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NOTE

IN THE MATTER OF JUVENILES A, B, C, D, E: ANALYZING THE RIGHTS OF INDIVIDUALS BY JUNKYARD STANDARDS

History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. The World War II relocation cases, and the Red scare and McCarthy-era internal subversion cases are only the most extreme reminders that when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.¹

I. INTRODUCTION

Acquired Immune Deficiency Syndrome (AIDS)² is an extraordinarily frightening and often misunderstood disease.³ The inability of the medical community to fully comprehend this elusive and ultimately fatal disease has engendered a public hysteria that is now being reflected in public health laws and penal laws throughout the country. In the desperate struggle to find an effective means of combating the spread of Human Immunodeficiency Virus (HIV)—which causes AIDS—society has begun

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

2. "AIDS" is an acronym for Acquired Immune Deficiency Syndrome. BLACK'S LAW DICTIONARY 24 (6th ed. 1990).

3. Legislative programs reflect the public's concerns regarding AIDS and how to control its spread. A number of public polls conducted over a six-month period between September, 1985, and January, 1986, found that between 28% and 51% of the respondents favored quarantining people with AIDS from the general public. See Larry Gostin, *The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties*, 49 OHIO ST. L.J. 1017, 1019 n.6 (1989). Many of the programs advocated by legislatures as a result of this type of public pressure have been labeled "unwarranted" and "absurd" by the scientific community. Bernadette Pratt Sadler, *When Rape Victims' Rights Meet Privacy Rights: Mandatory HIV Testing, Striking the Fourth Amendment Balance*, 67 WASH. L. REV. 195, 195 (1992) (citing Field, *Testing for AIDS: Uses and Abuses*, 16 AM. J.L. & MED. 34, 45 n.44 (1990)).

to look beyond the boundaries of the medical community. Public policy and legislation have become the weapons of choice in the battle against AIDS. Without a medical cure on the immediate horizon, legislators around the United States have attempted to create legislative "cures" by enacting various mandatory testing schemes that are mainly panaceas for unwarranted fears. These measures rarely address in a rational manner the problems associated with the AIDS virus because these legislative mandates are enacted as the result of immense public pressure. Thus, they reflect an inaccurate and hysterical understanding of the AIDS virus. As a result, AIDS not only threatens the physical well-being of the citizens of this country, but, as this Note explains, also threatens important American constitutional principles.

One of the most volatile issues confronting legislators today is how to balance the fears and concerns of sexual assault victims against the constitutional rights of convicted sex offenders in a manner that preserves the integrity of the Fourth Amendment and the constitutional right to privacy. Admittedly, the balance is a delicate one. The State of Washington has joined an ever-increasing number of states attempting to define the boundary between public sympathy and constitutionality by enacting mandatory HIV testing laws which attempt to balance the privacy issues associated with testing for sexually transmitted diseases and the need to reduce the incidence of HIV transmission efficiently and effectively.⁴ The Washington state legislature attempted to grapple with the issue of protecting the public health by granting a victim of sexual assault access to the mandatory HIV test results of the assailant. In so doing, the Washington state legislature has imprudently narrowed the protections of the Fourth Amendment and the right to privacy by permitting HIV testing of convicted sex offenders for the purpose of providing victims with information about their own health. As this Note will show, a victim of sexual assault cannot obtain accurate information about his/her own health from HIV test results of her offender.

In *In re Juveniles A, B, C, D, E*,⁵ the appellants-defendants argued that the drawing of their blood for HIV testing violated constitutional prohibitions against unreasonable searches and seizures under both the Fourth Amendment of the U.S. Constitution and the Constitution of the State of Washington.⁶ The Washington Supreme Court, however, upheld the ap-

4. WASH. REV. CODE ANN. § 70.24.015 (West 1992).

5. 847 P.2d 455 (Wash. 1993).

6. *Id.* at 459.

plication of the mandatory testing scheme set out in section 70.24.340(1)(a)⁷ of the Washington Code to all five juveniles who were found to have committed various sexual offenses under section 9A.44⁸ of Washington's criminal code. The court held that it was not necessary for the government to obtain a warrant before testing the appellants' blood because the searches were outside the criminal context and thus governed by the more liberal "special needs" doctrine.⁹ The court justified the application of the special needs test for the following reasons: the HIV testing statute was part of the health and public safety code of Washington; the purpose of testing the appellants was not to obtain evidence against them for use in a criminal case; a positive test would not place them at risk for a new conviction or longer sentence; and the traditional requirement of individualized suspicion, which ordinarily gives rise to probable cause to search, was impractical because HIV infection generally has no immediate outward manifestations.¹⁰ Additionally, the court found that the State's compelling interest in combating the spread of AIDS, protecting the rights of victims, facilitating effective prison management, and aiding an HIV-positive sexual offender through counseling outweighed the appellants' privacy in their bodily fluids.¹¹

Affirming the State's interest in testing without regard to the victim's minimal risk of exposure to HIV, the court rejected the appellants' argument that the statute improperly included behavior that is incapable of transmitting the virus.¹² Finally, the court rejected the appellants' argument that mandatory HIV testing violates the appellants' constitutional right to privacy. The court found that the testing statute imposes minimal intrusion on the confidentiality branch of privacy because the statute specifically limited the scope of dissemination of the test results.¹³ The court

7. The Washington statute provides, "[l]ocal health departments authorized under this chapter shall conduct or cause to be conducted pre-test counseling, HIV testing, and post-test counseling of all persons: Convicted of a sexual offense under chapter 9A.44 RCW." WASH. REV. CODE ANN. § 70.24.340(1)(a) (West 1992).

8. Under Washington's criminal code the following are listed as sexual offenses and thus any person convicted of committing one of these offenses would have to submit to an HIV test: 1) rape in the first, second, or third degree, *id.* §§ 44.040-.060 (West 1992 & Supp. 1994); 2) rape of a child in the first, second, or third degree, *id.* §§ 9A.44.073, .076, .079; 3) child molestation in the first, second, or third degree, *id.* §§ 9A.44.083, .086, .089; 4) sexual misconduct with a minor in the first and second degree, *id.* §§ 9A.44.093, .096; and 5) indecent liberties, *id.* § 9A.44.100.

9. *In re Juveniles*, 847 P.2d at 459.

10. *Id.*

11. *Id.* at 460-61.

12. *Id.* at 461.

13. WASH. REV. CODE ANN. § 70.24.115 (West 1992).

also concluded that the testing scheme did not conflict with the appellants' privacy interest in autonomy because the statute serves the state's compelling interests and is narrowly tailored to meet these interests.¹⁴

The Washington Supreme Court's decision in this case is highly problematic because the court neglected to carefully consider whether the mandatory testing scheme furthers the State's asserted purpose for enacting the statute: providing testing programs that deal "efficiently and effectively with reducing the incidence of sexually transmitted diseases."¹⁵ In so doing, the Washington Supreme Court did little more than pay lip service to the Fourth Amendment and the right to privacy. By applying the rational relationship test to its analysis and eliminating even a minimal probable cause requirement, the court made mandatory HIV testing easier to justify under circumstances in which the propriety of testing is highly questionable. For example, a cursory examination of the facts of each assault in *In re Juveniles* reveals that the conduct of only two of the juvenile offenders presented any risk of transmitting HIV.¹⁶ The Washington Supreme Court's decision, therefore, sets unsound and dangerous precedent in that it upholds a constitutionally infirm testing scheme which sacrifices fundamental principals of the Fourth Amendment and the right to privacy by allowing testing of a sex offender absent a probable cause inquiry. Additionally, the court's decision perpetuates the dangerous myth that current AIDS testing technology is capable of producing sufficiently accurate results upon which a victim may rely to indicate her/his own HIV status.

This Note evaluates the constitutionality of Washington's mandatory HIV testing statute as it applies to convicted sex offenders¹⁷ and con-

14. *In re Juveniles*, 847 P.2d at 462-63.

15. WASH. REV. CODE ANN. § 70.24.015 (West 1992).

16. Modes of transmission are very specific. See *infra* notes 33-40 and accompanying text. Juveniles "A" and "D" both were charged with "indecent liberties with a minor." Specifically, Juvenile "A" was adjudicated as having sodomized a four-year-old boy and Juvenile "D" was adjudicated as having rubbed his genitals and his hands against the genitals of an 11-year-old girl. Both of these acts pose a possible risk of transmission. However, Juveniles "B," "C," and "E" were all adjudicated as having committed first degree molestation. Their acts, while serious, consisted of fondling the young children and, in one instance, Juvenile "E" placed his mouth on the penis of a seven-year-old boy. It is important to note that there is no scientific evidence proving that HIV can be transmitted through any of these methods. *Id.*

17. The Washington statute provides:

[L]ocal health departments authorized under this chapter shall conduct or cause to be conducted pretest counseling, HIV testing, and post-test counseling of all persons: (a) convicted of a sexual offense under chapter 9A.44 RCW; . . . (2) Such

cludes that it is unconstitutional as an arbitrary and irrational scheme. This Note further concludes that mandatory HIV testing of convicted sex offenders, in general, is an inadequate method of preventing the spread of HIV infection among a state's citizens. First, this Note presents background information on the prevalence of AIDS, the etiology of AIDS, modes of transmission, and methods of testing for HIV. Next, this Note discusses the various Fourth Amendment analyses used by the U.S. Supreme Court in determining whether the government's actions are reasonable, including the probable cause requirement and the evolution of the "special needs" doctrine. This Note then discusses the branch of the constitutional right to privacy implicating confidentiality, focusing on the propriety of applying the doctrine of compelling need or probable cause over that of rational basis review to mandatory HIV testing for convicted felons. Finally, this Note analyzes how the Washington Supreme Court applied these constitutional standards to the facts at issue in *In re Juveniles* and concludes that the statute is unconstitutional on its face because it is not rationally related to its legislative purpose. Additionally, the Note concludes that the court's rejection of the probable cause requirement in favor of the "special needs" doctrine is erroneous because the statute does not serve a compelling state interest sufficient to justify the governmental intrusion into an individual's fundamental right to privacy.

II. MEDICAL BACKGROUND

A. *Statistical Prevalence of HIV Infection Among the United States Population*

AIDS was discovered in the United States in 1981,¹⁸ and in a relatively short period of time, has emerged as a leading cause of death in the United States.¹⁹ The disease spread at an alarming rate since its first introduction into the U.S. population. Human Immunodeficiency Virus in-

testing shall be conducted as soon as possible after sentencing and shall be so ordered by the sentencing judge.

WASH. REV. CODE ANN. §§ 70.24.340(1)(a), (2) (West 1992). The crimes which one must be convicted of to fall under this statute include first degree rape, second degree rape, third degree rape, first degree statutory rape, second degree statutory rape, third degree statutory rape, and indecent liberties. *See also* WASH. REV. CODE ANN. § 9A.44 (West 1988) (defining crimes listed above).

18. Gerald H. Friedland & Robert S. Klein, *Transmission of the Human Immunodeficiency Virus*, 317 NEW ENG. J. MED. 1125, 1128 (1987).

19. Centers for Disease Control and Prevention, *Update: Mortality Attributable to HIV Infection/AIDS Among Persons Aged 25-44 Years*, 270 JAMA 305 (1993).

fection caused the deaths of 29,850 U.S. residents in 1991 alone.²⁰ In 1990, the Centers for Disease Control (CDC) reported 41,616 cases of AIDS in the United States.²¹ The State of Washington reported 556 cases of AIDS in 1991.²² Approximately 0.4% of AIDS cases in 1990 were found among the teenage population.²³ The CDC reported 439 cases of AIDS in adolescents between the ages of thirteen and nineteen in 1989, however, the CDC estimated that for every child who had AIDS in 1989, there were at least another two to ten children who were infected with HIV.²⁴

1. Etiology of AIDS and the AIDS Virus

While AIDS is an extremely complex disease, the progression of the disease is generally predictable. AIDS develops when the Human Immunodeficiency Virus is introduced into the individual's bloodstream.²⁵ Human Immunodeficiency Virus antibodies usually develop within one to six months after initial infection. However, the time between the initial infection of the individual and the point at which the antibodies can be detected, commonly called the "window period," can last longer in some individuals.²⁶ The virus breaks down a person's immune system by destroying the T-helper cells which are a fundamental part of the body's infection-fighting mechanism.²⁷ As HIV destroys more and more of the T-helper cells, the body becomes increasingly vulnerable to infections that an otherwise healthy immune system could easily eradicate.²⁸ Initially, an HIV-infected individual is asymptomatic, but as the virus breaks down the immune system, the person gradually enters into the second stage of AIDS, AIDS Related Complex (ARC).²⁹ It is important to note, however, that symptoms of AIDS may not emerge for three to five years

20. *Id.*

21. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1992, No. 192, 125 (1992).

22. *Id.*

23. THE NATIONAL JUDICIAL COLLEGE AMERICAN BAR ASSOCIATION, AIDS BENCHMARK 10 (Abby R. Rubinfeld ed. 1991) [hereinafter BENCHMARK].

24. *Id.* at 10-11. See also *id.* at 156 n.2 (no separate figures are available for children and adolescents who have not developed AIDS but are HIV positive).

25. See *infra* notes 33-37 and accompanying text.

26. Harold W. Jaffe, *What Doctors Want to Tell Judges About AIDS*, 29 JUDGES' J. 8, 10 (Spring 1990).

27. *Id.*

28. *Id.*

29. AIDS-Related Complex is characterized by non-life-threatening conditions such as fever, weight loss, or enlargement of the lymph nodes. *Id.* at 11.

after HIV antibodies develop in an individual, and, in some cases, the virus may remain dormant for fifteen years.³⁰ During this period of dormancy the individual is capable of transmitting the virus to others through certain conduct.³¹ Severe immune deficiency marks the final stage of AIDS. At this point, the individual's immune system is so weak that s/he becomes extremely susceptible to life-threatening opportunistic infections, cancers, and neurological diseases.³²

2. Transmission of HIV

Although originally diagnosed in homosexual men, AIDS has spread throughout the heterosexual adult, heterosexual juvenile, and prenatal populations. Human Immunodeficiency Virus has been detected in blood, semen, vaginal secretions, saliva, breast milk, tears, urine, serum, cerebrospinal fluid, and alveolar fluid.³³ The most common modes of transmission are through blood and blood product transfusions,³⁴ intravenous drug use,³⁵ sexual intercourse,³⁶ and perinatal transmission.³⁷ The most significant factors in predicting probability of HIV transmission are the serological and clinical status of the individual,³⁸ type of exposure,³⁹

30. Joanna L. Weissman & Mildred Childers, Note, *Constitutional Questions: Mandatory Testing for AIDS Under Washington's AIDS Legislation*, 24 GONZ. L. REV. 433, 439 (1989).

31. *Id.*

32. Jaffe, *supra* note 26, at 11.

33. Friedland & Klein, *supra* note 18, at 1132.

34. *Id.* at 1125. Two percent of adults and 12% of children with AIDS in the United States were believed to have acquired the disease through blood transfusion, a small but important proportion of the total number of cases through January, 1987. *Id.*

35. *Id.* at 1127. In 1987, intravenous drug users accounted for 25% of all cases of AIDS in the United States. Intravenous drug use is distinguished from other intravenous routes such as accidental needle-stick inoculations which usually occur among health care workers. A single small inoculum carries a low risk of HIV infection. The rate of HIV infection through needle-stick injuries, after subjects at risk of nonoccupational exposure are excluded, is estimated at 1.3 to 3.9 per 1000. *Id.* at 1126-27.

36. *Id.* at 1128. In 1987, 74% of U.S. adults diagnosed with AIDS were homosexual and bisexual men. Heterosexual transmission accounted for 1.7% of adult cases of AIDS, but the number of heterosexual transmissions was projected to increase by more than eight times the reported percentage in 1987 to approximately 10%. *Id.*

37. *Id.* at 1130.

HIV may be transmitted from infected women to their offspring by three possible routes: to the fetus *in utero* through the maternal circulation, to the infant during labor and delivery by inoculation or ingestion of blood and other infected fluids, and to the infant shortly after birth through infected breast milk.

Id.

38. Lawrence O. Gostin et al., *HIV Testing, Counseling, and Prophylaxis After Sexual Assault*, 18 JAMA 1436, 1436 (1994).

number of exposures, and quantum of fluid involved in the exposure.⁴⁰

B. Testing Procedures and Reliability

A person who goes to a private physician or a clinic to be tested for AIDS is actually not tested for AIDS because there is no AIDS test per se.⁴¹ Rather, the two most commonly administered tests are designed to detect HIV antibodies in the blood.⁴² Human Immunodeficiency Virus infection is confirmed by a three-part protocol; with the Enzyme-Linked Immunosorbent Assay (ELISA) test functioning as the initial screening test.⁴³ The ELISA test was intentionally designed to be excessively sensitive to the presence of HIV because it was developed primarily to safeguard the blood supply.⁴⁴ If the first ELISA test is positive, the test is administered a second time.⁴⁵ The Western Blot⁴⁶ confirmatory test is administered if both the first and second ELISA tests are positive because the Western Blot test is more accurate in ruling out false positive results that often occur due to the sensitive nature of the ELISA screening test.⁴⁷

Unfortunately, neither the results of the ELISA test nor the Western Blot test are one hundred percent accurate.⁴⁸ Due to the sensitive nature

39. *Id.*

40. *Id.* at 1436-37; see also Nancy Padian et al., *Male-to-Female Transmission of Human Immunodeficiency Virus*, 258 JAMA 788, 789 (1987) (finding that the total number of exposures with an infected partner was a key factor in predicting male-to-female transmission of HIV).

41. Martha A. Field, *Testing for AIDS: Uses and Abuses*, 16 AM. J.L. & MED. 33, 37-38 (1990).

42. *Id.* at 38.

43. A sample of the patient's blood is applied to a cultured HIV protein material. A reactant designed to detect the presence of HIV antibodies is then added and a color change occurs. The technician then must determine if the intensity of the color change falls above or below a certain criterion. If the sample falls below the criterion, it is interpreted as negative. *Id.*

44. BENCHBOOK, *supra* note 23, at 17.

45. *Id.*

46. Paul H. MacDonald, *AIDS, Rape, and the Fourth Amendment: Schemes for Mandatory AIDS Testing of Sex Offenders*, 43 VAND. L. REV. 1607, 1614 (1990). Western Blot testing involves applying a sample of the suspect's blood onto special paper that has been blotted with HIV protein components. The paper is treated with radioactive isotopes. When the paper is x-rayed, the presence of HIV antibodies can be detected. *Id.*

47. See BENCHBOOK, *supra* note 23, at 17. False positive tests are the result of the overly sensitive nature of the ELISA test. It is possible for an individual who is not actually infected with HIV to test positive. *Id.*

48. *Doe v. Roe*, 526 N.Y.S.2d 718, 721 n.4 (N.Y. Sup. Ct. 1988). "The predictive value for seropositivity of an ELISA positive confirmed by a Western Blot has been estimated at 90.9% in a population in which the level of infection is .05%." *Id.* (citation omitted).

of both tests, false positive results occur periodically.⁴⁹ Even more disturbing, however, is the possibility of a false negative. A false negative result will occur if an HIV-positive person is tested during the window period between initial HIV infection and the development of antibodies.⁵⁰ During this time, if the individual is infected with the disease, s/he is fully capable of spreading the disease to others even though the virus itself cannot be detected by any medical tests.⁵¹

1. Statutory Testing Schemes

The legislature of every state in the country has responded to the AIDS crisis by enacting some type of AIDS-related legislation.⁵² Many state legislatures enacted statutes designed to deal specifically with the concerns of victims of sexual assault.⁵³ The general purpose of these testing schemes is to curb the spread of HIV⁵⁴ by releasing the results of an attacker's HIV test to the victim so that s/he may make lifestyle changes to prevent infection of others.⁵⁵ Generally, the legislative testing schemes differ in provisions regarding how test results must be obtained,⁵⁶ who may obtain the test results,⁵⁷ and at what point in the criminal process a sex offender will be tested.⁵⁸ For example, Colorado and California allow

49. Investigation of false positive rates of enzyme immunoassays ranged from zero to 6.8%. Klemens B. Meyer & Stephen G. Pauker, *Sounding Board, Screening for HIV: Can We Afford the False Positive Rate?*, 317 *NEW ENG. J. MED.* 238, 238 (1987).

50. See *BENCHBOOK*, *supra* note 23, at 17.

51. Field, *supra* note 41, at 41.

52. See generally Larry O. Gostin, *Public Health Strategies for Confronting AIDS, Legislative and Regulatory Policy in the United States*, 261 *JAMA* 1621 (1989) (characterizing and reporting on AIDS-related legislative and regulatory policy in the United States).

53. See *infra* notes 54-61 and accompanying text.

54. *WASH. REV. CODE ANN.* § 70.24.015 (West 1992).

55. See *id.*; *ILL. ANN. STAT.* ch. 730, para. 5/5-5-3(g) (Smith-Hurd Supp. 1994).

56. New York will not require that an alleged or convicted sex offender be tested nor will the test results be released to anyone without the offender's informed consent. See generally *N.Y. PUB. HEALTH LAW* § 2781 (McKinney 1993) (consenting to testing is always necessary even in the criminal context of rape or other sex offenses); *WIS. STAT. ANN.* § 146.025(2) (West Supp. 1993).

57. See generally *ILL. ANN. STAT.* ch. 730, para. 5/5-5-3(g) (giving judge discretionary power to determine if the test results will be revealed to anyone, including the victim).

58. See generally *IND. CODE ANN.* § 35-38-1-10.6 (Burns 1994) (requiring convicted sex offender to undergo HIV screening test); *ME. REV. STAT. ANN.* tit. 42, § 19203-E (West Supp. 1993) (court will require a convicted sex offender to undergo HIV test if the victim proves by a preponderance of the evidence that: (1) there is a significant risk of infection and (2) offender will not give informed consent to section 19203-E(5)); *N.J. STAT. ANN.* § 2A:4A-43.1 (West 1994) (mandating testing of juveniles charged with or adjudicated delinquent for aggravated sexual assault or sexual assault); *N.J. STAT. ANN.* § 2C:43-2.2 (West 1994) (mandating testing for a person convicted of, indicted for or formally charged with

courts to order HIV testing of accused or indicted sex offenders and to provide the results to victims.⁵⁹ Washington mandates testing only after the defendant is convicted of a specified sexual offense and then allows the results to be distributed to the victims.⁶⁰ A few states will disclose the results of the offender's HIV test to the victim only upon a showing of compelling need or other similar standard.⁶¹

III. PRIOR LAW—CONSIDERATION OF THE FOURTH AMENDMENT, PRIVACY—BALANCING THE GOVERNMENT'S INTERESTS AGAINST THE INDIVIDUAL'S PRIVACY INTERESTS

The United States Supreme Court has yet to rule on the validity of mandatory HIV testing in any context, including mandatory testing for alleged and convicted sex offenders. Several state courts and lower federal courts, however, have addressed the constitutionality of these statutes.⁶² The most frequent challenges to these statutes are whether the

aggravated sexual assault or sexual assault); S.C. CODE ANN. § 16-3-740 (Law. Co-op. 1993) (court will order the HIV test upon conviction if the conduct resulted in exposure to certain bodily fluids of the offender); WASH. REV. CODE ANN. § 70.24.340 (West Supp. 1993) (testing will occur after sentencing by order of the court); W. VA. CODE § 16-3C-2.(Michie Supp. 1994) (requiring HIV testing of convicted sex offenders); OKLA. STAT. ANN. tit. 63, § 1-524(B) (West Supp. 1994) (permitting HIV testing of alleged attacker after arraignment).

59. CAL. PENAL CODE § 1524.1 (Deering 1992) (requiring probable cause to believe accused committed the offense and probable cause to believe transmission was possible); CAL. HEALTH & SAFETY CODE § 199.96 (Deering 1990) (disclosure is made to the victim); COLO. REV. STAT. ANN. § 18-3-415 (West Supp. 1994) (test results are also disclosed to the court); *see also* FLA. STAT. ANN. § 960.003(4) (West Supp. 1994) (mandating an HIV test upon request of the victim; if the victim does not make such a request the court will require an HIV test upon conviction); GA. CODE ANN. § 17-10-5 (Michie Supp. 1994) (disclosing results to the court, penal institution and Department of Human Services in addition to the victim); MICH. COMP. LAWS ANN. § 333.5129(4) (West 1992) (victim automatically provided with attacker's test results); OKLA. STAT. ANN. tit. 63, § 1-524(B) (West Supp. 1994) (court may order HIV test after alleged attacker has been arraigned); TEX. CODE CRIM. PROC. ANN. art. 21.31 (West Supp. 1994) (court may order the test or the victim may request the test); VA. CODE ANN. § 18.2-62 (Michie Supp. 1994) (the state's attorney may request an HIV test be performed upon a person charged with certain offenses. A juvenile must be either convicted or adjudicated to have committed the offense before the state's attorney can request testing. Disclosure limited to the victim only).

60. WASH. REV. CODE ANN. § 70.24.340 (West Supp. 1993).

61. *See* DEL. CODE ANN. tit. 16, § 1202 (1992) (test results may be disclosed to a victim upon demonstration of compelling need); HAW. REV. STAT. § 325-101(11) (Supp. 1993) (disclosure made pursuant to court order upon showing of good cause by the party seeking the information).

62. *See, e.g.,* State v. Farmer, 805 P.2d 200 (Wash. 1991) (reversing trial court's order requiring HIV testing of convicted sex offender because test results were of no use in corroborating testimony that assailant was infected with HIV prior to soliciting juvenile

testing scheme constitutes an unreasonable search in violation of the Fourth Amendment to the U.S. Constitution and whether the disclosure clauses violate an individual's right to privacy.

The Fourth Amendment is the primary mechanism for limiting government intrusion into the privacy of individual citizens.⁶³ The U.S. Supreme Court has recognized an individual's right to privacy or "the right to be [left] alone."⁶⁴ The Supreme Court recognized this right to be one of "the most comprehensive of rights and the right most valued by civilized man."⁶⁵ When evaluating the validity of the various testing statutes enacted around the country to determine by which constitutional standard the statute should be judged, courts carefully examine the government's purpose in enacting the statute, the individual to be tested, and the purpose for which the test results will be used.⁶⁶ Because the U.S. Supreme Court has yet to rule on the constitutionality of a mandatory

prostitutes, thus the required compelling state interest in conducting the test was not present); *Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1*, 909 F.2d 820 (5th Cir. 1990) (holding hospital did not violate the Fourth Amendment rights of one of its nurses by requiring him to submit the results of an HIV test to the hospital officials and then subsequently firing him for failure to do so considering the highly regulated nature of the health care industry); *Dunn v. White*, 880 F.2d 1188 (10th Cir. 1989), *cert. denied*, 493 U.S. 1059 (1990) (upholding nonconsensual HIV test of prisoner because state's legitimate penological interest in preventing spread of HIV throughout the prison population outweighed prisoner's diminished expectation of privacy); *Glover v. Eastern Neb. Comm'ty Office of Retardation*, 867 F.2d 461 (8th Cir.) (holding health services agency policy requiring testing of certain employees invalid because government's purported compelling need to protect the health of clients was unsubstantiated due to the extraordinary low risk of AIDS transmission), *cert. denied*, 493 U.S. 932 (1989); *Johnetta v. Municipal Court*, 267 Cal. Rptr. 666 (Cal. Ct. App. 1990) (holding constitutional mandatory HIV testing of a woman who bit a bailiff as he attempted to remove her from a courtroom because state's interest in protecting public safety employees outweighed woman's privacy interest); *People v. Adams*, 597 N.E.2d 547 (Ill. 1992) (holding mandatory HIV testing of prostitutes constitutional because the statute served compelling state interest in protecting the public); *State v. C.S.*, 583 N.E.2d 726 (Ill. App. Ct. 1991) (holding mandatory testing of an individual convicted of possession of a hypodermic needle constitutional because state's interest in protecting public health by preventing the spread of HIV among intravenous drug users is sufficiently narrow); *Doe v. Roe*, 526 N.Y.S.2d 718 (N.Y. Sup. Ct. 1988) (holding involuntary HIV testing of custodial parent suspected of having HIV infection as a condition of awarding custody invalid absent a compelling need to know); *People v. Thomas*, 529 N.Y.S.2d 429 (N.Y. Civ. Ct. 1988) (upholding involuntary HIV testing of a convicted rapist because victim's mental anguish and suffering is greater than the minimal intrusion upon offender caused by the routine drawing of blood).

63. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 14.26, at 757 (4th ed. 1991).

64. *Id.* at 758.

65. *Id.*

66. See *infra* part III.A.2.a.

HIV testing statute, the lower courts have been left to decide these issues based on analogies between HIV testing and a variety of other blood and urinalysis testing cases decided by the Supreme Court.

A. *The Development of the Fourth Amendment Analyses: A Deterioration of the Probable Cause Requirement*

The Fourth Amendment provides that all people have the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."⁶⁷ The Fourth Amendment does not absolutely prohibit the government from conducting a search of an individual or an individual's papers, home, or effects. According to the text of the Fourth Amendment, the government may conduct a search if the court issues a warrant "upon probable cause, supported by Oath or affirmation."⁶⁸ The fundamental purpose of the Fourth Amendment is to safeguard personal privacy and dignity against unreasonable government interference.⁶⁹ The government need not always obtain a warrant for a search to be constitutional; the courts will uphold a warrantless search if the government can prove that the search was "reasonable."⁷⁰

Before the court can evaluate the reasonableness of the government's action, the court must first determine whether the government action constitutes a "search." In *Schmerber v. California*,⁷¹ the U.S. Supreme Court addressed the question of whether a blood test to determine blood-alcohol content constituted a "search" within the meaning of the Fourth Amendment.⁷² Writing for the Court, Justice Brennan found that a blood test "plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment" because the essence of the Fourth Amendment is to ensure that people are secure in their persons.⁷³

67. U.S. CONST. amend. IV.

68. *Id.*

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

70. See generally *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (holding warrantless blood and urinalysis tests of certain employees reasonable); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (holding warrantless pre-employment urinalysis testing of certain Customs Service employees reasonable due to the highly sensitive nature of the positions); *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (holding warrantless search of probationer's home reasonable in light of special needs of the probation system); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (holding warrantless search of student's purse by the vice principal reasonable due to school official's legitimate need to maintain a proper learning environment).

71. 384 U.S. 757 (1966).

72. *Id.* at 767.

73. *Id.*

The Supreme Court generally has categorized a "search" as any government intrusion that jeopardizes a person's reasonable expectation of privacy.⁷⁴ Because the current methods of testing for and confirming the presence of HIV is through the administration of two blood tests,⁷⁵ the tests would both constitute searches under the Fourth Amendment.⁷⁶ The government's purpose in conducting the search and the means by which the blood test is conducted must be "reasonable" for the test to be constitutionally valid.⁷⁷ The court determines the reasonableness of the search by weighing the degree of intrusiveness of the search upon the subject's Fourth Amendment privacy interests against the government's asserted interests in conducting the search.⁷⁸ A court's willingness to find a search to be "reasonable" depends heavily on the government's purpose in conducting the search. Depending on the purpose of the search, it will be categorized as an evidentiary search, an administrative search, or a "special needs" search.⁷⁹ The judicial standards governing each type of search are discussed below.

1. *Evidentiary Searches Under the Fourth Amendment: The Probable Cause Requirement*

Searches by law-enforcement officers to procure evidence generally require a warrant based on probable cause unless the intrusion is so minimal and the circumstances so urgent that waiver of the warrant requirement is justified.⁸⁰ However, the courts apply a strict standard of

74. *Id.* Justice Harlan enunciated a two-part test to aid in determining whether a search fell within the scope of Fourth Amendment protection. The person must have a subjective expectation of privacy and the expectation must be recognized by society as being reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Harlan's test was applied to blood tests by the Supreme Court in *Skinner*, there the Court found it was "obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable." *Skinner*, 489 U.S. at 616.

75. *See supra* part II.B.

76. *See also* *Barlow v. Ground*, 943 F.2d 1132 (9th Cir. 1991) (enjoining as an invalid search and seizure the HIV testing of two blood samples drawn from appellant who bit two police officers).

77. *Schmerber v. California*, 384 U.S. 757, 768 (1966).

78. *Skinner*, 489 U.S. at 619.

79. David Kennon Moody, *AIDS and Rape: The Constitutional Dimension of Mandatory Testing of Sex Offenders*, 76 CORNELL L. REV. 238, 247 (1990).

80. *See* *United States v. Place*, 462 U.S. 696, 701-03 (1983). *See generally* *Schmerber*, 384 U.S. 757 (holding involuntary blood test of person suspected of drunk driving reasonable because test was minimally intrusive and time delay would risk losing the evidence forever). *But cf.* *Winston v. Lee*, 470 U.S. 753 (1985) (holding involuntary surgery to re-

reasonableness to warrantless evidentiary searches which implicate substantial bodily intrusions.⁸¹ For example, in *Winston v. Lee*,⁸² the Court focused on the question of whether the community's need to appropriate evidence in a manner that posed a substantial intrusion upon the rights of the individual to be searched outweighed the individual's privacy interests.⁸³ The Court preserved the requirement of probable cause because of the intrusive nature of the search. Human Immunodeficiency Virus testing schemes may fit within the evidentiary search category if the test is conducted to ascertain whether criminal charges, such as attempted murder, can be brought against the accused individual.⁸⁴ Those cases are distinguishable from HIV-assault cases because the primary purpose of testing in HIV-assault cases is to provide the victim with information about the assailant's HIV status so that the victim may receive proper medical treatment and make necessary life-style adjustments.⁸⁵

The nature and purpose of Washington's mandatory HIV testing statute appears to eliminate the statute from analysis under the law enforcement purposes test.⁸⁶ Indeed, the Washington statute does not sanction

move bullet from suspected robber unreasonable because of intrusive nature of the procedure).

81. See generally *Winston*, 470 U.S. 753. The Court emphasized that some bodily intrusions are so great that they may be unreasonable even if there is probable cause to believe the search will yield evidence of a crime. *Id.* at 759.

82. 470 U.S. 753 (1985).

83. *Id.* at 759.

84. See *Weeks v. State*, 834 S.W.2d 559 (Tex. Ct. App. 1992) (convicting an HIV-positive defendant who spit on a prison guard of attempted murder); *Scroggins v. State*, 401 S.E.2d 13 (Ga. Ct. App. 1990) (holding evidence against an HIV-positive defendant who bit an officer responding to a domestic disturbance was sufficient to sustain a conviction of assault with intent to commit murder); *State v. Haines*, 545 N.E.2d 834 (Ind. Ct. App. 1989) (using fact that defendant was HIV positive to convict defendant of attempted murder when he sprayed his blood into the eyes and mouth of a police officer during an attempted suicide).

85. See *Johnetta v. San Francisco*, 267 Cal. Rptr. 666 (Cal. Ct. App. 1990) (holding testing of defendant's blood valid under California's Proposition 96, which allows HIV testing in situations where there is probable cause to believe infected bodily fluids may have been transferred to a peace officer so that precautions can be taken to preserve his/her health and the health of others).

86. WASH. REV. CODE ANN. § 70.24.015. After finding that incidence of sexually transmitted disease was rising rapidly and resulting in serious "social, health, and economic costs, including infant and maternal mortality, temporary and lifelong disability, and premature death," the legislature set out the purpose of Washington's HIV testing scheme as follows: "It is therefore the intent of the legislature to provide a program that is sufficiently flexible to meet emerging needs, deals efficiently and effectively with reducing the incidence of sexually transmitted diseases, and provides patients with a secure knowledge that information they provide will remain private and confidential." *Id.*

the use of the test results as evidence of a crime against an offender.⁸⁷ The primary purpose of mandatory testing is to protect the public health, therefore, mandatory testing statutes must be examined under the Supreme Court's special needs standard. However, the *Winston* standard may be the most appropriate standard of analysis considering the substantial intrusion HIV testing can have on the lives of the victim and the tested sex offender.⁸⁸

2. *Special Needs Administrative Searches Under the Fourth Amendment*

The standard of analysis used by the U.S. Supreme Court for evaluating the validity of administrative searches marks the beginning of a judicial trend toward eliminating the probable cause requirement of a reasonable search in non-exigent circumstances. Government searches to enforce regulatory health or safety codes are most often classified as administrative searches.⁸⁹ Originally, the Supreme Court required government officials to obtain a warrant based on probable cause for an administrative search to be valid in a non-emergency situation.⁹⁰ Necessity has caused the Supreme Court to move the focus of analysis away from the probable cause requirement in cases of administrative searches because the conditions triggering most evidentiary searches are usually not present in the circumstances of an administrative search.⁹¹ The "special needs" doctrine was developed by the Supreme Court to assess the validity of administrative searches.⁹²

a. *The "Special Needs" Doctrine*

The Court developed the "special needs" doctrine to address those situations where a warrant and the probable cause standard would be inap-

87. See *In re Juveniles*, 847 P.2d 455, 458 (Wash. 1993).

88. See *infra* part V.A.1.b.

89. Examples of administrative searches include searches of businesses, see *New York v. Burger*, 482 U.S. 691 (1987) (holding that searches of junkyards fall under administrative search guideline because they are closely regulated businesses), and residences, see *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967) (holding that warrantless searches pursuant to housing code inspections are permissible if appropriate person gives consent). It is important to note that the Supreme Court has never held that a search of a person constitutes an administrative search. *Moody*, *supra* note 79, at 248 n.75.

90. *Camara*, 387 U.S. at 525 (holding Fourth Amendment bars warrantless administrative searches of a personal residence where the government inspector has been denied entry by the occupant).

91. See *Sadler*, *supra* note 3, at 201.

92. See *id.*

appropriate considering the circumstances of the search.⁹³ "Special needs" arise when the search is conducted for reasons "beyond the normal need for law enforcement."⁹⁴ Special needs searches occur when the government's interest in conducting the search is protecting public safety, rather than procuring evidence to be used in criminal prosecution.⁹⁵ In those cases where the court finds that special needs exist, the court will assess the propriety of the warrantless search by balancing the government's need to conduct a warrantless search against the privacy interests of the individual that were invaded by the warrantless search.⁹⁶ Generally, the Court will uphold warrantless special needs searches if the government can show that its interests so substantially outweigh the individual's already diminished expectation of privacy that a warrant is unnecessary.⁹⁷

The Supreme Court first recognized the validity of a warrantless administrative search in *New York v. Burger*.⁹⁸ The Court found the warrantless search reasonable because the junk industry was traditionally heavily regulated and thus, individual's involved in a pervasively regulated industry had a decreased expectation of privacy.⁹⁹ The Court formulated a three-part reasonableness test to determine what types of warrantless administrative searches would withstand Fourth Amendment scrutiny. First, the government must show that a substantial state interest underlies the regulatory scheme and therefore justifies the search.¹⁰⁰ The government then must show that the regulatory scheme requires warrantless inspections to be effective.¹⁰¹ Finally, the certainty and regularity of the application of the inspection program must be such that it acts as an adequate substitute for a search warrant.¹⁰²

The Court extended the reach of the "special needs" doctrine to searches of persons in *Skinner v. Railway Labor Executives' Association*¹⁰³ and its companion case, *National Treasury Employees Union v.*

93. See *id.* at 201 (citing *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989)).

94. *Skinner*, 489 U.S. at 619 (citations omitted).

95. *Id.* at 620 (citations omitted).

96. *Id.* at 619.

97. *New York v. Burger*, 482 U.S. 691 (1987).

98. 482 U.S. 691 (1987) (upholding the warrantless inspection of a junkyard).

99. *Id.* at 700.

100. *Id.* at 702.

101. *Id.*

102. *Id.* at 703. This last requirement is effectively a notice requirement and is satisfied if it alerts a party that they may be subject to a search. At the same time, the government must limit the time, place, and scope of the search. *Id.*

103. 489 U.S. 602 (1989).

Von Raab.¹⁰⁴ These cases are significant because they signify the Court's elimination of the probable cause requirement from the Fourth Amendment administrative search framework.¹⁰⁵ In both *Skinner* and *Von Raab*, the Court held that the warrant requirement and the need for individualized suspicion were not prerequisites to a reasonable, warrantless administrative search of one's person.¹⁰⁶

The Court in *Skinner* upheld regulations requiring mandatory, warrantless blood and urine testing to detect the presence of drug and alcohol in employees involved in railroad accidents.¹⁰⁷ The Court found that because railroad employees occupied positions in which they were responsible for public safety, drug or alcohol use posed an immediate and serious threat to the public welfare.¹⁰⁸ Consequently, the government's need to conduct warrantless drug and alcohol tests justified the privacy intrusions suffered by those employees who were tested.¹⁰⁹

The warrant requirement protects privacy interests by assuring citizens that the proposed intrusion has been scrutinized by a neutral magistrate and that it is limited in its scope and objectives.¹¹⁰ The Court in *Skinner* determined that a warrant requirement would not have furthered these goals. The Court found that the interposition of a neutral magistrate was unnecessary because the railroad authorities did not have a great deal of discretion in deciding who would be tested.¹¹¹ Furthermore, the government regulations narrowly defined the circumstances justifying toxicological testing and the limits of the intrusion.¹¹² The Court gave considerable deference to the fact that the burden inherent in obtaining a warrant would frustrate the governmental purpose of the search.¹¹³

The *Skinner* Court also negated the requirement of individualized suspicion in circumstances where the privacy interests intruded upon by the

104. 489 U.S. 656 (1989).

105. *Moody*, *supra* note 79, at 250.

106. *Skinner*, 489 U.S. at 624; *Von Raab*, 489 U.S. at 679.

107. *Skinner*, 489 U.S. at 634. The Court found that statistical evidence presented by the Federal Railroad Administration substantiated the need for drug and alcohol testing. *Id.* at 632.

108. *Id.* at 628-29.

109. *Id.* at 634. The record was replete with evidence documenting the pervasiveness of drug and alcohol abuse by railroad employees. *Id.* at 607-08.

110. *Id.* at 622.

111. *Id.*

112. *Id.*

113. *Id.* at 623. The Court noted that "alcohol and other drugs are eliminated from the bloodstream at a constant rate," and, therefore, any delay in procuring a warrant could result in the loss of evidence. *Id.*

search are minimal and where the important governmental interests justifying the search would be jeopardized by requiring a showing of individualized suspicion.¹¹⁴ The individualized suspicion requirement threatened the very interests that the government's testing scheme sought to protect.

In *Von Raab*, the Court upheld the warrantless drug testing of U.S. Customs Service employees who were applying for certain positions because the government had a "compelling interest in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry."¹¹⁵ The government's interest in protecting its citizens and the integrity of its borders substantially outweighed the privacy interests of the customs officials.¹¹⁶

Although the Supreme Court has yet to hear a case involving mandatory HIV testing, a few federal and state courts have considered the issue and have applied the "special needs" doctrine.¹¹⁷

B. *The Substantive Right to Privacy*

The reasonableness of a Fourth Amendment warrantless search is based upon a weighing of the government's compelling interests and the

114. *Id.* at 624. Prior to *Skinner*, the Court held that blood tests did not present a significant intrusion upon an individual's privacy because the quantity of blood extracted is minimal and the pain and trauma incident to the test is virtually non-existent. *Id.* at 625 (citing *Schmerber v. California*, 384 U.S. 757 (1966)). The Court also recognized that railroad employees have a diminished expectation of privacy in information relating to their physical condition by virtue of the fact that they work in a pervasively regulated industry that has an obvious interest in the physical condition of its employees. *Id.* at 627-28.

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

116. *Id.* It is important to note that the government did not present any statistical proof to substantiate the need for the drug testing policy as it had in *Skinner*.

I joined the Court's opinion [in *Skinner*] because the demonstrated frequency of drug and alcohol use by the targeted class of employees, and the demonstrated connection between such use and grave harm, rendered the search a reasonable means of protecting society. I decline to join the Court's opinion in the present case because neither frequency of use nor connection to harm is demonstrated or even likely.

Id. at 680-81 (Scalia, J., dissenting).

117. See *State v. Farmer*, 805 P.2d 200 (Wash. 1991) (persons convicted of soliciting juvenile prostitutes); *Barlow v. Ground*, 943 F.2d 1132 (9th Cir. 1991) (defendant bit police officers); *Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1*, 909 F.2d 820 (5th Cir. 1990) (HIV testing of hospital employees); *Dunn v. White*, 880 F.2d 1188 (10th Cir. 1989) (prisoners); *Glover v. Eastern Neb. Comm'ty Office of Retardation*, 867 F.2d 461 (8th Cir. 1989) (health-care providers); *Johnetta v. Municipal Court*, 267 Cal. Rptr. 666 (Cal. Ct. App. 1990) (person charged with interfering with the official duties of public safety employees); *People v. Adams*, 597 N.E.2d 574 (Ill. 1992) (prostitutes); *People v. C.S.*, 583 N.E.2d 726 (Ill. App. Ct. 1991) (convicted intravenous drug users); *People v. Thomas*, 529 N.Y.S.2d 429 (N.Y. Civ. Ct. 1988) (convicted sex offender).

search-subject's right to privacy.¹¹⁸ There also exists a substantive constitutional right to privacy that encompasses two types of privacy: the right to confidentiality in intimate personal information and the right to make autonomous decisions.¹¹⁹ Although HIV testing implicates both privacy rights, the issue of informational privacy is more heavily contested.

The Supreme Court has yet to hold that the right to privacy limits the collection of data on private individuals by the government.¹²⁰ In *Whalen v. Roe*,¹²¹ the Court upheld a New York drug registration statute that required the state to develop a list of persons taking certain prescription drugs.¹²² The purpose of the statute was to control illegal distribution of prescription drugs.¹²³ While stopping short of finding that a constitutional right to informational privacy existed, the Court noted that the government's duty to avoid unwarranted disclosure of the collected information limited the government's right to collect data.¹²⁴

In *Thornburgh v. American College of Obstetricians and Gynecologists*,¹²⁵ the Court refined its theory on informational privacy to require that restrictions on an individual's right to privacy be reasonably related to the state's asserted compelling interests so as not to deter the exercise of valid constitutional rights.¹²⁶ The *Thornburgh* Court invalidated a statutory provision that made information available for public inspection that could potentially identify a woman who had undergone an abortion.¹²⁷ The Court found that the statute placed a restriction on a woman's right to an abortion which was not reasonably related to the state's asserted

118. See *supra* part III.

119. *In re Juveniles*, 847 P.2d 455, 462 (Wash. 1993).

120. NOWAK & ROTUNDA, *supra* note 63, at 807.

121. 429 U.S. 589 (1977).

122. *Id.* at 603-04.

123. *Id.* at 591-92.

124. *Id.* at 605-06. Justice Brennan noted in his concurring opinion that if the government did not carefully limit the use of the collected information, the government was running the risk of depriving individuals of their constitutionally protected privacy interest. *Id.* at 606-07.

125. 476 U.S. 747 (1986). In *Thornburgh* the Court invalidated a number of state regulations that restricted a woman's right to have an abortion because they were not reasonably related to the state's compelling interests in protecting the potential life of the fetus and the life of the mother. *Id.* at 766. The records that the physicians were required to keep included an extraordinary amount of information on the women. The Court found that the requirement that such information be included was not a reasonable means of achieving the state's goal in deterring abortions. NOWAK & ROTUNDA, *supra* note 63, at 807-08.

126. *Thornburgh*, 476 U.S. at 767.

127. *Id.* at 766-67.

compelling interest in protecting the health of women.¹²⁸ While not specifically addressing whether governmental data collection was limited by an individual's right to privacy, the majority did refer to the *Whalen* proposition that "a certain private sphere of individual liberty will be kept largely beyond the reach of government."¹²⁹

C. *The Right to Privacy in Autonomous Decision-Making*

Mandatory HIV testing statutes also implicate the autonomous decision-making branch of the constitutional right to privacy. The Court considers the right to make autonomous decisions in areas of procreation, marriage, and abortion to be a "fundamental right."¹³⁰ Applying strict scrutiny, the Court has held that the government must demonstrate a compelling state interest in restricting or invading the individual's privacy and that the means used by the state are narrowly tailored to achieve that interest.¹³¹ Therefore, any state law purporting to restrict an individual's right to make such autonomous decisions must be subject to strict judicial scrutiny.¹³²

In *Zablocki v. Redhail*,¹³³ the Supreme Court invalidated a Wisconsin law prohibiting a resident with minor children from marrying if the resident owed outstanding support obligations to his or her minor children.¹³⁴ The purpose of the statute was to serve as a collection device.¹³⁵ However, the Court found that the statute was not narrowly tailored to achieve this purpose because it limited marriage and failed to address other financial obligations that the parent might assume which would similarly prevent the individual from supporting his or her children.¹³⁶ The statute was also overbroad because it did not provide any exceptions for residents whose financial situations would be improved by a subsequent marriage, thus putting the resident in a better position to make

128. *Id.* at 766.

129. *Id.* at 772 (citing *Whalen v. Roe*, 429 U.S. 589 (1976)).

130. See *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (abortion); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (marriage); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Loving v. Virginia*, 388 U.S. 1 (1967) (interracial marriage); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (sterilization).

131. *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

132. NOWAK & ROTUNDA, *supra* note 63, at 780-81.

133. 434 U.S. 374 (1978).

134. *Id.* at 377.

135. See *id.* at 375 n.1.

136. *Id.* at 390.

support payments.¹³⁷ The Court has held on numerous occasions that a government regulation cannot unduly burden a fundamental right of an individual; when government regulation does burden a fundamental right, the government must use the least intrusive means available to achieve its interests.¹³⁸

IV. ANALYSIS OF WASHINGTON'S MANDATORY TESTING SCHEME AS APPLIED IN *In the Matter of Juveniles A, B, C, D, E*

A. Facts

*In re Juveniles*¹³⁹ involved five juveniles who were found by the Whatcom County commissioner to have committed various sexual offenses on separate occasions. The Commissioner then ordered the juvenile offenders to submit to HIV testing pursuant to Washington's mandatory HIV testing statute.¹⁴⁰

Juvenile "A," a fourteen-year-old male, was found to have taken indecent liberties through forcible compulsion with a younger boy when he held down the victim and sodomized him.¹⁴¹ Juvenile "B," a fourteen-year-old male, pleaded guilty to first degree child molestation. While "B" was alone with a four-year-old girl, he "kissed her on her breast, laid on top of her . . . removed her pants and licked and kissed her vaginal area."¹⁴² An original allegation that penetration occurred was later denied.¹⁴³ Juvenile "C," a fifteen-year-old girl, pleaded guilty to three counts of first degree child molestation.¹⁴⁴ She allowed a five-year-old boy to lie on top of her while both were fully clothed.¹⁴⁵ She let him kiss her on the mouth, touch her breast, and look inside her underwear.¹⁴⁶ Other allegations made against her included touching the penis of a young boy on several different occasions; fondling a four-year-old girl in

137. *Id.*

138. See *Winston v. Lee*, 470 U.S. 753 (1985) (holding bodily invasion unreasonable because other evidence could be obtained to convict defendant); *Zablocki v. Redhail*, 434 U.S. 374, 388 (1989) (holding right to marry could not be restricted due to existence of back child support payments because the government had other more appropriate means of getting support paid).

139. 847 P.2d 455 (Wash. 1993).

140. See WASH. REV. CODE ANN. § 70.24.340 (West 1992).

141. *In re Juveniles*, 847 P.2d at 456.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

the genital area by scratching herself in the genital area, and then placing her hand inside the victim's underwear; and touching the penis of a young boy she was baby-sitting.¹⁴⁷ Juvenile "D," a sixteen-year-old male, pleaded guilty to indecent liberties when he touched the breasts and genital area of an eleven-year-old female.¹⁴⁸ Additionally, the victim of Juvenile "D" alleged that Juvenile "D" removed his clothes and the victim's clothes and then proceeded to rub his genitals and hands against the victim's genitals.¹⁴⁹ Finally, Juvenile "E," a fifteen-year-old male, pleaded guilty to first degree child molestation. On three separate occasions during the evening, "E" placed his mouth on the penis of a seven-year-old boy he was baby-sitting.¹⁵⁰

After the pleas of juveniles "B," "C," "D," and "E" were entered, and upon a court finding that juvenile "A" committed indecent liberties upon a younger boy, the State sought orders from the juvenile court compelling the five juvenile offenders to be tested for HIV pursuant to the state mandatory testing statute.¹⁵¹ Appellants' opposition to the statute was heard by a hearing commissioner who upheld the constitutionality of the statute.¹⁵² The commissioner's order directing HIV testing of the appellants was issued, but was stayed pending review by the appellate division. The Supreme Court of Washington accepted the appellate court's certification of the case.¹⁵³

B. The Majority Opinion

The Supreme Court of Washington upheld the constitutionality of the mandatory testing scheme as applied to these five juveniles, finding that the HIV test did not constitute an unreasonable search or seizure because "substantial governmental interests [were] served by testing and disclosure of those test results to a limited group of people [that] eclipse[d] the defendants' interest in preventing the search" and that the testing did not

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*; The Washington statute provides, "[l]ocal health departments authorized under this chapter shall conduct or cause to be conducted pre-test counseling, HIV testing, and post-test counseling of all persons: Convicted of a sexual offense under chapter 9A.44 RCW." WASH. REV. CODE ANN. § 70.24.340(1)(a) (West 1992).

152. *In re Juveniles*, 847 P.2d at 456. Commissioner Morrow found that the statute comported with both the Fourth Amendment and the right to privacy. *Id.*

153. *Id.* at 457.

violate any of the defendants' privacy interests.¹⁵⁴

V. UPHOLDING MANDATORY HIV TESTING: THE IRRATIONAL
RELATION BETWEEN THE STATE'S INTERESTS AND THE
MEANS OF ACHIEVING THEM.

A. Fourth Amendment: Eliminating the Probable Cause Requirement

After concluding that HIV testing implicates the Fourth Amendment, the *In re Juveniles* majority employed the analytical framework of the "special needs" test enunciated in *Skinner v. Railway Labor Executives' Association*¹⁵⁵ as the appropriate doctrine for analyzing nonconsensual HIV testing.¹⁵⁶ The court found that the HIV testing scheme constituted a special need because the testing was performed pursuant to a health and safety regulation and not to the criminal code; the individuals were not being tested to find evidence of a crime; the results of the tests did not place the parties in danger of having new charges brought against them or extending their already existing sentences; and the requirement of individualized suspicion was impracticable because HIV-infected individuals rarely exhibit outward manifestations of infection.¹⁵⁷

The majority's application of the "special needs" doctrine is erroneous because it fails to reflect a full understanding of the special needs analysis developed by the Court in *Skinner* and *Von Raab*.¹⁵⁸ Unlike the testing regulations present in *Skinner* and *Von Raab*, it cannot be said that the Washington testing statute is so narrowly defined that there is no need for the detached scrutiny of a neutral magistrate. In fact, the statute mandates testing of criminal defendants who perpetrate crimes that present

154. *Id.* at 463. The juvenile court's application of the statute to juveniles was upheld by the Washington Supreme Court which found that to exclude juveniles from the scope of the mandatory HIV testing statutes would violate the legislative intent of the statute. *Id.* at 458-59. The purpose of the statute is to help stop the spread of sexually transmitted diseases, including AIDS, through testing and disclosure of the test results to certain individuals. WASH. REV. CODE ANN. § 70.24.015 (West 1992). It is important to note that another asserted purpose of the statute, to preserve the confidentiality of the test results, is in complete and irreconcilable opposition to the former purpose. *See id.* § 70.24.340(1) (a) (West 1992).

155. 489 U.S. 602, 619 (1989).

156. *In re Juveniles*, 847 P.2d at 460. "For searches outside the criminal context, the Supreme Court has developed the 'special needs' doctrine Numerous courts have found the special needs doctrine to be appropriate when analyzing nonconsensual HIV testing." *Id.* at 459.

157. *Id.* at 459-60.

158. *Id.* at 464 (Utter, J., dissenting).

no risk of transmitting the HIV infection.¹⁵⁹

The government is only permitted to conduct warrantless searches under the aegis of the "special needs" exception if the government can demonstrate that a warrant and probable cause requirement are impractical.¹⁶⁰ A warrant may be impractical in situations where the passage of time imperils the goal of the government's search thus jeopardizing its interest in conducting the search.¹⁶¹ The same rationale does not apply to searches conducted to detect the presence of HIV, however, because once HIV enters the bloodstream and antibodies develop, the "evidence" remains with the individual forever.¹⁶² Hence, the passage of time will not diminish the presence of the virus beyond detection.¹⁶³ In *Barlow v. Ground*,¹⁶⁴ the U.S. Court of Appeals for the Ninth Circuit held that the police violated the Fourth Amendment when they seized two blood samples from a man who bit them as they attempted to take him into custody.¹⁶⁵ The court was primarily concerned with the propriety of testing the defendant because insufficient scientific evidence existed to prove that HIV can be transmitted through saliva.¹⁶⁶ The court also found that neither the undue delay exception nor the exigent circumstances exception applied because "[a] slight delay in testing [would] not lead to the destruction of the information sought" because HIV antibodies, once de-

159. See WASH. REV. CODE ANN. § 9A.44 (West 1993).

160. See *supra* notes 92-93 and accompanying text. Judge Utter, in his dissent in *In re Juveniles*, points out that the mandatory drug testing in *Skinner* was not upheld "merely because of the grave need to ensure public safety, but rather because warrant and probable cause requirements would have been impractical under the circumstances." *In re Juveniles*, 847 P.2d at 464 (Utter, J., dissenting) (emphasis in original).

161. See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Schmerber v. California*, 384 U.S. 757 (1966). In all these cases the Court recognized that a warrant requirement was unreasonable because any delay in conducting the search could potentially destroy the evidence the government was seeking.

162. *Barlow v. Ground*, 943 F.2d 1132, 1138 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2995 (1992).

163. Jaffe, *supra* note 26, at 10. The nature of the AIDS virus is such that it permeates the genetic material of the cells by transcribing its genetic material from RNA to DNA, the genetic material of humans.

Once this "transcription" step has taken place, this DNA copy containing the virus's genetic material can then integrate or become part of the host cell

This kind of cellular life-style has some very important implications. First, once individuals are infected with HIV, they remain infected, presumably for the rest of their lives.

Id.

164. 943 F.2d 1132 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2995 (1992).

165. *Id.* at 1137.

166. *Id.* at 1138-39.

veloped, do not leave a person's blood.¹⁶⁷

Under the Washington testing scheme, an individual is not tested for HIV until convicted of a sexual offense.¹⁶⁸ Depending on the length of the pre-trial process and the trial itself, considerable time can elapse between the sexual offense and conviction. The possibility that the perpetrator may have contracted HIV subsequent to the assault of the victim presents a compelling argument for requiring a probable cause inquiry to assess the possibility of transmission prior to mandating testing.¹⁶⁹

Ironically, the Washington legislature includes a standard of review provision similar to a probable cause inquiry in the section of the HIV testing statute dealing with occupational exposure to the disease.¹⁷⁰ Under this provision, the court will only order testing if the facts reveal a possible risk of HIV transmission.¹⁷¹ It seems highly unlikely that the legislature is less concerned with the health of possibly exposed municipal employees than the health of victims of sexual assault. Therefore, the only logical conclusion is that the legislature recognized that testing may not be reasonable in all situations because not all contacts between individuals pose a risk of HIV transmission.

If the conduct between the victim and the perpetrator presents no scientifically-proven risk of transmission, testing the perpetrator will only produce inaccurate and misleading test results that needlessly exacerbate the fears of a victim who has already suffered a tremendously traumatic experience. The Washington HIV testing statute requires testing of sex offenders who commit offenses that pose a negligible risk of transmission.¹⁷² Therefore, the detached scrutiny of a neutral magistrate should

167. *Id.* at 1138. The exigent circumstances exception did not apply to the search because the "officers could not decrease or increase the risk to their health" by testing the defendant immediately. *Id.* at 1139.

168. See WASH. REV. CODE ANN. § 70.24.340 (1)(a) (West 1992).

169. The Washington code includes a provision for HIV testing of individuals who expose certain municipal employees, including law enforcement officers, fire fighters, and health care providers, to a substantial amount of bodily fluids. If the individual refuses voluntary testing, the exposed worker may petition the court to order testing. The standard of review for the order requires the court to look at "whether substantial exposure occurred and whether that exposure presents a possible risk of transmission." *Id.* § 70.24.340(4).

170. *Id.*

171. *Id.* California, which has one of the most liberal mandatory testing statutes, requires a preliminary hearing to determine if there is probable cause to believe that HIV could have been transferred from the accused to the victim. CAL. PENAL CODE § 1524.1 (Deering 1992).

172. See generally *supra* note 8. Acts that encompass the crimes of child molestation, sexual misconduct with a minor, and indecent liberties do not necessarily involve acts that

be required to ensure that the search is justified by a governmental need to test the offender.

1. *Individualized Suspicion and Fourth Amendment Balancing: Placing Fear and Ignorance Above the Right to Be Secure in One's Person*

The Court in *Skinner* held that even if a warrant and probable cause requirement were impracticable, evidence of individualized suspicion is required unless the government's interest in testing outweighs the individual's privacy interests.¹⁷³ In *In re Juveniles*, the majority's application of the balancing test misses the mark created by the Court in *Skinner*. Ultimately, the majority's balancing approach in *In re Juveniles* grossly overstates the government's compelling need to test the offenders and drastically minimizes the privacy interests of the offender that are implicated by the testing procedure. The court, relying upon this faulty analysis, concludes that the state's need to compel HIV testing of sex offenders outweighs the individual's privacy interests.¹⁷⁴ However, a cursory investigation of the court's rationale suggests that little scientific evidence exists to support this conclusion.

a. *The State's Compelling Interests*

The court's finding that the state's interests in mandatory testing are compelling is, at best, dubious. The court finds that the state has compelling interests in combating the spread of AIDS, protecting the rights of victims, aiding officials involved in prison and probation management, and aiding sex offenders by providing pre- and post-test counseling and giving them information that will assist them in altering their behavior.¹⁷⁵

i. *Combating the Spread of AIDS*

The court recognized the state's compelling interest in exercising its police power to control communicable diseases, including AIDS, but the court does not evaluate how section 70.24.340 achieves this goal.¹⁷⁶ Due to the inaccuracy of currently available HIV tests, this goal is impossible

could potentially transmit HIV. Child molestation, for example, includes fondling of a child's genitals, an act that usually does not include an exchange of bodily fluids. See *supra* part II.A.2.

173. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989).

174. *In re Juveniles*, 847 P.2d 455, 463 (Wash. 1993).

175. *Id.* at 460-61.

176. *Id.* at 460.

to achieve through mandatory testing of the offender.¹⁷⁷ A negative test result of a sex offender might instill in the victim a false sense of security because it is possible that the offender may be infected and capable of infecting others without having developed the antibodies that the ELISA and Western Blot tests are designed to detect.¹⁷⁸ Thus, the testing scheme may work against the legislature's stated intention of controlling the spread of HIV by enabling an infected victim, who believes that s/he is not infected because his/her attacker tested negative, to transmit HIV to others.

The best way to prevent the spread of HIV by the victim, and to help the victim make important lifestyle choices in the least intrusive manner is to test the victim for HIV and provide counseling for the victim. The victim's right to accurate medical information about his/her own health is far more compelling and reasonable than the right to have the offender tested.

ii. State's Interest in Protecting the Rights of Victims

The court recognizes a victim's right to know the HIV status of the offender so that s/he may use the information to obtain proper medical treatment. Furthermore, the court acknowledged the state's interest in helping to relieve the "mental anguish suffered by victims"¹⁷⁹ of sexual assaults. The use of mandatory HIV testing to achieve these goals is problematic.

First, if there is no evidence suggesting that behavior capable of transmitting the disease occurred,¹⁸⁰ then the rationale for testing offenders is misplaced. The dissent notes that the state's interest in protecting the victim would be compelling in those cases where "there was a possibility of infection, as in the case where there was probable cause to believe there was a transmission of bodily fluids."¹⁸¹

177. See *supra* part II.B.

178. BENCHBOOK, *supra* note 23, at 10, 17; Field, *supra* note 41, at 41. Although it is true that Washington tests the offenders after they have been convicted and a significant amount of time may have elapsed since the contact between victim and assailant took place, there is medical evidence that indicates it may take years for HIV antibodies to develop. BENCHBOOK, *supra* note 23, at 17.

179. *In re Juveniles*, 847 P.2d at 461.

180. See *supra* part II.A.2.

181. *In re Juveniles*, 847 P.2d at 466. The dissent also noted that there is no more need to test a convicted sex offender whose conduct does not pose a significant risk of transmission for HIV than there is to test "an automobile thief whose offense poses no possibility of HIV infection." *Id.* (Utter, J., dissenting).

Second, recent scientific experimentation has disproved the prophylactic effects of AZT.¹⁸² Moreover, because of the possible harsh side-effects associated with the drug, many physicians are unwilling to treat patients with AZT unless the patient has tested positive for the virus.¹⁸³

Finally, current medical technology has not produced a completely accurate HIV test.¹⁸⁴ A positive test result will undoubtedly exacerbate the fears and anxieties of the victim, perhaps needlessly. Due to the less than one hundred percent reliability of HIV antibody tests currently available, there is a statistically significant chance that an offender who is not infected will test positive for HIV.¹⁸⁵ Even if the offender is HIV positive, the likelihood of transmitting the virus to the victim through one contact is low.¹⁸⁶ The possibility that the offender was infected subsequent to his contact with the victim becomes greater as more time elapses between the initial assault and the testing, thus increasing the chance that the offender did not expose the victim to the virus at the time of the attack.¹⁸⁷ The above stated reasons diminish the state's compelling interest in testing the offender because testing does not necessarily elicit reliable information upon which the victim could make any rational choices concerning life-style changes or medical treatment.

iii. *The State's Interest in Effective Prison and Probation Management*

The majority asserts that the state's interest in effective prison and pro-

182. "AZT" is an acronym for azidothymidine which is an antiretroviral drug used to slow down the progression of symptoms associated with HIV infection. MEDICAL ECONOMICS CO. INC., PHYSICIANS' DESK REFERENCE 778 (45th ed. 1991); see also Marsha F. Goldsmith, *HIV/AIDS Early Treatment Controversy Cues New Advice but Questions Remain*, 270 JAMA 295, 295-96 (1993).

183. Gostin, *supra* note 38, at 1439.

184. See Meyer & Pauker, *supra* note 49; see also *Doe v. Roe*, 526 N.Y.S. 2d 718, 721 n.4 (N.Y. Sup. Ct. 1988).

185. MacDonald, *supra* note 46, at 1614-16. Additionally, compelling studies of the accuracy of HIV testing exist which indicate that the rate of false positive results increase as the number of low-risk people tested increases. *Id.* at 1616 n.81. The ELISA test was initially developed as a method of testing the blood supply donated at blood banks. As a result, the line between positive and negative results is drawn conservatively in order to afford greater protection of the blood supply against HIV. Mary C. Morgan, *The Problems of Testing for HIV in the Criminal Courts*, 29 JUDGES' J. 22, 67 (Spring 1990).

186. Friedland & Klein, *supra* note 18, at 1129. In a study conducted by the Surgeon General of 750 health care workers, all of whom had been exposed to the bodily fluids of patients through spills or needle sticks, only three tested positive for HIV. Morgan, *supra* note 185, at 67.

187. Morgan, *supra* note 185, at 67.

bation management is achieved by mandatory HIV testing because it allows the state to alert prison officials of the sex offender's HIV status so proper precautions can be taken to guard against the spread of the disease and so proper medical care for the offender can be arranged.¹⁸⁸ The efficient prison management justification is, however, highly suspect. As the dissent points out, "the testing authorized by [the Washington testing statute] is not associated in any fashion with incarceration."¹⁸⁹ The illogical nature of the majority's assertion is emphasized by the fact that this statute only pertains to testing of convicted sex offenders and not other offenders entering the prison system who may also be infected with HIV.¹⁹⁰

iv. *The State's Interest in Assisting Sexual Offenders Through Counseling*

Finally, the court finds that the state has an interest in providing pre- and post-test counseling to sex offenders who test positive for HIV.¹⁹¹ This justification relates back to the government's interest in curbing the spread of communicable diseases by providing counseling for the offenders to help them modify their behavior.¹⁹² The dissent argues that to achieve this goal, the state has no greater interest in testing sex offenders than it does in testing all criminal offenders coming into the penal system who would also need the same counseling as HIV positive sex offenders.¹⁹³ Thus, the state's interest in helping potentially HIV infected sex offenders cannot be considered compelling unless mandatory testing of all prisoners was implemented.¹⁹⁴

b. *The Offender's Privacy Interests*

The majority in *In re Juveniles* concludes that the state's interests outweigh the privacy interests asserted by the defendants.¹⁹⁵ The court comes to this conclusion by using the *Skinner* balancing test which takes into account the invasiveness of the proposed search and the expectation of privacy of the searched individual. However, this evaluation falls short

188. *In re Juveniles*, 847 P.2d 455, 461 (Wash. 1993).

189. *Id.* at 467.

190. *Id.* at 467 n.3.

191. *Id.* at 461.

192. *Id.*

193. *Id.* at 467.

194. *Id.*

195. *Id.* at 460.

of considering the social realities of AIDS. The majority states that in several opinions the Supreme Court has concluded that the impact of a blood test upon an individual's privacy interests is minimal.¹⁹⁶ While it may be true that the physical act of drawing blood from an individual presents no great risk or trauma, the Washington Supreme Court neglected to consider the enormous psychological and social impact a positive test will have on an individual.¹⁹⁷ Medical studies cite a plethora of psychological disorders associated with learning that one is HIV-positive, ranging from depression and paranoia to suicide, that lend strong support to the proposition that focusing solely on the immediate physical risk of drawing blood is short-sighted.¹⁹⁸ The dissent points out that AIDS is associated with myriad devastating social consequences including employment and housing discrimination which, along with the psychological impact of AIDS, make a strong case for applying stricter standards of analysis to issues involving AIDS than the majority used in this case.¹⁹⁹

The *In re Juveniles* majority also notes that the privacy interests of an individual who is convicted of a crime are more limited than the privacy

196. *Id.* In support of this conclusion the majority cites the Supreme Court's conclusion in *Winston v. Lee*, 470 U.S. 753, 762 (1985), stating that blood testing is considered a reasonable bodily intrusion because it is "society's judgment that blood tests do not constitute an unduly extensive imposition of an individual's personal privacy and bodily integrity." *In re Juveniles*, 847 P.2d at 460. Other courts have interpreted the Court's ruling in *Skinner* to affirm the contention that blood testing should not be afforded the same amount of fourth amendment protection as other bodily intrusions. See *Johnetta v. Municipal Court*, 267 Cal. Rptr. 666, 679 (Cal. Ct. App. 1990). Recently, however, some lower state courts have started to consider the impact HIV testing on an individual's life and rejected requests to test an individual based on psychological impact a positive result has on an infected individual and societal reaction to an individual who is HIV-positive. See *Doe v. Roe*, 526 N.Y.S.2d 718 (N.Y. Sup. Ct. 1988) (refusing request by grandparents involved in custody dispute to have their grandchild's father tested for HIV).

197. Some courts have compared the impact of learning that one is HIV-positive with receiving the death penalty. *Doe*, 526 N.Y.S.2d at 722. See also *Glover v. Eastern Neb. Comm'ty Office of Retardation*, 686 F. Supp. 243, 248 (D. Neb 1988), *aff'd*, 867 F.2d 461 (8th Cir.), *cert. denied*, 493 U.S. 932 (1989).

198. Peter M. Marzuk et al., *Increased Risk of Suicide in Persons With AIDS*, 259 JAMA 1333 (1988). The study concluded that "the rate of suicide in persons with AIDS is substantially higher than equivalent age- and gender-specific rates of the general population Men aged 20 to 59 years with a diagnosis of AIDS are approximately 36 times as likely to commit suicide than men in the general population." *Id.* at 1333, 1336.

199. *In re Juveniles*, 847 P.2d at 467. The dissent points to discrimination in employment, education, housing, and medical treatment which make AIDS just as difficult to deal with on a social level as on a psychological level. *Id.* Other courts have suggested that, "the special characteristics of AIDS and AIDS testing, the potential stigmatization of persons identified as suffering from AIDS . . . and other detriments of non-consensual mandatory testing . . . suggest that a much stricter standard . . . should be employed where AIDS testing is at issue." *Doe*, 526 N.Y.S.2d at 719.

interests of the general public.²⁰⁰ The federal courts have recognized, and the majority relies upon, a diminished expectation of privacy for convicted criminals which, under most circumstances, minimizes a criminal's interest in not being searched.²⁰¹ The majority applies this rationale to the juvenile sex offenders in this case. The court reasoned that because the constitutional rights of incarcerated individuals are substantially limited, a sex offender should not be surprised to learn that her or his privacy expectations in his or her bodily fluids are substantially diminished, as well, because s/he "engaged in a class of criminal behavior which presents the potential of exposing others to the AIDS virus."²⁰² The court's rationale is faulty on both legal and factual bases.

Although the U.S. Supreme Court has held that prisoners may be subject to the limitation of, and in some cases, complete withdrawal of certain rights justified by "considerations underlying [the] penal system,"²⁰³ prisoners continue to retain all constitutional rights "not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration."²⁰⁴ The U.S. Supreme Court has held that the Fourth Amendment does not apply to the confines of a prisoner's cell because of the state's interest in controlling the proliferation of contraband.²⁰⁵ However, the U.S. Supreme Court has yet to address whether prisoners retain their full Fourth Amendment right to be free from unreasonable searches and seizures of their person.

In deciding this issue, the Supreme Court should apply the higher standard of scrutiny that it has applied to the pre-*Skinner* cases dealing with bodily intrusions by the government.²⁰⁶ The railroad industry's need for testing in *Skinner* can be distinguished from the government's asserted

200. *In re Juveniles*, 847 P.2d at 460.

201. *Id.* (citing *Jones v. Murray*, 962 F.2d 302, 307 (4th Cir. 1992) and *Walker v. Sumner*, 917 F.2d 382, 385 (9th Cir. 1990)).

202. *Id.*

203. *Hudson v. Palmer*, 468 U.S. 517, 524 (1984) (citing *Price v. Johnston*, 334 U.S. 266, 285 (1948)).

204. *Id.* at 523. A few examples of the rights retained by those who are incarcerated are: the right to be free from invidious racial discrimination, *id.* (citing *Lee v. Washington*, 390 U.S. 333 (1968) (per curiam)); the right to exercise religious freedom, *id.* (citing *Cruz v. Beto*, 405 U.S. 319 (1972) (per curiam)); and the First Amendment rights of speech, *id.* (citing *Pell v. Procunier*, 417 U.S. 817, 822 (1974)).

205. *See generally Hudson*, 468 U.S. 517 (holding inmates have a reasonable privacy interest in prison cells entitling Fourth Amendment protection against unreasonable searches).

206. *See generally Winston v. Lee*, 470 U.S. 753 (1985) (holding an order directing assailant to undergo surgery to remove a bullet in his shoulder for evidentiary purposes constitutes an unreasonable search under the Fourth Amendment).

need for HIV testing in *In re Juveniles*. In *Skinner*, the bodily intrusion was justified by substantial data showing a correlation between substance abuse and train accidents.²⁰⁷ A demonstrated connection between sex offenses and HIV transmission has not been documented by the medical community.²⁰⁸ In *In re Juveniles*, the Supreme Court of Washington failed to acknowledge the higher standard traditionally accorded to such bodily intrusions in making its decision.

Additionally, the facts of *In re Juveniles* do not support the majority's conclusion that testing of all the juveniles was warranted. The courts have declined to allow the testing of employees whose interaction with clients presented only a negligible risk of transmitting HIV.²⁰⁹ Only two juveniles, Juvenile "A" and Juvenile "D," engaged in behavior that presented a substantial risk of transmitting HIV.²¹⁰ The special needs doctrine established by the U.S. Supreme Court should not be construed as completely eliminating the requirement that some degree of rationale exist for a search to be valid.²¹¹ Testing the other juveniles offends both the notions of reasonableness and justice.

B. Constitutional Right to Privacy

1. Informational Privacy-Confidentiality

A state's use of its police power to protect the public health carries with it a presumption of constitutionality.²¹² However, use of the police power will only be deemed valid if it is rationally related to the protection of public health and safety.²¹³ Additionally, the Supreme Court has re-

207. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 606-07 (1989). See also *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting) (stating that Custom Service's drug screening program was a "kind of immolation of privacy and human dignity in symbolic opposition to drug use").

208. Gostin, *supra* note 38, at 1436.

209. See generally *Glover v. Eastern Neb. Comm'ty Office of Retardation*, 867 F.2d 461 (8th Cir.) (holding requirement that certain employees submit to mandatory HIV testing unreasonable because risk of transmission of HIV from patient to health care personnel in this setting was negligible), *cert. denied*, 493 U.S. 932 (1989).

210. See *supra* notes 141-150 and accompanying text.

211. Even in *Skinner*, the government presented substantial evidence that drug and alcohol abuse was a problem among employees in the transportation industry. See *supra* note 109 and accompanying text. It is also important to note that one of the strongest criticisms of *Von Raab* arose from the lack of evidence presented by the government that drug and alcohol abuse were a problem warranting testing. See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 680-81 (1989) (Scalia J., dissenting).

212. *Jacobsen v. Massachusetts*, 197 U.S. 11 (1904) (requiring smallpox vaccinations was a reasonable means of protecting public health).

213. *Weissman & Childers*, *supra* note 30, at 465 (citing *Jacobsen*, 197 U.S. at 31).

quired that the government action allowing collection or dissemination of information be reasonably related to the government's purpose for collecting the information.²¹⁴ Application of this principle to the mandatory testing scheme developed by the State of Washington reveals that the scheme fails to hold up against the rational relation standard. The majority in *In re Juveniles* examined the limited disclosure provision of the statute and concluded that because the offender suffered only a minimal intrusion upon his privacy interests, the confidentiality branch of privacy had been satisfied.²¹⁵ However, the majority omitted the rational relationship test from its analysis. Washington's legislature enacted the mandatory testing scheme to curb the spread of AIDS and other sexually transmitted diseases.²¹⁶ The legislature sought to accomplish this by giving victims of sex offenses information about the HIV status of the perpetrators.²¹⁷ However, mandatory testing of the offender is not a rational way to help the victim prevent the spread of the disease because of irregularities in the testing procedures which may cause erroneous results.²¹⁸ The inaccuracy of current testing coupled with the devastating social impact of disclosure, including all types of discrimination, combine to make a strong case for tight regulation of HIV test results.²¹⁹

2. Right to Privacy in Autonomous Decision-Making

The U.S. Supreme Court found a fundamental right of privacy to exist in circumstances where "abolition of a privilege or immunity, essential to a scheme of ordered liberty would violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental."²²⁰ Both the majority and the dissent in *In re Juveniles* acknowledge that strict scrutiny is the appropriate standard applied to legislative schemes that affect fundamental rights. The Court considers three factors

214. See *supra* notes 121-124 and accompanying text.

215. *In re Juveniles*, 847 P.2d 455, 461 (Wash. 1993). See WASH. REV. CODE ANN. § 70.24.340(1)(a) (West 1992).

216. See WASH. REV. CODE ANN. § 70.24.340(1)(a) (West 1992).

217. *Id.*

218. See *supra* part II.B.

219. LAURENCE H. TRIBE, CONSTITUTIONAL LAW § 15-16, at 1394-96 (2d ed. 1988). The author notes that dissemination of HIV information must be handled with extreme care because, "[d]issemination of the fact that someone has contracted AIDS, or even tested positive for antibodies to the virus . . . can cause that person to lose his employment, housing, insurance coverage, visitation rights with his children, and other privileges, rights and opportunities." *Id.* at 1394.

220. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

when evaluating statutes under the strict scrutiny standard: first, whether the government has a compelling need justifying the invasion; second, whether the means of achieving the government's compelling interests are narrowly tailored; and third, whether the government employed the least intrusive means of achieving that goal.²²¹

Mandatory testing of a convicted sex offender is not the least intrusive manner in which to stop the spread of HIV because of the potentially devastating social and psychological impact HIV testing can have on the tested individual.²²² Mandatory testing is also not the best method for controlling the spread of HIV because, if the test shows a negative result when the perpetrator is HIV-positive, the victim, unaware of the infection, may unknowingly infect others.

VI. CONCLUSION: A STRICTER STANDARD IS NEEDED

AIDS is a frightening disease. Society cannot condemn legislators for reacting to the AIDS crisis with zeal, but the legislators have a duty to act reasonably, not irrationally. Mandatory HIV testing schemes, such as the one enacted in Washington under the "special needs" doctrine, exacerbate the already existing paranoia surrounding AIDS and unnecessarily complicate the matter by perpetuating ignorance and misunderstanding. When courts are given permission to analyze the right of a human being to be free from intrusive testing by the same standard they apply to searches of buildings and junkyards, society will inevitably suffer.²²³ Mandatory testing disserves the victims of sexual assault, by potentially providing them with misinformation about their HIV status, and disserves offenders, by callously disregarding their constitutional rights through the severe and unwarranted intrusion that HIV testing imposes into their lives.

The nature and impact of the AIDS virus require substantial consideration of personal privacy and dignity, and therefore require adherence to the probable cause standard before the government can conduct non-consensual HIV testing. Accordingly, mandatory testing statutes would be best analyzed within the framework of the probable cause doctrine enunciated by the Court in *Winston v. Lee*.²²⁴ The Supreme Court's approach

221. *In re Juveniles*, 847 P.2d 455, 469 (Wash. 1993).

222. See *supra* notes 195-199 and accompanying text.

223. See generally *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967); *New York v. Burger*, 482 U.S. 691 (1987).

224. 470 U.S. 753 (1985). The Court held that some bodily intrusions are so great that they may be unreasonable even if probable cause is present. *Id.* at 759.

in *Winston* is the most appropriate standard by which to analyze HIV testing statutes because the Court placed the proper amount of emphasis on the right of an individual to be free from unreasonable intrusions by the state. The intrusiveness of mandatory HIV testing necessitates the preservation of the probable cause requirement. At the very least, the government should be required to show that the circumstances of the sexual assault were such that HIV could have been transmitted from offender to victim and thus, establish that probable cause exists to conduct the search.²²⁵

The AIDS epidemic must be dealt with in a rational manner through rational policies that truly protect public health. The courts have an obligation to resist popular pressure and preserve the fundamental constitutional principles of privacy and freedom from unreasonable government intrusion. Our legislatures and our courts must not sacrifice privacy and human dignity in a superficial gesture seemingly designed to deal with the AIDS crisis faced by our nation.

Christine M. Stevenson

225. *In re Juveniles*, 847 P.2d 455, 465 (Wash. 1993).

