level of anxiety suffered by the rape victim . . . .[96]

Unquestionably, empathy for the innocent victim of a violent crime such as rape could motivate a court to do something that it perceives might help the victim. However, as illustrated by the above discussion, attempting to allay the victim's fears is a fruitless endeavor due to the shortcomings of the available diagnostic tests for the virus.[97] The two factors that a rape victim would find relevant in deciding whether her fears should be allayed, because of their absolute nature, admit of only four possibilities. Either the defendant did or did not rape the victim, and the defendant will either test positive or negative for HIV. If the defendant did not rape the victim, the result of his HIV test is, in actuality, irrelevant. It is

95. *Id.* at 370.
96. *Id.* at 370-71.
97. *See supra* notes 11-18 and accompanying text.

certainly possible that the victim could believe that the defendant was her assailant (and thus a negative test result would in fact allay her fears), but if the defendant was truly innocent any subsidence in the victim's fears would have no basis in reality. If the defendant did rape the victim and tests positive, the victim's fears will be exacerbated instead of allayed despite the long odds against the infection actually being transmitted during the rape; furthermore, a false positive result will inflict needless fear and worry upon the victim. If the defendant did rape the victim and subsequently tests negative, the victim is subject to the false sense of security described earlier by virtue of the inexactness of the testing procedures.[98] "[HIV testing] doesn't really change the risk of the situation. It only changes the perception of the risk."[99]

Professor Eisenstat suggests that the level of anxiety suffered by the rape victim justifies the mandatory testing of the defendant. He argues that the fear of infection is "compounded" with the trauma of the rape.[100] Professor Eisenstat offers no evidence, however, that these dual psychological "injuries" are synergistic.[101] If the fear of infection is assigned an "anxiety burden" value of x, and the trauma from the rape itself is assigned a value of y, it is unclear whether the total anxiety will amount to some synergistic value approaching a maximum of xy which would be greater than the cumulative value of $x + y$.

A hypothetical example may serve to further illustrate the point.[102] Suppose that there are two nurses in a hospital. Suppose further that one is sexually assaulted while on duty and the other is exposed to a needle stick, and that both fear contracting the HIV as a result. According to Professor Eisenstat, the nurse that was assaulted should be more anxious over *the fear of HIV infection alone* since this fear has been compounded by the manner of her potential exposure.

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98. *See supra* notes 11-18 and accompanying text.

99. Eisenstat, *supra* note 93, at 361 (quoting *Florida Legislation Would Provide Procedures for Medical Workers*, 5 Aids Policy & The Law (BNA) No. 11, at 2 (June 13, 1990)).

100. *Id.* at 371.

101. *See generally id.* at 370-72.

102. The author gratefully acknowledges the contribution of Jeff L. Lewin, Professor of Law at West Virginia University, for his assistance in formulating this hypothetical.

But let us suppose that both the patient whose blood was left in the needle and the assailant were tested for HIV and both tests were negative. If Professor Eisenstat's theory is correct, the rape victim should still be experiencing greater anxiety since her anxiety was greater to start with. Since there is no apparent reason to differentiate between the likelihood that either result is more reliable than the other on its face, it is not at all clear that the assaulted nurse should be more worried about contracting HIV than the nurse who was exposed to the needle. Furthermore, if the assaulted nurse is in fact more traumatized by the possibility of HIV exposure, it is likely an irrational fear on her part; while the assaulted nurse suffered, no doubt, great trauma at the hands of her attacker, any further trauma from possible HIV exposure should be no greater than the experience by the nurse who was stuck with the needle.

If it is indeed the case that the burden is cumulative instead of synergistic, then it can be argued that there are already societal mechanisms in place, such as counseling centers and public mental health clinics, to assist the victim of a rape in dealing with the psychological trauma associated with being raped. Courts are inadequate substitutes, however admirable their motivation, for those institutions already specializing in ameliorating mental and psychological anxieties resulting from sexual assault.

This leaves in isolation the fear of infection, which cannot be distinguished from the same fear experienced by medical or safety personnel who may have been exposed to the HIV. As explained earlier, ordering HIV testing of a potential carrier for the purpose of allaying such fears is counterproductive, in that a false sense of security may accompany a false negative result.

Along with the psychological benefits supposedly accruing to the potentially infected by virtue of having her fears allayed, those seeking to justify exposure-based HIV testing assert that disclosure of the accused's HIV test results to the victim provides her with the information needed "to commence treatment prior to the time they would be able to ascertain their own HIV status if the subject tests positive."[103]

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103. Eisenstat, *supra* note 93, at 364.

However, treatment options are limited. There is currently no treatment that will succeed in removing the HIV from a person's body once that person has been infected.[104] In some cases AZT will succeed in delaying the onset of AIDS symptoms, but it is only necessary to commence AZT treatment prior to the onset of symptoms.[105] Since symptoms rarely develop until years subsequent to the exposure, waiting the few months necessary to confirm one's own seropositivity will not adversely affect any available treatment option.[106] Additionally, commencing immediate AZT treatment on the basis of the defendant's having tested HIV-positive raises "serious medical concerns" since AZT treatment is itself not without risk.[107]

Professor Eisenstat, while contending that "[n]either of the two reasons advanced to support exposure testing provide a valid justification for the testing",[108] offers an assessment of the true motivation behind the desire of legislatures in implementing mandatory HIV testing. "The primary motivation behind the enactment of these types of statutes would appear to be a popular or legislative desire to somehow assist those individuals [who] . . . are faced with an unavoidable exposure . . . . [109] [t]hus, while laudable in intent, exposure testing provides only an elusive security to those fearing infection."[110]

2. The Individual's Privacy Interest in Nondisclosure

Since the courts evaluate the extent of the intrusion upon an individual as well as the importance of the governmental interests in determining constitutional privacy questions,[111] an examination of the intrusiveness upon individual privacy of a public health measure such as mandatory HIV testing is appropriate.

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104. *See supra* note 20 and accompanying text.
105. Eisenstat, *supra* note 93, at 360.
106. *Id.*
107. *Id.* at 359.
108. *Id.* at 360.
109. *Id.*
110. *Id.* at 364.
111. *See supra* notes 57-59 and accompanying text.

> If the governmental interests furthered are minimal, but the privacy intrusion is slight as well, such a measure may still be deemed rational. However, when a program both fails to effectuate the purposes which underlie its implementation, and simultaneously intrudes significantly upon the privacy of the individuals it affects, the program is not rational and should not be adopted.[112]

It has been said that testing positive for the HIV is the equivalent of receiving a death sentence;[113] the medical implication of a positive HIV test result is that the individual will ultimately die from AIDS. By consenting to HIV testing, the individual has agreed to accept the life and death implications of the test. But to require the individual to submit to the test is to compel him or her to confront the prospect of a painful and ultimately fatal disease. In taking away the right of when to face such a prospect, compulsory testing imposes an extremely invasive intrusion upon an individual.[114]

The societal implications of a positive HIV result also significantly affect the individual's privacy interests. Since test results may be disclosed to persons other than the test subject and his physician (and such disclosure is precisely the intent of testing rape defendants), the risk of unauthorized disclosures, both unintentional and deliberate, increases.[115]

Additionally, the nonconsensual disclosure of HIV test results to third parties constitutes a significant privacy invasion in that it exposes the subject to the extensive forms of discrimination currently leveled against HIV-infected persons. As a result of these biases, seropositive individuals continue to experience discrimination when seeking employment, medical treatment, housing, and life and health insurance.[116] Even with the increasing statutory protections being afforded HIV-positive individuals, these persons still face a panoply of discriminatory acts.[117]

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112. Eisenstat, *supra* note 93, at 364-65.

113. Johnetta J. v. Municipal Court, 267 Cal. Rptr. 666, 679-80 (Ct. App. 1990).

114. Eisenstat, *supra* note 93, at 365.

115. *Id.* at 365-66.

116. *Id.* at 366.

117. *Id.* at 367. Professor Eisenstat lists examples of such discrimination as the refusal of physicians and dentists to treat HIV infected persons, various forms of employment discrimination, inaccessibility to and eviction from rental housing, and the denial or cancellation of health and life insurance coverage. *Id.*

D. *Applying the Law to the Identifiable Interests*

Under Fourth Amendment search and seizure analysis, in order for a search to be reasonable, the governmental interest in conducting the search must outweigh the individual's interest in privacy.[118] As shown above, the alleged governmental interests in ordering compulsory HIV testing of rape defendants are largely perceived, and not real.[119] Conversely, it has been shown that the individual's privacy interests are both very real and very significant.[120] Therefore, ordering an accused rapist to undergo compulsory HIV testing so that the results can be released to the victim is likely an unconstitutional search within the meaning of the Fourth Amendment.

The right-to-privacy argument appears to be even stronger. By compulsory testing, an individual's fundamental interest in maintaining privacy concerning his HIV status is implicated.[121] The governmental interest in conducting that test and disclosing the results must be compelling.[122] The typical governmental interests asserted in defense of compulsory HIV testing appear to fall far short of that standard, and, as a result, compulsory testing would likely infringe upon the accused's right to privacy.

IV. Mandatory Testing of Rape Defendants: The Legislative and Judicial Responses

State legislatures have begun to react to the question of mandatory HIV testing in a multitude of contexts and, via these statutory schemes, have expressed a preference for protecting the concerns of either the rape victim or the accused. California and New York, two states with a high incidence of AIDS cases and HIV infection among their population,[123] have reacted to the problem in opposite manners. California expresses a clear preference for the concerns of the victim; New York mandates a high level of protection of the

118. *See supra* note 33 and accompanying text.
119. *See supra* notes 89-110 and accompanying text.
120. *See supra* notes 111-17 and accompanying text.
121. *See supra* notes 83-84 and accompanying text.
122. *See supra* note 74 and accompanying text.
123. Goedert & Blattner, *supra* note 19, at 39.

privacy interests of the accused. West Virginia's statutory solution appears to fall somewhere in between the California and New York approaches.

A few courts have addressed the issue as well. Two cases have been decided in New York; one case was decided prior to the passage of that state's testing statutes,[124] while the other was decided subsequently.[125] The question has yet to come before either the California or West Virginia courts, but in *Government of the Virgin Islands v. Roberts*,[126] the United States Court for the District of the Virgin Islands squarely confronted the matter.

The first purpose of this section is to briefly examine the California, New York, and West Virginia legislative approaches to the question of allowing mandatory HIV testing of rape defendants and to ascertain the likelihood of their constitutionality. Next, it will examine the judicial response to the issue and evaluate the rationale and arguments supporting the holdings of these courts.

A. The Legislative Response

1. The California Approach

An expansion of California's penal code was that state's first attempt to provide for the HIV testing of rape defendants.[127] The statute empowers the state courts, at the written request of the victim,[128] to issue a search warrant to commence HIV testing when probable cause exists to believe both that the accused committed the offense and that the accused has transferred to the victim blood, semen, or any other bodily fluid capable of transmitting HIV.[129] Upon receipt of the test results, the state may then release them to the victim,[130] who in turn may disclose the test results as he or she

124. People v. Thomas, 529 N.Y.S.2d 429 (Co. Ct. 1988).
125. People v. Durham, 553 N.Y.S.2d 944 (Sup. Ct. 1990).
126. 756 F. Supp. 898 (D.V.I. 1991).
127. CAL. PENAL CODE § 1524.1 (Deering Supp. 1991).
128. *Id.* § 1524.1(b)(1).
129. *Id.*
130. *Id.* § 1524.1(g).

deems necessary to protect his or her health and safety or the health and safety of his or her family or sexual partner.[131]

The voters of California later approved an initiative, Proposition 96, which became an addition to the state's health and safety code.[132] The requirements that the victim's request be written[133] and that probable cause exists[134] are essentially the same as those found in the Penal Code.

Despite the declared purpose of California to protect the health and safety of its citizens[135] and the Supreme Court's affirmation that such a purpose is a compelling state interest,[136] the mandatory HIV testing of rape defendants does not serve that purpose. Such testing does not further the victim's psychological health insofar as she relies upon the inherently inexact results to make conclusions about her own likelihood of infection.[137] Neither does such testing further the victim's physical health by presenting her with viable treatment options that must be commenced immediately.[138] Since the privacy interests of the defendant in nondisclosure are so deeply implicated,[139] it would appear that the California statutes are unconstitutional.

2. The New York Approach

New York's legislative intent as expressed in their HIV testing statute[140] is directly opposed to that of California. According to the New York legislature, "maximum confidentiality protection for information related to [HIV] infection and [AIDS] is an essential public health measure . . . . [S]trong confidentiality protections can limit the risk of discrimination and the harm to an individual's interest in privacy that unauthorized disclosure of HIV related information

131. *Id.* § 1524.1(i).
132. CAL. HEALTH AND SAFETY CODE §§ 199.95-.99 (Deering 1990).
133. *Id.* § 199.96.
134. *Id.*
135. *Id.* § 199.95.
136. Moody, *supra* note 6, at 254-55.
137. *See supra* notes 93-102 and accompanying text.
138. *See supra* notes 103-107 and accompanying text.
139. *See supra* notes 111-117 and accompanying text.
140. N.Y. PUB. HEALTH LAW § 2780 (McKinney Supp. 1991).

can cause . . . ."[141] The statute provides that no person can order an HIV test without the written, informed consent of the subject of the test.[142] The statute also provides strict penalties for persons who order HIV tests or disclose information contained in an authorized test. Such persons may be fined up to five thousand dollars for each occurrence,[143] and a willful violation is a misdemeanor.[144]

A New York court may order disclosure of HIV-related information upon a showing of a compelling need relating to the adjudication of a criminal or civil proceeding.[145] Disclosure may also be appropriate if a clear and imminent danger to an unknowing individual's life or health[146] or the public's health[147] exists as a result of contact with the test subject.[148] Upon assessing compelling need or clear and imminent danger, a court must weigh the need for disclosure against the privacy interest of the protected individual and the public interest disserved by disclosure.[149] Since the constitutional standards regarding searches and invasions of privacy[150] are built into the statute, thereby guaranteeing that the rights of the individual will be fully protected, the New York legislation would likely withstand constitutional scrutiny.

3. The West Virginia Approach

West Virginia's "AIDS-related Medical Testing and Records Confidentiality Act"[151] strikes a balance between the victim- conscious California approach and the defendant-conscious New York approach. Whereas California allows testing of persons merely ac-

141. *Id.* Historical and statutory notes.
142. *Id.* § 2781(1).
143. *Id.* § 2783(1)(b).
144. *Id.* § 2783(2).
145. *Id.* § 2785(2)(a).
146. *Id.* § 2785(2)(b).
147. *Id.* § 2785(2)(c).
148. *Id.* § 2785(2)(d). Section 2785(2)(d) provides that a disclosure order may also be procured by any person (presumably a government official) who is lawfully entitled to the disclosure provided that the disclosure is consistent with the provisions of the article.
149. *Id.* § 2785(5).
150. *See supra* discussion in text following note 72; *see also supra* note 83 and accompanying text.
151. W. VA. CODE §§ 16-3C-1 to -9 (1991).

cused of rape,[152] and New York proscribes all HIV testing absent written consent,[153] West Virginia will mandate testing only upon conviction for rape.[154] While West Virginia's civil penalties for disclosing HIV testing information to unauthorized persons[155] are more severe than California's,[156] New York has taken the added step of imposing criminal sanctions.[157]

Because West Virginia imposes involuntary HIV testing only upon those convicted of rape, and convicted felons arguably have a diminished expectation of privacy compared to the public at large,[158] the West Virginia AIDS testing statute likely passes constitutional muster. But a diminished expectation of privacy is not the same as no expectation at all. It is very difficult to imagine a situation where a victim of sexual assault could gain much utility from having her convicted attacker tested, since the period of time required for the victim's own seroconversion[159] would almost always surpass the amount of time that passes between arrest and conviction.

B. The Judicial Response

1. *People v. Thomas* and *People v. Durham*: Before and After New York's HIV Testing Statute

Prior to the enactment of New York's HIV testing statute, the Schoharie County Court had an opportunity to address the mandatory testing issue in *People v. Thomas*.[160] The defendant in this case was indicted on two counts each of rape, sodomy, and sexual abuse (all in the first degree) and second-degree burglary.[161] Despite

152. *See supra* note 127 and accompanying text.
153. *See supra* note 142 and accompanying text.
154. W. VA. CODE § 16-3C-2(f)(2).
155. *Id.* § 16-3C-5(a).
156. CAL. HEALTH AND SAFETY CODE § 199.99(e) (Deering 1990).
157. *See supra* notes 143-44 and accompanying text.
158. *See generally* Hudson v. Palmer, 468 U.S. 517 (1984) (inmates have no reasonable expectation of privacy in their cells).
159. *See supra* notes 14-16 and accompanying text.
160. 529 N.Y.S.2d 429 (Co. Ct. 1988).
161. *Id.* at 430.

having a prior conviction for attempted rape in the first degree,[162] he was allowed to plead guilty to the same crime in full satisfaction of the charges against him.[163] As a result of his prior conviction, he had spent a substantial number of years in the state penitentiary.[164]

The defendant opposed the testing on Fourth Amendment search and seizure grounds, claiming further that a positive result could expose him to additional criminal prosecution for depraved indifference murder.[165] In granting the victim's request to have the defendant tested for the HIV virus, the court noted that there was sufficient evidence in the indictment record to establish that the defendant exposed the victim to his bodily fluids.[166] The court also took judicial notice of several facts, including that antibodies might not be detected in the victim for several months or years[167] and that HIV exposure is markedly more prevalent among prison populations than the general population.[168] The court brushed aside the defendant's Fourth Amendment defense, finding that the proposed search was entirely reasonable because it was the "intelligent, humane, logical, and proper course of action under the circumstances."[169] The court defined the scope of the intrusion into the defendant's privacy as being restricted to the intrusion occasioned by the routine drawing of a blood sample, which the court described as very minimal and commonplace.[170] The court declined to broaden the defendant's privacy interests to include any that might be implicated as a result of disclosing the test results.

The New York HIV-testing statute was passed shortly after the decision in *Thomas*, and the issue has come before the state's courts

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162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 431. *But see* notes 13-15 *supra* and accompanying text. It is the rare case indeed that a person fails to seroconvert within a year of exposure.
168. *Id.*
169. *Id.*
170. *Id.*

only once since. In *People v. Durham*,[171] a defendant accused of rape had announced to the victim that he was an AIDS carrier.[172] The victim subsequently went to the hospital where a Vitullo Kit sample (a device used to compare DNA fingerprints between the semen source of a rape and a defendant's blood) was taken from her.[173] The New York Police Department Laboratory declined to analyze the kit, however, because policy prohibited such testing upon an indication that the source of the semen might have AIDS.[174]

Despite the enactment of New York's HIV-testing statute, the court allowed the defendant to be tested. The court cited an exception in the testing statute in the state civil procedure rules,[175] which requires a party to submit to a blood examination in which the "physical condition of a party *is in controversy*."[176] The court ruled that the defendant himself, by announcing that he had AIDS, had placed into controversy the issue of his physical condition.[177]

By virtue of its analysis, the court avoided a direct confrontation with the spirit of the state's HIV-testing statute. *Durham* presented a unique fact pattern, since it is unlikely that most rape defendants will make a proclamation to the victim similar to the one made in that case. It will be interesting to see whether the holding in *Durham* will be limited to its facts, or whether subsequent actions will serve to possibly further bypass the strict statutory prohibitions against mandatory HIV testing. One state judge has already promised to take advantage of the language in the statute which binds *persons*, not courts, to its prohibitions.[178]

2. *Government of the Virgin Islands v. Roberts*: A Federal Common-Law Precedent

The federal system confronted the issue of compelling rape defendants to be tested for the HIV for the first time in early 1991.

171. 553 N.Y.S.2d 944 (Sup. Ct. 1990).
172. *Id.* at 945.
173. *Id.*
174. *Id.* at 947.
175. *Id.*
176. *Id.*
177. *Id.*
178. MacDonald, *supra* note 1, at 1629.

In *Government of the Virgin Islands v. Roberts*,[179] the defendant was alleged to have approached the victim and her male companion with a gun, forcing the victim to restrain her companion with handcuffs.[180] The companion was then asked by the defendant to sexually assault the woman while the assailant watched.[181] After the companion declared that he was unable to comply, the defendant raped the woman at gunpoint and shot her in the neck.[182] She survived, and escaped to sea where she was picked up by a boat two hours later.[183] Her companion was killed by a bullet wound to the head, and later found nude and handcuffed.[184] The government requested that the defendant be tested for HIV and that the results be released to the victim.[185] The defendant opposed the motion, claiming that such a test would be an unreasonable search and seizure under the Fourth Amendment.[186]

In granting the government's motion, the court noted that since probable cause existed to charge the defendant with rape, probable cause also existed to believe that the victim had been exposed to a known method of transmitting the HIV virus.[187] Since the challenged perinatal intrusion was more substantial than that associated with a traditional search, the test of whether a proposed search is reasonable requires balancing "the extent of the intrusion against the need for it."[188]

The court identified the government's need to conduct the test as compelling,[189] and proceeded to outline the specific interests involved. First, the government has an interest in protecting the physical and mental health of victims of sexual assault, both generally and in their roles as government witnesses.[190] The government's sec-

179. 756 F.Supp 898 (D.V.I. 1991).
180. *Id.* at 899.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.* at 898.
186. *Id.* at 901.
187. *Id.*
188. *Id.* (quoting Tennessee v. Garner, 471 U.S. 1, 8 (1985)).
189. *Id.* at 903.
190. *Id.*

ond interest is in protecting the health of the general citizenry from HIV transmission that could be occasioned by the victim engaging in intimate relations with others.[191]

The court held that the government interests in testing outweighed the defendant's privacy interests, as the intrusion required to extract blood was "not significant"[192] or "unduly extensive",[193] and that since the results of the testing would be revealed only to the parties and their physicians, the defendant's interest in nondisclosure would not be significantly infringed.[194]

Although the defendant did not advance a constitutional "right to privacy" defense,[195] the court seemed to anticipate such a defense being raised in future cases where its precedent might be applied. The court was careful to classify the government's need in ordering the test as "compelling"[196], and emphasized the narrow tailoring of its remedy in discussing the limited sphere of disclosure.[197] Since the court could have confined its Fourth Amendment analysis to the individual privacy interests implicated only by virtue of the perinatal invasion necessary to draw blood for the test (the physical search), it is difficult to believe that the discussion of the individual privacy interests in nondisclosure was intended as mere dicta.

In assessing the court's position, it can be noted that there are really not any new justifications for implementing mandatory HIV testing for rape defendants, just reformulations of old ones. As has been previously discussed, ordering such testing in order to assuage the victim's fears results only in a false sense of security.[198] Given the current status of treatment for HIV infection, failure to test rape defendants does not adversely affect the victim's treatment options, even in the unlikely event the virus has been transmitted.[199]

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191. *Id.* at 904.

192. *Id.* at 901 (quoting Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 625 (1989)).

193. *Id.* (quoting Winston v. Lee, 470 U.S. 753, 762 (1985)).

194. *Id.* at 902.

195. *Id.* at 901. The court characterizes Roberts' Fourth Amendment defense as his "sole argument."

196. *See supra* note 189 and accompanying text.

197. *See supra* notes 192-94 and accompanying text.

198. *See supra* notes 93-102 and accompanying text.

199. *See supra* notes 103-07 and accompanying text.

As for the argument that mandatory testing serves the health and safety of society at large by preventing the spread of AIDS by an unknowing victim, we can only ask whether society would be better off in the event of a victim who is actually infected feeling free to engage in intimate behavior on the basis of a false negative report.

V. Conclusion

It is difficult to understate the tragedy of rape in our society. Innocent victims suffer untold physical and mental anguish at the hands of their assailants while legislatures and courts do little to ameliorate the victim's anguish.

Equally tragic is the societal discrimination leveled against persons testing positive for the HIV when the fact of their infection is made public. Not only are these persons subjected to the prospect of a slow, horrible death for which there is no cure, but they must live their remaining precious years as second-class citizens, victimized by ignorance and prejudice.

When the potentially HIV-infected person is a rape defendant, that person is vulnerable to a request from his alleged victim which would force him to undergo testing to detect the presence of the HIV antibodies. The test is administered at a time not necessarily of the defendant's choosing, and the results are disclosed to persons not necessarily having the best interests of the defendant at heart. A defendant wishing to resist HIV testing in this context may invoke the Fourth Amendment's prohibition against unreasonable searches and seizures as applied to the states through the Fourteenth Amendment, as well as the general constitutional privacy safeguards.

Both constitutional analyses require an identification of both the government's interest in conducting the testing and the individual's interest in preventing it. An individual possesses privacy interests in his autonomy and the nondisclosure of intensely personal information regarding his HIV status. An individual also has an interest in avoiding unreasonable searches and seizures of his person. These interests are readily identifiable. The government's interests are less clear and not easily articulated.

States have addressed this issue along a continuum of potential responses. California has enacted a victim-conscious statute which,

under all circumstances, allows for the testing of a rape defendant pursuant to the written request of the victim. The constitutionality of this statute is in question, as it seemingly fails to adequately consider the rights of the defendant. New York's statute is defendant-conscious, prohibiting nearly all forms of HIV testing absent the consent of the subject. Since the statute fully considers the rights of the defendant, it is in all likelihood constitutional. West Virginia's statute allows mandatory testing, but only of those persons convicted of rape. Since persons convicted of a crime have a lower expectation of privacy, the West Virginia HIV testing provisions also appear to be constitutional.

The courts have been slow to adequately address the legitimate privacy concerns of the rape defendant. However, there is a small yet increasing body of caselaw permitting HIV testing of defendants upon the victim's request.

As tragic as the plight of rape victims unquestionably is, our legislatures and courts cannot permit their empathy for these persons to significantly erode our fundamental rights, especially when the good to be gained from doing so is merely illusory. Our right to be free from unreasonable searches and seizures, our right to autonomy in making our decisions, and our right to keep intensely personal information private have been too hard-won to surrender to chimeric notions of justice.

Raymond S. Franks